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II] REPORTS [1992

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[Appellate Jurisdiction]

Present:- *Nainar Sundaram, Actg. C.J.* and *Somasundaram, J.*

W.A.No.1353 of 1991 *21st January, 1992.*

P.Madhavan *...Appellant*
v.
Binny Limited represented by its General Manager *...Respondent.*

(A) Factories Act (LXIII of 1948), Sec.49 - Tamil Nadu Factories (Welfare Officers) Rules (1953), Rules 4 to 7 - Post of Labour Welfare Officer in Factories wherein five hundred or more workers are ordinarily employed - Person holding, if can be transferred by the Factory from that post - If can be transferred to another post of equal Cadre in the absence of any term of condition of service.
(B) Constitution of India (1950), Art.226 - Writ of mandamus - Issue of - Condition precedent for.
The writ petitioner who is the appellant in the appeal, entered the service of Binny Ltd., the respondent in both the petition and the appeal as a clerk on 7.11.1969. By a letter of appointment dated 29.4.1985, he was promoted as a Labour Welfare Officer on probation. The appointment was confirmed by Order dated 21.10.1986. On 29.3.1991, an Order came to be passed transferring the petitioner to Materials Department in a post of equal cadre. He filed a writ petition seeking for a writ of *certiorarified mandamus* to quash that order. It was dismissed. In appeal, he contended that the post of Labour Welfare Officer being one contemplated to be created under the Factories Act, the Management could not by transferring a Labour Welfare Officer from the post abrogate the statutory rights, privileges and duties of significance of public nature conferred by the statutory rules. The respondent contended that the writ itself was not maintainable.
Held:- The post is not one created in ordinary service parlance. The post is one required to be created by Sec.49(1) of the Act. In that sense, it could be characterised as a statutory post. Sec.49(2) enjoins upon the State Government to prescribe the duties, qualifications and conditions of service for the incumbents in the post. The rules got formulated towards that end. Rule 4 prescribes the qualifications and Rule 5 sets down the method of recruitment. There is no escape from these statutory prescriptions. Thus the post is a substantive one created under and pursuant to statute. The Court has no ambiguity in its mind that the post is of a public nature and it carries with it the duties of significance of an office which affects a general section of the public. The duties annexed to the post enjoin upon the incumbent to maintain harmonious relationship between the management and the workers; to bring to the notice of the management the grievances of the workers individual as well as collective with a view to secure expeditious redressal. The incumbent should act as Liaison Officer between the Management and the workers. He should encourage provision of very many amenities for the workers. He has got a role to play with reference to the provision of Welfare Facilities and to suggest measures to raise the standard of living of the workers. Viewed from the above angles, the office of the Welfare Officer can certainly be characterised as an office of a public and administrative nature. The respondent cannot without any legal sanction therefor dislodge the petitioner from the post. The rules by themselves do not envisage the disturbance of the incumbent from the post of a Welfare Officer so as to be transferred to any other post, may be of equal cadre. If one goes by the express verbalism of the rules, disturbance of the petitioner from the post of a Welfare Officer by way of transfer as happened in the present case cannot be sustained.

In this case, the court is confronted with total lack of materials on the question of any term or condition explicitly providing for the transfer of a Welfare Officer from that post to the post of any other post, may be of equal cadre. When the significance annexable to the post of a Welfare Officer as per the statutory provisions is taken note of, in the absence of exposure before the court of any term of condition of service, contemplating his disturbance from that post to any other post, may be of equal cadre, the court does not think that it should indulge in investigation into this question and give an answer to it. *[Paras 8 and 10]*

The basic rule has been settled without any ambiguity that the condition precedent for the issue of a *mandamus* is that there is in one claiming it, a legal right to the performance of a legal duty by one against whom it is sought. The rights, privileges and the significance of the post are those discernible from the statutory provisions and the petitioner, the incumbent in the post of a welfare officer is certainly entitled to those statutory rights, privileges and significance; and correspondingly there is a duty cast upon the respondent; the management to preserve them without abrogating them except in the manner known to law. When there is a breach of them, certainly, this Court can issue the writ of *mandamus* to restore those rights and privileges and repair the damage done to them. The petitioner can be said to be aggrieved when he has been denuded of the statutory right and privileges by the respondent, who has a legal duty to preserve them or to abstain from doing away with them. *[Para 11]*

Cases referred to:

Pratap Chandra Sen v. Commissioner of Labour, A.I.R. 1957 S.C. 794; Synthetics and Chemicals Ltd. v. G.C.Kumar, (1972)25 F.L.R. 146; Prem Narain v. Gaupore Chemical Works, 1974 Lab.I.C. 479; Associated Cement Companies v. P.N.Sharma, A.I.R. 1965 S.C. 1595: (1965)1 Lab.L.J. 433; Praga Tools Corporation v. C.A.Immanuel, (1969)1 L.L.J. 23: (1969)3 S.C.R. 773.

Appeal under Clause 15 of the Letters Patent against the Order of S.Ramalingam, J., dated 9.10.1991, and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.14193 of 1991 presented under Art.226 of the Constitution of India to issue a writ of *certiorarified mandamus* calling for the records and quashing the impugned order dated 29.3.1991 bearing Reg.No.Secry/25 of 1991, passed by the 1st Respondent and direct the respondent to allow the petitioner to continue as Labour Welfare Officer with all attendant benefits and award costs.

N.G.R.Prasad, for *M/s.Row and Reddy, Balan Haridoss* and *Poornima Madhuram*, for Apppellant.

M.R.Narayanaswami, Senior Counsel, for *T.S. Gopalan, P.Ibrahim Kalifullah* and *S.Ramachandran*, for Respondent.

The Judgment of the Court was delivered by

S.Nainar Sundaram, Actg.C.J.:- The Petitioner in W.P.No.14193 of 1991 is the appellant is this writ appeal. The respondent in the writ petition is the respondent in this writ appeal. It will be convenient for us if we refer to the parties as per their nomenclature in the writ petition in the course of this judgment of ours.

2. Before we come to the points urged in this writ appeal on behalf of the petitioner, it is better that we delineate certain factual features which are not in dispute. The petitioner entered the service of the respondent as a clerk on 7.11.1969. In 1985, an occasion arose for the appointment of Labour Welfare Officers in the service of the respondent. Suffice it to point out at this juncture that the statutory formalities with reference to the filling up of the posts were gone through and the petitioner was one of the appointees as a Labour Welfare Officer. Since much has been said both ways on the terms and conditions of appointment, we deem it necessary to extract the letter of appointment, dated 29.4.1985, as follows:

"Telex : 41.302 BINNY - IN 41-7263-BCML-IN
Telegrams : Binny Madras Bucarnico Madras.
Personnel Department;
Registered Office : 65, Armenian Street, P.O.Box No.66,
Binny Limited, Madras-1.
Telephone : 29361.
Mr.P.Madhavan,
B & C Mills.
Your ref.
Our ref. Pers/F/PM
Date 29th April, 1985
Dear Sir,-

As we have received a satisfactory report on your work, we are pleased to promote you as a Labour Welfare Officer in our management staff group F on Probation for one year, which

may be curtailed or extended, with effect from 1st May, 1985 on a basic salary of Rs.455 per mensem. Your basic salary for subsequent years will be decided having regard to your performance each year and other relevant factors. You will be paid a dearness allowance of Rs.560 p.m. in addition to your basic salary, calculated, on the basis of a graduated scale applicable to your group.

The minimum and the maximum basic salary applicable to Group F is shown below:

Minimum Rs.250

Maximum Rs.550

In addition to your basic salary and dearness allowance you will be entitled to the following benefits:-

1. *House Rent Allowance*: You will be eligible for a House Rent Allowance of Rs.175 p.m. *i.e.* at the rate of 20% of Basic + D.A. subject to a maximum of Rs.175 p.m.

2. *Leave*: You will be entitled to 28 days privilege leave per annum, (propate for 1985) on confirmation and upto 28 days sick leave per annum on full pay.

3. *Provident Fund*: You will continue to be a member of the B. & C. Company Limited Work People's Provident Fund.

You will be covered by the Employees State Insurance Scheme and you will be eligible for sick leave and other medical benefits in accordance with the provisions of that scheme. The age of retirement has been fixed at 58 years. The Company nevertheless, reserves the right to retire an employee before he reaches the age of 58 years.

Please note that during your probation and subsequently, you are liable to be posted at any of our establishments in India.

Other terms and conditions of service applicable to Management Staff in general and Group F in particular will be applicable to you.

Your faithfully,

Binny Limited,

sd/. xxx

Mill Director."

We will presently refer to the necessary features of the letter of appointment while we deal with the concerned aspect urged by the respondent in answer to the claims of the petitioner. On 21.10.1986, the appointment of the petitioner as Labour Welfare Officer got confirmed and the letter of confirmation also stands extracted as follows:

"Telex : 41-302-BINNY-IN

Telegrams : Binny Madras

Telephone : 30181.

Personnel Departments

Registered Office : 65, Armenian Street, P.O.Box.No.66, Madras-600 001.

BINNY LIMITED

Mr.P.Madhavan.

B & C Mills.

Your ref.

Our ref.

Pers/F/PM

Dear Sir,

We refer to our letter Petrs/F/PM, dated 22nd April, 1986. Your extended probationary period expires on 31st October, 1986. Taking into account your performance during your extended period of probation, we have pleasure in confirming you as a Labour Welfare Officer in Management Staff Group F on a basic salary of Rs.505 p.m. from 1st November, 1986. Your basic salary for subsequent years will be decided having regard to your performance each year and other relevant factors.

You will be paid a Dearness Allowance of Rs.580 p.m. applicable to your Group and a House Rent Allowance of Rs.175 p.m. *i.e.* at the rate of 20% of Basic + D.A. subject to a maximum of Rs.175 p.m. These allowances are subject to alteration with or without notice at the discretion of the Management.

You will be required to execute a Service Agreement and if you are accepting the terms set out above, please return the annexed memorandum of agreement duly executed.

All other terms and conditions of service applicable to management staff in general and Group F in particular will be applicable to you.

Your faithfully,

BINNY LIMITED,

sd/- Staff Manager."

On 29.3.1991 an order has come to be made transferring the petitioner to Materials Department, and this order was put in issue in the present writ petition, and the body of the said order stands extracted as follows:

"Secy/25/91, March 29, 1991

The Industrial Relations Manager

The materials Manager.
Mr.P.Madhavan, Management
Staff Group 'F', J.R. Office
The above-mentioned Management Staff is transferred to Materials Department forthwith. He has to report to the Materials Manager.
sd./- Production Manager.
C.C.General Manager (Pers. & Admn.)
C.C.Mill Manager.
C.C.Manager (Admn.Accouts)/ Mr.R. Sivakumar."

3. It must be noted that the petitioner came to this Court earlier by way of W.P.No.5133 of 1991 seeking for a writ of *mandamus* to direct the respondents to assign the petitioner only the duties prescribed by the Factories Act 63 of 1948, hereinafter referred to as the Act. It must also be noted here that the statutory nomenclature for the post is Welfare Officer, though the parties preferred to describe the post as Labour Welfare Officer. The learned single Judge, who dealt with the writ petition, found that the controversy has been raised in a doubtful sphere even with reference to the factum of the order of transfer and the learned single Judge did not countenance the prayer as put forth by the petitioner, but ordered the writ petition in the following terms:

"In view of the conflicting claims with reference to the order of transfer and the receipt of the orders of transfer, if may be said that so long as the order of transfer is not served the petitioner holds the post of the Labour Welfare Officer. If there is any transfer, it is always open to the petitioner to get remedy under law. Having regard to the subject matter of the writ petition and to the relief that is asked for, it has to be said that the person who holds the office of the Labour Welfare Officer is entitled to have the duties to be assigned as prescribed under the Tamil Nadu Factories Act as well as Rules framed therein. It is always open to the respondents to exercise the power available to the respondent so as to effect transfer of the staff working in the respondent's concern. With these observations, the writ petition is ordered accordingly. No costs."

The petitioner obviously on getting served with the order, dated 29.3.1991, came to this Court by way of the present writ petition seeking for a writ of *certiorarified mandamus* to quash the order dated 29.3.1991 and to direct the respondent to allow the petitioner to continue as Labour Welfare Officer with all attendant benefits. The learned single Judge, who dealt with the present writ petition, adverted to the provisions of the Tamil Nadu Factories (Welfare Officers) Rules, 1953, hereinafter referred to as the Rules, and opining that the terms and conditions of service applicable to Management Staff in general and Group 'F' in particular, being applicable to the petitioner as per the very order of appointment, the petitioner cannot demur over the impugned order dated 29.3.1991 and dismissed the writ petition. The learned single Judge declined to draw any inspiration to support the cause of the petitioner from the respondents cited before him. This writ appeal is directed against the order of th learned single Judge.

4. Before us, Mr.N.G.R.Prasad, learned counsel for the petitioner, would draw our attention to Sec.49 of the Act and the relevant provisions of the Rules to say that the post of a Labour Welfare Officer is one contemplated to be created under the Act; and the Rules, which are statutory, have set down the qualifications, method of recruitment, conditions of service, and the duties of a Welfare Officer and hence it must be held that the post of a Labour Welfare Officer is one charged with statutory rights, privileges and duties of significance of public nature, and hence the management cannot by transferring a Labour Welfare Officer from that post, abrogate the said rights, privileges and duties of significance of public nature, conferred by the statutory rules. Mr.M.R.Narayanaswami, learned senior counsel appearing for the respondent, would, however, submit that though the post of a Labour Welfare Officer could be stated to be one contemplated to be created under Sec.49 of the Act yet rule 6(1) and (2) make it clear that a Labour Welfare Officer would have the appropriate status corresponding to the status of a member of the factory executive staff and his conditions of service shall be the same as those of other members of the staff of the corresponding status in the factory, and in the instant case the conditions of service, permit the transfer of a Labour Welfare Officer from that post to any other post of equal cadre.

5. To appreciate and assess the submissions made by both the sides, which are built, apart from the relevant documents, on the provisions of the Act

and the Rules, we deem it necessary to extract the relevant statutory provisions. Sec.49 of the Act reads as follows:

49. *Welfare Officers*: (1) In every factory wherein five hundred or more workers are ordinarily employed the occupier shall employ in the factory such number of welfare officers as may be prescribed.

2. The State Government may prescribe the duties, qualifications and conditions of service of officers employed under Sub-sec.(1).".

The rules are obviously those formulated pursuant to Sub-sec.(2) of Sec.49. Rule 4 speaks about the qualifications and reads as follows:

"4. *Qualifications:* No person shall be eligible for appointment as Welfare Officer unless he possesses the following qualifications, namely;-

(a) A degree of any University or Institution recognised by the University Grants Commission for the purpose of its grant;

(b) A degree or diploma in Social Work or Social Science or Labour Relations or Social Welfare with Labour Laws or Industrial Relation as a principal subject, from any University or Institution recognised by the University Grants Commission for the purpose of its grant or a diploma in Labour Laws awarded by the Indian Law Institute, New-Delhi or Post Graduate diploma in Labour Laws and Administrative Laws conducted by the Madras Law College or a degree in Law of any University or a post graduate diploma in Labour Administration awarded by the Tamil Nadu Institute of Labour Studies or a post graduate diploma in Personnel Management, Industrial Relations and Labour Welfare awarded by the Madras and Coimbatore Productivity Councils or any other Institutions recognised by the State Government; and

(c) Adequate knowledge of the language spoken by the majority of the workers in the factory to which he is to be attached;

Provided that these qualifications shall not apply to any person who is a Government servant and is deputed to a factory to work as Welfare Officer;

Provided further that in the case of a person who is acting as a Welfare Officer at the time of coming into force of the rules prescribing the qualifications, the State Government may, subject to such conditions as it may specify, relax all or any of the aforesaid qualifications."

There is no dispute that the petitioner satisfied the qualification and then only his entitlement came for being appointed as a Welfare Officer. Rule 5 speaks about the method of recruitment and it needs extraction as follows:

"5. *Recruitment of Welfare Officers*, (1) Vacancies in the post of Welfare Officers shall be advertised in two newspapers having wide circulation in the State, one of which shall be in Tamil and the other in English;

Provided that the vacancies in the Government establishments, quasi-Government establishments, Public Undertakings and Private establishments financially assisted by the Government shall be filled up through the Employment Exchange. Vacancies in the said establishments shall be advertised in the Newspapers only after obtaining non-availability certificate from the Employment Exchange.

(2) Selection for appointment to the post of Welfare Officer shall be made from among the candidates applying for the post by a committee appointed by the occupier of a factory.

(3) The appointment when made shall be notified by the Occupier to the State Government or such other authority as the State Government may specify for the purpose, giving the details of the qualifications age, pay, previous experience and other relevant particulars of the officer appointed and the terms and conditions of his service."

Here again, there is no dispute that this rule was satisfied when the recruitment of the petitioner did happen. Then we come to Rule 6 and that rule needs extraction as follows:-

"6. *Conditions of service of Welfare Officers*:-

(1) A Welfare Officer shall be given appropriate status corresponding to the status of a member of the factory executive staff.

(2) The conditions of service of a Welfare Officer shall be the same as those of other members of the staff of corresponding status in the factory, provided that in the case of discharge or dismissal, the Welfare Officer shall have a right of appeal to the Commissioner of Labour, whose decision thereon shall be final and binding upon the Occupier of the factory. The appeal shall be preferred within thirty days from the date of receipt of the Welfare

Officer of the order of discharge or dismissal.

(2-A) The Welfare Officer shall be started on a suitable scale of pay minimum of which shall not be less than Rs.800 per mensem for the Welfare Officer and Rs.600 per mensem for the Assistant Welfare Officer, inclusive of the Dearness Allowance.

(3) No penalty shall be imposed upon a Welfare Officer by the management unless he has been first informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself."

Rule 7 deals with the duties of a Welfare Officer and we deem it necessary to extract the said rule also as follows:-

"7. *Duties of Welfare Officers*: The duties of the Welfare Officer shall be--

(a) to establish contacts and hold consultations with a view to maintaining harmonious relations between the factory management and workers;

(b) to bring to the notice of the factory management the grievances of workers, individual as well as collective, with a view to securing their expeditious redress and to act as a liaison officer between the management and labour;

(c) to study and understand the point of view of labour in order to help the factory management to shape and formulate labour policies and to interpret these policies to the workers in a languages they can understand;

(d) to watch industrial relations with a view to using his influence in the event of a dispute between the factory management and workers and to help to bring about a settlement by persuasive effect;

(e) to advise on fulfilment by the management and the concerned departments of the factory of obligations, statutory or otherwise, concerning regulation of working maternity benefit, medical care, compensation for injuries and sickness and other welfare and social benefit measures;

(f) to advise and assist the management in the fulfilment of its obligations, statutory or otherwise, concerning prevention of personal injuries and maintaining a safe work environment, in such factories where a Safety Officer is not required to be appointed under the enabling provisions under Sec.40-B of the Act;

(g) to promote relations between the concerned departments of the factory and workers which will bring about productive efficiency as well as amelioration in the working conditions and to help workers to adjust and adapt themselves to their working environment;

(h) to encourage the formation of Works and Joint Production Committee, Co-operative Societies and Welfare Committees and to supervise their work;

(i) to encourage provision of amenities such as canteens, shelters for rest, creches, adequate latrine facilities, drinking water, sickness and benevolent scheme payment, pension and superannuation funds, gratuity payment, granting of loans and legal advice to workers;

(j) to help the factory management in regulating the grant of leave with wages and explain to the workers the provisions relating to leave with wages and other leave privileges and to guide the workers in the matter of submission of application for grant of leave for regulating authorised absence;

(k) to advise on provision of welfare facilities, such as housing facilities, foodstuffs, social and recreational facilities, sanitation, advice on individual personnel problems and education of children;

(l) to advise the factory management on questions relating to training of new starters, apprentices, workers on transfer and promotion, instructors and supervisors, supervision and control of notice board and information bulletins to further education of workers and to encourage their attendance at technical institutes;

(m) to suggest measures which will serve to raise the standard of living of workers and in general promote their well being;

(n) to work for the improvement of educational facilities and to promote adoption of the family welfare measures amongst the workers."

6. Placing reliance mainly on the rules, learned counsel for the petitioner, would submit that there could not be any ambiguity that rights, privileges and duties of significance and public importance got accrued and settled by statutory rules and correspondingly the management has got an obligation to preserve them and not abrogate them, by transferring the incumbent in that post to anv

other post. Analytically, when we look into the rules, we are obliged to agree with the submissions of the learned counsel for the petitioner that rights, privileges and duties of significance of public nature, get conferred on a welfare Officer. Sub-rule (2) of rule 6 speaks about the right of appeal available to the Welfare Officer in the case of discharge or dismissal of the Welfare Officer and it further says that the decision of the Commissioner of Labour thereon shall be final and binding upon the occupier of the factory. Sub-rule (3) contemplates that no penalty shall be imposed upon a Welfare Officer by the Management unless he has been first informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. Coming to rule 7, it has assigned a very significant role of public nature for the Welfare Officer. Learned counsel for the respondent would submit that these rights, privileges and duties could be claimed, so long the person is an incumbent in the post and not otherwise. That is not the question that should engage our attention; but the question is as to whether a legal sanction could be found to do away with those rights, privileges and duties, by transferring the person from the post.

7. With regard to the nature of the post, certain pronouncements were cited before us by the learned counsel for the petitioner and in our view, it would be worthwhile to refer to them. In *Pratap Chandra Sen v. Commissioner of Labour, A.I.R. 1957 S.C. 794*, the Supreme Court had occasion to advert to the Bihar Factories Welfare Officers Rules, 1952, the said rules also being those formulated under Sec.49(2) of the Act and the significance of the safeguards for the holder of the post of a Welfare Officer was summed up in the following terms:

> "The permanence of tenure and the safeguards against arbitrary punishment provided by the above rules are in order to safeguard him against victimisation by the employer having regard to the nature of his duties in the discharge of which there are chances of his incurring the employer's displeasure."

In *Synthetics and Chemicals Ltd. v. G.C.Kumar, (1972) 25 F.L.R. 146*, a Bench of the High Court of Allahabad dealt with a case where a person appointed to the post of a Welfare Officer was sent out of service on the ground of not fulfilling the qualifications under the U.P.Factories Welfare Officers' Rules, 1955. The question arose as to whether a writ in the nature of *mandamus* could issue to the State Government to set aside the order of the management terminating the services of a Welfare Officer and to command the management to reinstate him to the post. The learned Judges of the Bench of the High Court of Allahabad reviewed the English and Indian authorities and summed up the principles with regard to issuance of a writ of *mandamus* by the High Court, in the following terms:

> "(1) *Mandamus* may issue to a trading corporation to compel it to do its duty which is of a public nature.
>
> (2) A duty is of a public nature if it is imposed by charter, common law or statute.
>
> (3) *Mandamus* may issue to restore a person to a corporate office if the office is of a public nature.
>
> (4) The office is of a public nature if it is created by a statute and the duties of the office affect the general public or a section thereof.
>
> (5) Art.226 empowers the High Court to issue a writ in the nature of *mandamus*. The power may be exercised, keeping in regard the broad and fundamental principles which guide the issue of *mandamus*."

The further question as to whether the office of a Welfare Officer is a public one was also discussed in the light of the U.P.Factories Welfare Officers' Rules, 1955 and the answer was given in the following terms:

> "These provisions show that the post of the Labour Welfare Officer is an office created by the Act. The office is of a permanent character. It is a substantive office. It is not an office held at mere will. The officer can be discharged only for some cause and with the written concurrence of the Labour Commissioner and after hearing. His duties are of a public nature because they affect the interest of a large number of workers employed in the factory. In the discharge of his duties he has to deal with persons not concerned with the factory. Accordingly, the office of the Labour Welfare Officer is a public office, and a writ of the nature of *mandamus* can issue to the appellant to restore G.C.Kumar to his office. It necessarily follows that the appellant owes a duty of a public nature to restore him to his office. The

duty arises from Sec.49 of the Act and the Factories Welfare Officers' Rules."

In *Prem Narain v. Gawnpore Chemical Works, 1974 Lab.I.C. 479,* a single Judge of the High Court of Allahabad had to deal with a case of the termination of the service of a Welfare Officer appointed under the Act and the U.P. Factories Welfare Officers, Rules, 1955, and the significance of the post of Welfare Officer was recapitulated by the learned single Judge of the High Court of Allahabad in the following terms:

"The above catalogue of the duties of a Welfare Officer leaves no room for doubt that not only he holds an office but that it is a public office and his functions are replete with all the elements of a public employment. In fact, his duties embody a high concept of social justice, He has to act as Liaison Officer between the workers and the management. He has to endeavour to secure real welfare and amenities to the workers in the modern industrial set up and in so discharging his functions has certainly in a measure to act as a curb on the management which has to be kept within bounds. In these circumstances, it cannot be contended that with force that a Labour Welfare Officer functions on the will of the employer. On the contrary his office is created by the Act. It is of a permanent nature and it is a public office. If, therefore, a Labour Welfare Officer has a right to continue in his post until he attains the age of superannuation and the management or the private company chooses to terminate his service prior to that contingency or without complying with the statutory procedure, the officer is entitled to ask for a writ of *mandamus*. He has a legal right to the office and the management is under a statutory obligation to retain him in office."

It could be said that the amplitude of the concerned rules dealt with in the above pronouncement are larger than that of the Rules here. But, we do not find much difference in the implications of them. Hence, what all have been expressed in the above pronouncements can certainly form a guidance to decide the present issue.

8. The post is not one created in ordinary service parlance. The post is one required to be created by Sec.49(1) of the Act. In that sense, it could be characterised as a statutory post. Sec.49(2) enjoins upon the State Government to prescribe the duties, qualifications and conditions of service for the incumbent in the post. The Rules got formulated towards that end. As already seen, Rule 4 prescribes the qualifications and Rule 5 sets down the method of recruitment. There is no escape from these statutory prescriptions. The implications of Rules 6 and 7 have already been noticed. Thus, the post is a substantive one created under and pursuant to statute. We have no ambiguity in our mind that the post is of a public nature and it carries with it the duties of significance of an office, which affects a section of the general public. The duties annexed to the post enjoins upon the incumbent to maintain harmonious relationship between the management and the workers; to bring to the notice of the management the grievances of the workers, individual as well as collective, with a view to secure expeditious redressal. The incumbent should act as Liaison Officer between the management and the workers. He should encourage provision of very many amenities for the workers. He has got a role to play with reference to the provision of welfare facilities and to suggest measures to raise the standard of living of the workers. We have only broadly recapitulated the duties of a Welfare Officer, but they are exhaustively set down in rule 7. Viewed from the above angles, the office of a Welfare Officer can certainly be characterised as an office of a public and substantive nature. The respondent cannot without any legal sanction therefor dislodge the petitioner from the post. The rules by themselves do not envisage the disturbance of the incumbent from the post of a Welfare Officer so as to be transferred to any other post, may be of equal cadre. If we go by the express verbalism of the rules, disturbance of the petitioner from the post of a Welfare Officer by way of transfer, as happened in the present case, cannot be sustained. But, the endeavor on the part of the learned counsel for the respondent is to say that the conditions of service of a Welfare Officer being same as those of other members of the executive staff, the petitioner could be transferred from the post of Welfare Officer to any post of equal cadre.

9. It is true that Rule 6(1) speaks about the Welfare Officer having appropriate status corresponding to the status of a member of the factory executive staff and rule 6(2) says that the conditions of service of a Welfare Officer shall be

that same as those of other members of the staff of corresponding status in the facto.y. It is possible to argue that if the conditions of service have contemplated and set down the transfer of a Welfare Officer from that post to any other post of equal status or cadre, that has got to be implemented. However, we must record here that Mr.N.G.Prasad, learned counsel for the petitioner, would submit that even if there is such a term or condition of service, that must stand ignored as abrogating the statutory rights and privileges annexed to the post of a Welfare Officer. This contention may require examination only if a term or condition of service which has contemplated and settled the question of a transfer of a Welfare Officer from that post to any other post of equal cadre, has been expressed in the service parlance of the respondent. Hence, we are first obliged to find out as to whether any material throwing light on this aspect has been made available to the Court by the respondent.

10. The letter of appointment dated 29.4.1985, of course speaks that 'other terms and conditions of service applicable to management staff in general and Group F in particular will be applicable to you'. But, what are those terms and conditions of service and whether they take in any term or condition relatable to transfer, and in particular, transfer of Welfare Officer to any other post, may be of equal cadre, is not exposed before us. The order of confirmation dated 21.10.1986 also says, "All other terms and conditions of service applicable to management staff in general and Group 'F' in particular will be applicable to you." This statement has also not improved the position in the absence of disclosure of the relevant terms and conditions of service contemplating transfer, as has happened in the present case. The order of confirmation refers to a memorandum of agreement to be signed by the petitioner and returned. The admitted position is there is no such memorandum of agreement available in records. This is what has been declared in the counter-affidavit filed on behalf of the respondent before us in the writ appeal. The learned single Judge has dealt with this aspect saying that there is no dispute or denial that under the other terms and conditions, there is no prohibition against a transfer of an employee from one department to another department and hence such a transfer could happen. It must be remembered that we are not dealing with a case of a transfer of a Welfare Officer from one Unit to another Unit as a Welfare Officer. Here, we are asked to look at the grievance of the petitioner with reference to total disturbance and dislodgement from the post of a Welfare Officer. The lack of express prohibition certainly cannot be construed as permission for such a transfer. Mr.M.R.Narayanaswami, learned senior counsel appearing for the respondent, for the proposition that when transfer is effected pursuant to the terms, and conditions of employment that will be permissible, placed reliance on the pronouncement of the Supreme Court in *Associated Cement Companies v. P.N.Sharma, A.I.R. 1965 S.C. 1595: (1965)1 Lab.L.J. 433.* Any disputation over this proposition, as done by the learned counsel for the petitioner, does not require consideration, because here we are confronted with total lack of materials on the question of any term or condition explicitly providing for the transfer of a Welfare Officer from that post to the post of any other post, may be of equal cadre. When we take note of the significance annexable to the post of a Welfare Officer as per the statutory provisions, in the absence of exposure before us of any term of condition of service, contemplating his disturbance from that post to any other post, may be of equal cadre, we do not think we should indulge in investigation into this question and give an answer to it. We are not able to fall in line with the thinking of the learned single Judge when he proceeded that the terms and conditions of service will enable the respondent to pass the impugned order of transfer.

11. However, Mr.M.R.Narayanaswami, learned senior counsel appearing for the respondent, would raise a contention with regard to the maintainability of a writ petition for the issue of a writ of *mandamus* as asked for in the present case and against his client. The basic rule has been settled without any ambiguity that the condition precedent for the issue of a *mandamus* is that there is, in one claiming it, a legal right to the performance of a legal duty by one against whom it is sought. The rights privileges and the significance of the post are those discernible from the statutory provisions and the petitioner, the incumbent in the post of a Welfare Officer is certainly entitled to those statutory rights, privileges and significance; and correspondingly there is a duty cast upon the respondent, the management to preserve them

without abrogating them except in the manner known to law. When there is a breach of them, certainly this Court can issue the writ of *mandamus* to restore those rights and privileges and repair the damages done to them. The petitioner can be said to be aggrieved when he has been denuded of the statutory rights and privileges by the respondent, who has a legal duty to preserve them or to abstain from doing away with them. In this behalf, the principles noted by the Bench of the High Court of Allahabad in *Synthetics and Chemicals Ltd. v. G.C.Kumar, (1972)25 F.L.R. 146,* regarding issue of a writ of *mandamus* which we have extracted as above, do form a succulent guidance. On the question of issuance of *mandamus*, the concept is getting very much enlarged and in this behalf our attention was drawn to the pronouncement of the Supreme Court in *Andi Mukta Satguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and others v. V.R.Rodhani and others, (1989)2 L.L.J. 324.* The following passage occurring in the said pronouncement requires extraction as follows:

> "The term 'authority' used in Art.226, in the context, must receive a liberal meaning unlike the term in Art.12. Art.12 is relevant only for the purpose of enforcement of fundamental rights under Art.32. Art.226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Art.226 are, therefore, not to be confined only to statutory authorities, and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists *mandamus* cannot be denied. In *Praga Tools Corporation v. C.A.Immanual, (1969)1 L.L.J. 23: (1969)3 S.C.R. 773,* at 24 short notes), this Court said that a *mandamus* can issue against a person or body to carry out the duties placed on them by the statutes even though they are not public officials or statutory, body. It was observed.
>
> "It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A *mandamus* can issue, for instance, to an official of a society to compel him to carry out the terms of the statue under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A *mandamus* would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities. (Of. Halsbury's Laws of England, 3rd Edition, Volume II, Page 52 and onwards)."
>
> Here again we may point out that *mandamus* cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states; "To be enforceable by *mandamus* a public duty does not necessarily have to be one imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fact expanding maze of bodies affecting the rights of the people should not be put into water-tight compartment. It should remain flexible to meet the requirements of variable circumstances. *Mandamus* is a very wide remedy which must be easily available 'to reach injustice where-ever it is found." Technicalities should not come in the way of granting that relief under Art.226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

In view of the propositions noted above, we do not think that we should deny the writ of *mandamus* as asked for by the petitioner.

12. This being our assessment of the question, we are obliged to countenance the grievance of the petitioner. Accordingly, we allow this writ appeal; set aside the order of the learned single Judge in W.P.No.14193 of 1991 and the said writ petition will stand allowed as prayed for. We make no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Lakshmanan, J.*

O.M.S.No.21 of 1991 *25th February, 1992.*

R.Anita Marginic ...*Petitioner*
v.
R.Annadurai ...*Respondent.*

(A) Divorce Act (IV of 1869), Sec.2 - Jurisdiction of court under, when can be invoked.
If either of the parties is a Christian, it would be sufficient to invoke the jurisdiction of the court under the provisions of the Divorce Act.
[Para 9]

(B) Divorce Act (IV of 1869), Sec.19 - Application for declaration of nullity of marriage on grounds stated in section - Jurisdiction to entertain.
The High Court alone is empowered to entertain an application for nullity of the marriage on the grounds stated in Sec.19 of the Divorce Act.
[Para 9]

(C) Hindu Marriage Act (XXV of 1955) - Marriage under - Proof - Registration alone, if sufficient to prove marriage.
When the factum of marriage is disputed, evidence regarding performance of marriage according to Hindu rites must be brought on record to show that there had been a valid marriage. The registration is not the sole proof of marriage in order to become a valid marriage.
[Para 10]

Cases referred to:
Sasivarnam v. S.Gnanasundari Kamalam, A.I.R. 1954 Mad. 1018; B.Ignatius Anthoney Jayaraj v. Immy Margaret Florence, A.I.R. 1978 Karn. 69; Mousumi Chakraborty v. Subrata Guha Roy, (1991)2 Current Civil Cases Calcutta 401.

T.Viswanatha Rao and *K.P.Santhosh,* for Petitioner.

S.Swamidoss Manokaran, for Respondent.

The Court made the following

ORDER:- This petition has been filed under Secs.18 and 19 of the Indian Divorce Act, 1869, to pass a decree and judgment declaring that the alleged marriage of the petitioner with the respondent is *null and void* and for costs.

2. The facts leading to the filing of this petition may be set out as follows: The petitioner is now aged about 19 years, her date of birth being 19.4.1972 as per the transfer certificate marked as Ex.P-3. She is the daughter of Mr.J.Robby and Mrs.Kethsi Bai. Admittedly they are born Christians and members of C.S.I.Church, Mambalam, *vide* Ex.P-1 certificate issued by the C.S.I.Church. The petitioner's father is a leading real estate businessman. The petitioner was at times assisting her father. Her maternal aunt Suganthi, an unmarried lady employed as a teacher in Kilpauk used to visit the house often. She took a short term hand loan of Rs.30,000 from the petitioner promising repayment in seven days. When she did not repay the amount and the petitioner's father scolded her, the petitioner insisted her maternal aunt to repay the money. Suganthi offered to go to her native place in Kanyakumari, arrange the money and bring back the same to be repaid. She persuaded the petitioner to go with her for a short trip and the petitioner lent her Rs.400 and went with her on 6.7.1990. They arranged a car and the respondent, an acquaintance of Suganthi, recommended by her for employment under the petitioner's father, accompanied them at the instance of Suganthi. Unsuspectingly the petitioner went with them. On the way they have taken the petitioner to Mayavaram, the native place of the respondent where the petitioner was detained in a remote house under constant vigil and signatures were obtained from the petitioner under threat and after severe beatings. The petitioner was also made to sign some forms before the Registrar of Assurances allegedly purporting to register an alleged marriage and later on she was shifted to various places and ultimately to a house in Velacheri in Madras. Even there the petitioner was detained against her wish and the respondent had removed her jewellery and sold certain items. Some other items were also either sold or pledged through some relatives of the respondent. In the meantime, petitioner's father lodged a police complaint about her missing from the house and also filed a writ petition for the relief of *habeas corpus* arraying the petitioner's maternal aunt Suganthi and her relatives as respondents. They had obtained bail and the proceedings were not fruitful. On 18.1.1991, the petitioner could escape from the respondent's illegal custody and she returned to her parents. Immediately, necessary complaint was lodged by the petitioner with the police (F.I.R. 1390 of 1990, dated 18.1.1991 marked as Ex.P-4) and the police

admittedly apprehended the respondent and have even recovered the illegally sold and pledged jewellery belonging to the petitioner. Criminal proceedings are pending against the respondent in the Criminal Courts. Hence, the petitioner contends that no valid marriage took place between the respondent and herself and even the alleged marriage evidenced by Ex.P-2 (extract dated 26.10.1990 from the Hindu Marriage Register) is vitiated and bad in law since no such valid marriage could take place as she is a Christian and also since her consent to the alleged marriage was obtained by fraud, misrepresentation and coercion.

3. The respondent resisted the petition by filing a counter alleging that while he was in the employment of the father of the petitioner for a short-while, he and the petitioner fell in love with each other, that the petitioner without his knowledge and consent ran away from the house and went to his uncle's house, that the petitioner did not listen to his persuasions and wanted to marry him, hence he took her to Trichy on 5.3.1990, stayed in his relation's house there and the marriage had taken place between them on 8.8.1990 which was attended by hundred persons, that at simple ceremony the petitioner was allegedly converted to Hinduism, that they lived together at various places and on 14.1.1991 the petitioner's father came with rowdy elements, assaulted the respondent and took away the petitioner and then lodged a false criminal proceedings against him and that there was a valid marriage between himself and the petitioner and her consent thereto was out of free volition.

4. The following 8 issues were framed by me for trial on 16.7.1991:

"Whether the petitioner was taken to the respondent's place at Mayavaram by the respondent and her maternal aunt Smt.Suganthi, by practising fraud, misrepresentation and coercion, detained there against her will and forced to sign papers, records and documents?

(2) Whether the petitioner had left her parental house voluntarily with intent to marry the respondent as alleged by him?

(3) Whether the petitioner was validly converted from Christianity to Hinduism?

(4) Whether any marriage, valid and known to law took place between the parties on 8.8.1990?

(5) Whether the registration of the alleged marriage under the Tamil Nadu Hindu Marriage (Registration) Rules, 1967 is nullity or valid?

(6) Whether the petitioner is entitled to the relief of declaration that the alleged marriage between the parties was brought about by fraud, misrepresentation and coercion and hence *null and void*?

(7) Whether this Court has jurisdiction, the marriage not being a Christian marriage?

(8) To what relief or reliefs the petitioner is entitled?

5. The parties went into box as P.W.1 and R.W.1 and Exs.P-1 to P-6 and D-1 and D-2 were marked respectively, on behalf of both parties. In the evidence, the petitioner deposed that she is a born Christian, that she went with her aunt believing her representation that they are going to Kanyakumari, that she was never converted into Hinduism, that no valid marriage took place at any time, that she was subjected to third degree methods and severe beatings, that her signatures were obtained to various documents including the application form to the Registrar and that she never consented for the marriage freely.

6. As against this, the respondent, as R.W.1 concedes that he does not even know the correct address of the petitioner's father, that he does not know when he left his service, that he does not know the residential address of the petitioner, that he does not remember the names of the witnesses who signed the marriage register, that he has records when he left the service under the petitioner's father and joined P.T.C. but did not produce them, that he purposely did not inform the petitioner's father about the alleged presence of the petitioner with him though he continued to serve him, that the particulars given in the extract of the marriage register are false to his knowledge but they were given so at the instance of the petitioner. He further states that he does not know whether the petitioner was converted from Christianity to Hinduism and whether she continues to be Christian, that he does not remember the marriage hall where the alleged marriage took place, that no marriage in accordance with the customs of the petitioner's community took place and that except the marriage certificate Ex.P-2, there is nothing in writing to show that the marriage took place between the petitioner and the respondent.

7. In the light of the above evidence and pleadings, the controversy between the parties has to be resolved, and the arguments of both sides appreciated.

8. *Issue Nos.3, 4, 5 and 7:* Admittedly, the petitioner is a Christian and absolutely there is no record to show that she got herself converted to Hinduism before the alleged marriage between the parties. Hence, Issue No.3 is answered in favour of the petitioner and against the respondent.

9. The petitioner, admittedly, is a Christian and the respondent is a Hindu. If either of the parties is a Christian, it would be sufficient to invoke the jurisdiction of the Court under the provisions of the Divorce Act. This view is supported by the decision of a Special Bench of this Court in *Sasivarnam v. S.Gnanasundari Kamalam, A.I.R. 1954 Mad. 1018.* In the said decision, it has been held as follows:

> "Where either of the parties to a petition for divorce is a Christian, it would be sufficient to invoke the jurisdiction of the Court under Sec.2 of the Divorce Act as amended in 1927 for relief under it."

This Court alone, in my view, is empowered to entertain an application for nullity of the marriage on the grounds stated in Sec.19 of the Divorce Act. My view is also affirmed by a decision of the Special Bench of Karnataka High Court, reported in *B.Ignatius Anthoney Jayaraj v. Immy Margaret Florence, A.I.R. 1978 Karn. 69.* It has been held in the above decision as follows:

> "Under Secs.18 and 19 the District Court and the High Court have concurrent jurisdiction for entertaining a petition for nullity of marriage on the grounds stated in sub-secs.(1) to (4) of Sec.19.
>
> So far as the decree of nullity of marriage on the ground of force or fraud is concerned, the same can be obtained only by presenting a petition to the High Court which has a residuary jurisdiction to deal with a petition for dissolution of marriage on the ground that consent of either party was obtained by force or fraud. Thus, the District Court has no jurisdiction to entertain a petition for declaration of nullity of marriage on the ground that the consent of either party to the marriage was obtained by force or fraud."

Hence I hold that on issue No.7 this Court alone has jurisdiction. There is also no evidence that the petitioner a Christian got converted to Hinduism. The respondent also admits in his evidence that he does not even know whether the petitioner was converted from Christianity to Hinduism and whether she continues to be a Christian. Hence no valid marriage under the provisions of the Hindu Marriage Act, 1955 can taken place between the parties. Therefore, on issue No.4, I hold that there is no valid marriage between the parties under the provisions of the Hindu Marriage Act, 1955. There is no proof of any marriage having at all taken place between the parties and it is the admission of the respondent that except for the extract from the Hindu Marriage Register there is no other proof in writing.

10. When the factum of marriage is disputed, evidence regarding performance of marriage according to Hindu rites must be brought on record to show that there had been a valid marriage. The registration is not the sole proof of marriage in order to become a valid marriage. Reference can be usefully made to the decision of the Calcutta High Court, reported in *Mousumi Chakraborty v. Subrata Guha Roy, (1991) 2 Current Civil Cases Calcutta 401.* In the said decision a Division Bench of the Calcutta High Court has held as follows:

> "In this particular case, the appellant had filed a suit stating that there had been no marriage at all between her and the respondent. On the contrary, the respondent claimed that there was a valid marriage. It is well settled principle that the burden of proof lies upon the party who substantially asserts the affirmative of the issue. The evidential burden in matrimonial case is that the burden is on the proponent, or in other words, the party who claims that there was a valid marriage, has to prove that marriage. The question is whether the production of marriage registration certificate raises a presumption and even if a presumption is there, whether the same could be rebutted. Sec.8 of the Hindu Marriage Act, 1955 provides Hindu Marriages registration has been introduced for the purpose of facilitating the proof of Hindu Marriage. The registration is not the sole proof of marriage in order to become a valid marriage. Sec.7 of the said Act provides that the validity of a marriage will depend on observance of "customary rites and

ceremonies."

"The ceremony essential for a valid marriage prevailing in the community must be performed and if there is no valid marriage in that even there could not be any valid registration under the provisions of Sec.8 of the Hindu Marriage Act, 1955."

In my view, evidence regarding the performance of marriage according to Hindu rites must be brought on record to show that there had been a valid marriage. Unfortunately, in this particular case, from the evidence on record, it is clear that the ceremonies essential to the validity of the marriage were wholly absent. The respondent who argued that there had been a valid marriage in accordance with the Hindu rites could not even tell whether the essential ceremonies to the Hindu Marriage were performed in the alleged marriage. Again, the respondent who claims to have married the petitioner could not tell anything about the name of the witnesses who signed the marriage register. According to him, even the particulars of both himself and the petitioner given in the Marriage Register are all false and they were given so only at the instance of the petitioner. It is his further evidence that he does not remember where did the marriage take place. Except the Marriage Certificate Ex.P-2, there is no other document in writing to show that the marriage took place between the petitioner and the respondent. Hence, I hold that the registration of the alleged marriage under the Tamil Nadu Hindu Marriage (Registration) Rules, 1969 is nullity and not valid. Issue No.5 is answered accordingly.

11. The respondent also did not examine any of the witnesses who allegedly attended the alleged marriage and there is no proof before this Court either oral or documentary for any such marriage. Hence, this Court has to draw only an adverse inference against the respondent and the only presumption is that no such valid marriage could have ever taken place between the parties.

12. *Issue Nos.1 and 2:* The petitioner has established that her consent to the marriage was obtained by fraud etc. The following circumstances will establish the said fact.

(a) The petitioner alleges that she was totally against her wish taken to Mayavaram and other places including Velacheri at Madras.

(b) She also says that she was beaten and under threat her signatures were obtained to various documents including the application for Registration of the Marriage.

(c) The respondent pleads that his uncle at Madras, a relation Kalyanasundaram at Trichy, his friends and even the landlady at the Velacheri house and neighbours allegedly knew that she was residing with the respondent voluntarily. Conspicuously none of the persons has been examined as witness.

(d) The respondent admits that he kept the alleged presence of the petitioner with him either voluntarily or otherwise, secret from the knowledge of the parents of the petitioner though for some time he worked under the petitioner's father during that period.

(e) The respondent does not even know the residential address of the petitioner. His service under the petitioner's father at his office was just for a few months. It is highly unbelievable that the parties fell in love with each other and the petitioner allegedly eloped with the respondent to get married to him out of the free will and consent.

(f) The respondent also has no records to show when he went to Trichy and other places along with the petitioner. Significantly he does not produce any such evidence. In such cases, this Court has to draw only an adverse inference against the respondent, and it should be presumed that the taking away of the petitioner by the respondent was much earlier on 6.7.1990 and that too, against her will as pleaded and proved by the petitioner.

(g) In the marriage certificate all the particulars of both the parents were given falsely. The only explanation respondent offers is that the petitioner allegedly wanted him to do so. It is obvious that the respondent wanted to keep the matter secret and unknown and undetected by the petitioner's parents. Even the name and the age of the petitioner and the religion were given falsely in the extract from the marriage register and the respondent is signatory to the same.

(h) The respondent does not possess any money even to maintain the petitioner and himself. He pledged and sold the jewels of the petitioner and admittedly after the complaint by the petitioner, the police authorities recovered her jewels pledged and sold by the respondent and his relations. The only explanation offered

by the respondent is that the petitioner herself wanted him to sell the jewels and he came to know about the pledging and sale of her other jewels by his relations only much later. This explanation in my view is far from truth and cannot be accepted.

(i) The petitioner has cogently pleaded the particulars of fraud and deposed about them. Nothing has been elicited against her nor her version shaken in any manner in her cross-examination.

Against, the following circumstances, *viz.*

(a) the petitioner's tender age, she being aged 18 years at that time;

(b) the respondent's wanting circumstances;

(c) the difference in religion;

(d) the difference in social circumstances

(e) and the secret manner in which the respondent wanted the alleged marriage between the petitioner and the respondent to take place at Trichy and being registered at Mayavaram much later.

Will clearly establish that the petitioner's consent was obtained by fraud, misrepresentation and coercion for the alleged marriage. Hence, I hold that the petitioner had left her parental house not voluntarily with intent to marry the respondent as alleged by him and that the petitioner was taken to Mayavaram by the respondent and the maternal aunt to the petitioner by practising fraud, misrepresentation and coercion and retained in various places against her will. Accordingly, issue Nos.1 and 2 are also answered in favour of the petitioner and against the respondent.

Issue No.6: In view of the foregoing discussions, I am clearly of the view that the petitioner is entitled to the relief of declaration that the alleged marriage between herself and the respondent was brought about by fraud, misrepresentation and coercion and hence I hold that the alleged marriage is *null and void.*

Issue No.8: In the result, the petition is allowed and the marriage between the petitioner and the respondent is declared as *null and void.* No costs. At the time of argument, it was brought to my notice that certain criminal complaints were filed before the Criminal Courts against the respondent by the petitioner and her father. In view of this decision declaring the alleged marriage between the petitioner and the respondent as *null and void* the petitioner and her father may not press the criminal prosecutions launched against the respondent and may withdraw the same in the interest of the parties.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

O.S.A.No.29 of 1985 *21st January, 1992.*

K.Appa Rao (died) and others *...Appellants*

v.

State Bank of Hyderabad, T.Nagar, Madras-17 *...Respondent.*

Civil Procedure Code (V of 1908), Sec.34 - Banking Regulation Act (X of 1949), Sec.21(2)(C) - Usurious Loans Act (X of 1918) - Commercial transaction - Rate of interest - Loanee disentitling himself of any concessional rate of interest - Liable not to contractual rate of interest but to rate at which moneys were lent or advanced by nationalised banks in relation to commercial transactions.

The defendant/appellant was carrying on business of export of granite, marble and other stones and minerals and different types of wood and timber to various countries and was maintaining an account with the plaintiff/respondent Bank. In 1973, he sought for loan facility from the plaintiff Bank. The Bank initially sanctioned in November, 1973, loan facilities to the defendant for a limit of Rs.50,000 and later on enhanced it to Rs.1,50,000 in June, 1974. The appellant availed of a loan of Rs.91,350 executing a promissory note dated 29.7.1974 for Rs.95,350. He failed to arrange for the purchase of sandalwood etc. as well as to export the same as a result of which the letter of credit expired and consequently the loan amount remained unadjusted. The plaintiff filed a suit. It was decreed for a sum of Rs.1,33,474.30 together with interest at 16 1/2% p.a. on the sum of Rs.91,350 from the date of suit till date of realisation. In appeal, the appellant contended the correctness of the finding with respect to the rate of interest, which was not the contracted rate.

Held:- Sec.34 of the Code of Civil Procedure provides that insofar as the decree is for the payment of money, the court may, in the decree, order interest at such rate as the Court from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate not exceeding six per cent as the Court deems reasonable on such principal sum from the date of the decree to the date of payment or to such earlier date as the court thinks fit; provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction the rate of such further interest may exceed six per cent per annum but shall not exceed the contractual rate of interest or where there is no contractual rate of interest, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions. It is not in dispute that the instant transaction is a commercial transaction. It is also not disputed that there has been a contractual rate on condition that the loan granted was for export of sandalwood and other items such as granite, rosewood, ebony wood etc. The defendant/appellant, however, disentitled himself of any concessional rate of interest. He thus became liable not to the contractual rate of interest but the rate at which moneys were lent or advanced by nationalised banks in relation to commercial transactions at the relevant time. The concessional rate was 11 1/2%. The rate applied to the commercial transaction effective from 23rd July, 1974 was 12 1/2%. That rate, however, could not be applied to the transaction of the defendant/appellant on any date prior to Ex.P-23 that is to say 5.7.1975. Thus, in the opinion of the Court, it is a fit case in which the rate of interest that may be allowed should be 11 1/2% from 29.7.1974 upto 5.7.1975 and thereafter at the rate of 12 1/2% the rate which the plaintiff/respondent was able to prove, applied to commercial transactions as per the circular of the Reserve Bank of India.

[Paras 12 and 13]

Cases referred to:

Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238; Venkataramanan & Company v. Indian Overseas Bank, (1989)2 L.W. 6; D.W.Gowda v. Corporation Bank, A.I.R. 1983 Karn. 133.

Appeal under Clause 15 of the Letters Patent against the Order of Swamikannu, J., dated 26.11.1982 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S.No.168 of 1978 on the file of this Court.

S.V.Jayaraman, for Appellants.

T.P.Sankaran, for Respondent.

The Court made the following

JUDGMENT:- A suit filed on behalf of the plaintiff/respondent has been decreed for a sum of Rs.1,33,474.30 together with interest at 16 1/2% p.a. on the sum of Rs.91,350 from the date of the suit till the date of the realisation, for creating a charge for the decretal sum on the pledged goods detailed in the pledge delivery letter executed by the defendant in favour of the plaintiff/respondent and for directing the stocks to be sold and proceeds credited towards decree and for costs of suit.

2. The defendant/appellant was carrying on business of export of granite, marble and other stones and minerals and different types of wood and timber to various countries and was maintaining an account with the plaintiff/respondent. In the year 1973, he sought for loan facility from the plaintiff Bank in relation to his export trade to enable him to purchase necessary materials for the purpose of export against existing or anticipated orders. The plaintiff/respondent initially sanctioned in November, 1973 loan facilities to the defendant/appellant for a limit of Rs.50,000. At the request of the defendant/appellant, the loan limit was enhanced to Rs.1,50,000 in June, 1974. Pursuant to the sanction of the enhanced limit, the appellant availed a loan of Rs.91,350 by debit to his account with the plaintiff/respondent and withdraw the said amount and thus received consideration. In relation to this loan, he executed in favour of the plaintiff/respondent a promissory note dated 29.7.1974 for Rs.95,350. Alleging however that the defendant appellant, after having availed the loan, failed to arrange for the purchase of the sandalwood, etc., as well as to export the same, as a result of which, the Letter of Credit expired and consequently the loan amount remained unadjusted and overdue; the plaintiff/respondent's demands for return of the loan, however, also were not honoured by the defendant/appellant, but he created in favour of the plaintiff/respondent a charge under the agreement of hypothecation dated 17.9.1976 and the hypothecation on inspection later was discovered to be of inferior variety and not enough to cover

even a portion of the loan outstanding, and "in view of the continued failure on the part of the defendant to adjust the outstanding, the plaintiff filed the suit.

3. In the written statement that was filed on behalf of the defendant/appellant, it was conceded that the initial loan limit was Rs.50,000 which was later enhanced to Rs.1,50,000 and that the defendant/appellant availed the loan facility as per promissory note for Rs.91,350, dated 29.7.1974. The defendant/appellant however asserted that he had the requisite sandalwood pieces for export as arranged, but due to unexpected circumstances, they could not be exported in time. In response to the plaintiff/respondent's letter, the defendant/appellant tried his best to obtain extension of time provided in letters of credit deposited with the plaintiff and in response to the plaintiff's demand for payment of the outstanding liability, the defendant furnished securities first by execution of the hypothecation bond dated 17.9.1976 and confirmation letter of pledge dated 8.12.1976, but the plaintiff insisted for security of an immovable property and so the defendant deposited with the plaintiff the title deeds of his land in Kolur Village, Ponneri Taluk (an extent of 54 acres-estimated value of Rs.1,62,000).

4. The trial court, as stated above, has decreed the suit. The appellant has not questioned his liability before us and thus the principal sum is not in dispute. Learned counsel for the appellant has questioned however the correctness of the finding with respect to the rate of interest, which admittedly was not the contracted rate. Defendant/appellant, has contended that the only rate of interest that could be allowed in terms of the provisions of law that regulate the rate of interest chargeable on the principal sum by any creditor cannot exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalised banks in relation to commercial transactions. He has submitted that, although the plaintiff/respondent is a nationalised Bank, it is not shown that the rate of interest at 16 1/2% p.a. was the rate at which monies were lent or advanced at the relevant time by nationalised banks in relation to the transactions like the one in question. He has also submitted that the court has got ample power to reduce the rate of interest keeping in view the nature of transaction between the parties and the reason of the failure of the defendant/appellant in honouring the commitments as to the repayment of loans. Learned counsel for the respondent, on the other hand, has contended that on facts as are available on the record, it is conceded that the defendant/appellant took advantage of the concessional rate of interest for export oriented loan, but he did not utilise the loan advanced by the plaintiff/respondent for the purpose of any goods that were exported or stacked for export. He has submitted that on the facts as found by the learned trial Judge, which are not in dispute before us, the proper rate of interest at which the defendant/appellant should pay to the plaintiff/respondent, is the lending rate at which monies were lent or advanced by nationalised banks at the relevant time and that rate of 16 1/2% p.a. has been claimed in the suit.

5. Before we advert to the relevant provisions of law in this behalf, we may extract a passage from the judgment of the trial court to know as to how and why the contractual rate of 11 1/2% was enhanced to 16 1/2% by the trial Court. The trial Court has said:

> "Mr.Habibullah Badsha, learned counsel for the plaintiff concedes the general proposition of law that unless there is any specific provisions or enactment regarding retrospective effect, then the effect of the provisions in the said enactment has to be given prospectively and not retrospectively. Though it looks as if against the contention raised on behalf of the plaintiff, yet he submits that it is his duty to bring to the notice of this Hon'ble Court a proposition that is found in the fact note which may be considered against the contentions raised on behalf of the plaintiff, but it is not so.
>
> Mr.Habibullah Badsha further submits:
>
> (a) There is a consensus between the plaintiff and the defendant in the instant case with regard to the aspect that the concessional rate of interest is available for export oriented loans *i.e.*, at the rate of 11 1/2 per cent. It is also conceded by the defendant that this was an export oriented loan. So, the defendant must be deemed to be aware of the penalties attached to the non-fulfilment of the conditions of the export loan. Hence there is no question of retrospective operation for the acceptance of the penalty attached to the non-fulfilment. It is more in the nature of

procedural law.

(b) The more important fact is whether the issues involved are prospective or retrospective in effect of availing,because Exs.P-10 and P-11 and Ex.D-12 written by the plaintiff to the defendant made it clear that the rate of interest was 16 1/2 per cent from the date on which the loan was availed of and there was no reply to these letters written on behalf of the plaintiff to the defendant. Therefore, the defendant is liable to pay interest at 16 1/2 per cent per annum even though it is deemed to be retrospective.

(c) Even if it is deemed to be prospective and cannot apply retrospectively, Ex.P-23 is dated 5.7.1975 and so it will be applicable atleast from 5.7.1975. The deemed promissory note Ex.P-1 is dated 29.7.1974. Though the plaintiff does not concede that the rate of interest at 16 1/2 per cent is not applicable from 29.7.1974, if it is held that due to the law of prospective operation of the notification then it will apply only from the date of the issue of Ex.P-23. Then the plaintiff is entitled to claim interest at the rate of 16 1/2 per cent from 5th July, 1975.

Mr.Mustafa, the learned counsel for the defendant submits that the concessional rate of interest at 11 1/2 per cent is the rate that should be adopted even with respect to the transactions that had been conducted after Ex.P-15 was not fully complied with, because the defendant did engage himself in activities contemplated by the letter of credit Ex.P-15. The loan is on a credit of one and half a lakh of rupees which was granted by the bank to the defendant. We are governed by the contract in this. One contemporaneous document which is Ex.P-2 and it came into existence at the time of the coming into existence of Ex.P-1, that is on 29.7.1974. In the instant case, though the defendant has not been examined, it is his son who has been examined on behalf of him as D.W.1. There is evidence to show that D.W.1 is associated with the transaction. Therefore, he is competent to speak. On the other hand, so far as P.W.1 is concerned he is the incompetent witness in the sense that he lacks personal knowledge, relating to the documents relied upon by the plaintiff.

Mr.Mustafa submits that in so far as Ex.P-1 is concerned, the interest charged should be on the basis of the contract imbedded in Ex.P-1. There is also alternative interest specified in Ex.P-1. There are two types of interest that are contemplated by the contents of Ex.P-1. The quarterly rests mentioned in Ex.P-1 will not be available to the plaintiff for charging the defendant with quarterly rests. Mr.Mustafa, learned counsel for the defendant points out Ex.P-1 which reads as follows:

> "On demand", I, K.Appa Rao, promise to pay the State Bank of Hyderabad, T.Nagar, or order the sum of Rupees Ninety One thousand three hundred and fifty one for value received with interest from this date at 2 per cent (above) below State Bank Advance rate subject to a minimum of 9 per cent per annum with quarterly rests."

By reading Ex.P-1, Mr.Mustafa submits that "Quarterly rests", can be called as a proviso clause *i.e.* the minimum of 9 per cent per annum. If quarterly rests subject to 9 per cent per annum is taken as a parenthetical clause, then D.W.1, has correctly stated in his evidence that quarterly rests will apply only where only interest is charged at 9 per cent. They have charged State Bank Advance rate of interest. We must necessarily have the knowledge of the State Bank Advance rate of interest. Ex.P-1 mentions the State Bank Advance rate of interest and that the defendant must pay 2 per cent below the State Bank advance rate of interest. Therefore, there should be evidence on the State Bank advance rate of interest in order to charge interest.

Mr.Mustafa submits that there is no evidence in this regarding State Bank Advance Rate of interest except Ex.P-21. Mr.Mustafa, learned counsel for the defendant refers to Clause 11 of Ex.P-21 which reads as follows:

> "Consequent upon the rise in Reserve Bank of India rate from 7% to 9% from 23rd July, 1974 as also the State Bank of India Advance Rate now revised to 12 1/2% the rate of interest on all types of advances in our Bank have been revised as per Annexure-1. Please note that the revised rates will come into force with retrospective effect from the 23rd July. 1974."

In Ex.P-21, only there is a reference that there should be revision of rate of interest. Therefore excepting this reference to 12 1/2 per cent in Ex.P-21, and reading the same with reference to the contents of Ex.P-1, the interest payable to the

defendant under Ex.P-1 is 2 per cent below the State Bank advance rate of interest which comes to 10 1/2 per cent. That is more than the 9% interest mentioned in Ex.P-1.

On the question whether the loan has been granted for a particular purpose, we have necessarily to look into the contemporaneous document Ex.P-2 along with Ex.P-1. By reading Ex.P-2, we come to know that it is not for export activity which is referred to herein. Mr.Mustafa, learned counsel for the defendant submits that instead of going through the entire document Ex.P-2, one or two paragraphs may be referred to and in fact he refers to the opening paragraph of the same which specifies the amount to be advanced, namely, Rs.91,350. He also refers to clause 4 of Ex.P-2 which reads as follows:

> "In the case of goods intended to be sold in India, they shall be as from the time they are delivered to me/us or the property therein passes to me/us be and remain hypothecated and/or pledged with you until they are redeemed by me/us."

In Clause 4 of Ex.P-2 it has been agreed that even with respect to goods that are to be sold in India, it shall remain hypothecated or pledged. It is an internal arrangement of trade. But the schedule to Ex.P-2 does not contain anything. That is the schedule which was expected to contain the rules to be read by the defendant. There is the blank schedule. If we look into the oral evidence of P.W.1, it is the sandal wood and granite that are expected to be exported. That is the evidence of P.W.1. Therefore, the plaintiff is not clear in his submission whether sandalwood and sandalwood alone have to be exported. Therefore, there is no document to show that export of sandalwood is not the only activity and the export is not the only activity for which the loan has been granted. It is also pointed out that Reserve Bank of India directions as such are not before this Court as exhibits. Exs.P-21 and P-22 are only giving out some directions in general and which are in pursuance of directions of Reserve Bank of India. What those Reserve Bank of India's directions and what were the actual definitions that are contemplated have not been made clear by the plaintiff and the evidence emanating from P.W.1 is also not sufficient in that aspect so as to throw light under Sec.21(2). of the Banking Regulation Act, 1949.

Mr.Musthafa, learned counsel for the defendant further submits that there is no specific stipulation in anyone of the written instruments to the effect that the defendant is bound to pay at the enhanced rate of 16 1/2 per cent, though the Reserve Bank had given instructions to its subordinate banks for following that course of conduct for collecting interest. According to Mr.Musthafa, Ex.P-15 the letter of credit has been entrusted with the plaintiff-bank only with the understanding that the export of the commodities dealt with by the defendant will be ensured and that does not mean that within the stipulated period mentioned in the letter of credit, Ex.P-15, had to be complied with in the strict sense of the terms. He further submits that the money borrowed is only for the purpose of export under Ex.P-15 and that the granite stones and sandalwood were the items to be exported.

6. After stating as above, learned trial Judge has taken notice of the evidence of P.W.1 and some documents filed on behalf of the plaintiff/respondent to state that the loan granted was not for export of sandalwood alone but also for further items such as granite, rosewood, ebony wood, etc., and that there was no evidence either oral or documentary to show that the State Bank advance rate of interest had been revised, which rate was shown in Ex.P-21 to read as follows:

> "Consequent upon the rise in Reserve Bank of India rate from 7% to 9% from 23rd July, 1974, as also the State Bank of India Advance Rate now revision to 12 1/2% the rate of interest on all types of advance in our Bank have been revised as per Annexure-I. Please note that the revised rates will come into force with retrospective effect from the 23rd July, 1974."

We are not intending to quote any further from the judgment of the learned trial Judge or to go to any other discussion as to the rate of interest, for we shall presently notice that there is no evidence on record to show as to what is the rate of interest for which moneys were lent or advanced by nationalised banks in relation to commercial transactions at the relevant time except that a concessional rate of interest was stipulated for export oriented loans at the rate of 11 1/2% per cent and that there was nothing to claim any higher rate of interest on any date prior to 5th July, 1975, for as noticed in the various passages of the judgment of the learned trial Judge extracted above, Ex.P-23 dated 5.7.1975 could be applied only prospectively

and not retrospectively. In fact, the plaintiff/respondent almost conceded this petition but in the words of the learned trial Judge,

"Though the plaintiff does not concede that the rate of interest at 16% per cent is not applicable from 29.7.1974, if it is held that due to the law of prospective operation of the notification, then it will apply only from the date of the issue of Ex.P-23. Then the plaintiff is entitled to claim interest at the rate of 16 1/2 per cent atleast from 5th July, 1975."

7. In the above there is one mistake noticed by us that the rate higher than 11 1/2 per cent could be claimed until Ex.P-23 became operational but on Ex.P-23 becoming operational, how the rate of interest at 16 1/2% was worked out would depend entirely upon the evidence on such rate of interest, the rate that was applicable to moneys lent or advance by nationalised banks in relation to commercial transactions.

8. Learned counsel for the appellant has urged that it is a case of excessive rate of interest claimed by a nationalised bank and this Court should call in aid the provisions of the Usurious Loans Act, 1918 to mitigate the rigour of the loan transaction. Our difficulty, however, in taking any aid from the said Act is created on account of a bench decision of this Court in the case of *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238,* in which case a Bench of this Court has said,

"The avowed object of the Banking Regulation Act, 1949 is to consolidate and amend the law relating to banking and thereunder provision is made for the regulation and control by the Reserve Bank of India of the carrying on of the business of banking by banking companies including the rate of interest on advances by Banks. Any contravention on the part of the banks to charge interest at the rates specified under Sec.21(2)(c) is made punishable under Sec.46(4) of the Banking Regulation Act, 1949. the primary object of the Usurious Loans Act, is to confer a power on court to afford relief to a debtor, if the court has reason to believe that a particular transaction between the parties is substantially unfair. No particular rate of interest, as reasonable interest or excessive interest, has been prescribed in the Usurious Loans Act and the reasonableness or otherwise of the rate of interest in any given case has to be decided and determined in the light of the statutory provisions contained therein. In other words, the provisions of the Usurious Loans Act do not in any manner control or regulate the charging of rates of interest, but are intended merely to afford relief from a claim for excessive interest in cases where the transaction is considered to be substantially unfair. It is obvious that the spheres of operation of these two enactments are very different, in that one is concerned with the control and regulation of the business of banking including the rate of interest on advances to be made by the banking companies, while the other is intended to secure relief from excessive claims for interest sought to be enforced through Courts. On a consideration of the diverse scope of the operation of the provisions of these enactments, we are of the view that the provisions of the Banking Regulation Act, 1949, alone regulate the rate of interest on advances by nationalised banks and that there is no inconsistency between its provisions and the provisions of the Usurious Loans Act. The contention of the learned counsel for the petitioner in this regard has, therefore, to be negatived. Equally, the contention of the learned counsel for the respondents that the provisions of the Usurious Loans Act will prevail over the provisions of the Banking Regulation Act, 1949, has also to be rejected.

9. A Bench of the Karnataka High Court, however, in *D.W.Gowda v. Corporation Bank, A.I.R. 1983 Karn. 143,* has expressed its inability to follow the decision of this Court in the case of *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238,* saying that the relevant circulars and directives of the Reserve Bank of India have been brought to the notice of the Bench of this Court in the case of *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238.* In a later Judgment of this Court in *Venkataramanan & Company v. Indian Overseas Bank, (1989)2 L.W. 6,* a Bench of this Court has taken notice of the judgment of this Court in the *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238,* as well as the judgment of the Karnataka High Court in the case of *D.W.Gowda v. Corporation Bank, A.I.R. 1983 Karn. 143,* and observed:

"Learned counsel appearing for the appellants

drew our attention to a decision of *D.W.Gowda v. Corporation Bank, A.I.R. 1983 Karn. 143,* where the identical question was considered by a Bench of the said court. The learned Judges, who decided that said case, referred to a decision of this Court in *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238.* After elaborately considering the entire matter, the Karnataka High Court expressed their inability to follow the decision of this Court for the various reasons. According to them, all the relevant circulars and directives of the Reserve Bank of India were not brought to the notice of the said Court. Their attention was drawn to the circulars issued by the Reserve Bank of India in 1972, 1974 and 1976 and commanding all commercial banks including nationalised banks not to charge compound interest on agricultural loans. A particular reference was made to the circular issued in Ref.DBOD.No.B.P.B.C. 94/C; 453 (A) 76, dated 17.8.1976. Even otherwise, the learned Judges of the Karnataka High Court were not inclined to accept the soundness and tenability of the reasonings found in the said judgment of this Court. They did not agree with the principle declared therein to the effect that the directives of the Reserve Bank would constitute a special circumstance within the scope of the Explanation I to Sec.3(1) of the Usurious Loans Act. In this background, an earnest appeal was made by the learned counsel for the appellants that though this Bench is bound by the earlier decision of this Court, we may consider the question of referring the matter to a larger Bench. Even though the matter may require a second look, we feel that it is not necessary at this stage to make such a reference, since on facts we find that a decision by a larger Bench on this point may not be relevant to dispose of the present appeal."

10. The instant case is one however in which the court may take notice of the provisions in the Banking Regulation Act, 1949 and the various circulars and orders issued by the Reserve Bank of India and need not advert to the provisions of the Usurious Loans Act to hold that while there may be a reasonable basis to hold that the defendants/appellant was/is obliged to pay interest at 11 1/2% the contracted rate of interest, by his conduct that has been found by the learned trial Judge and which has not been seriously disputed before us, made himself liable to such rate of interest which was chargeable upon the loan advanced to him by a nationalised bank as if it was not an export oriented loan. The plaintiff/respondent, however, cannot claim interest higher than the rate noticed by us above which nationalised banks charged on commercial transactions. The plaintiff/respondent had to establish such rate of interest, but it failed to do so. All that it has been able to establish is the rate of 11 1/2 per cent chargeable on export oriented loan (concessional rate) and that there was an upward revision to 12 1/2 per cent effective from 23.7.1974 with respect to commercial transactions otherwise than export-oriented loans.

11. Since we have taken the view that in the instant case there is no requirement to decide as to whether there is any conflict between the provisions of Usurious Loans Act and the Banking Regulation Act, we are not inclined to make any attempt to resolve the conflicting views of this court in the case of *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238,* and that of the Karnataka High Court in the case of *D.W.Gowda v. Corporation Bank, A.I.R. 1983 Karn. 143,* and/or to refer the case to a larger Bench. We, however, feel that the judgment of this Court in the case of *Indian Bank, Tiruvannamalai v. Balasubramania Gurukkal, (1982)2 M.L.J. 238,* may require a second look but we do not say anything beyond that.

12. Sec.34 of the Code of Civil Procedure provides that insofar as the decree is for the payment of money, the court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjusted, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six per cent as the Court deems reasonable on such principal sum, from the date of the decree to the date of payment, or to such earlier date as the court thinks fit; Provided that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at

which moneys are lent or advanced by nationalised banks in relation to commercial transactions.

13. It is not in dispute that the instant transaction is a commercial transaction. It is also not disputed that there has been a contractual rate on condition that the loan granted was for export of sandalwood and other items such as granites, rosewood, ebony, wood, etc., The defendant/appellant, however, disentitled himself as found by the learned trial Judge of any concessional rate of interest. He thus became liable as noticed by us above not to the contractual rate of interest but the rate at which moneys were lent or advanced by nationalised banks in relation to commercial transactions at the relevant time. The concessional rate was 11 1/2%. The rate applied to the commercial transaction effective from 23rd July, 1974, was 12 1/2%. That rate however could not be applied to the transaction of the defendant/appellant on any date prior to Ex.P-23 that is to say 5.7.1975. Thus in our opinion, it is a fit case in which the rate of interest that may be allowed should be 11 1/2 per cent from 29.7.1974 upto 5.7.1975 and thereafter at the rate of 12 1/2 per cent, the rate which the plaintiff/respondent was able to prove, applied to commercial transaction as per the circular of the Reserve Bank of India.

14. Thus we are satisfied that the plaintiff/respondent is entitled to treat the transaction as any other commercial transaction and not export oriented loan and charge the rate of interest which the nationalised banks were entitled to realize which the nationalised banks were entitled to realize in relation to commercial transactions on and from 5.7.1975 but not prior to that date. The plaintiff/respondent has been able to prove that the rate of interest at 12 1/2 per cent effective from 29.7.1974 applied to the case of the appellant from 5.7.1975 and not at the rate of 16 1/2 per cent for which there has been no evidence.

15. In the result, the appeal is allowed in part. The suit is decreed for a sum of Rs.91,350 with interest at the rate of 11 1/2 per cent per annum on and from 29.7.1974 upto 5.7.1975 and thereafter at the rate of 12 1/2 per cent per annum till date of payment with proportionate costs. There shall however be no decree as to costs in the appeal and the parties shall bear their respective costs in the appeal.

B.S. --- *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.3204 of 1991 *30th January, 1992.*

Annammal ...*Petitioner*

v.

R.Narasimhan ...*Respondent.*

(A) Presidency Small Cause Courts Act (XV of 1882), Sec.53 - Application for distress warrant under - Basis of provision for - Liability should be an admitted one - Person swearing affidavit under Section - Must state same truly.

Sec.53 of the Presidency Small Cause Courts Act is a special provision enabling a landlord to claim arrears of rent by a summary process and records the same by the issue of a warrant under the circumstances set out in the section. It is clear on a bare perusal of the provisions of Sec.53 and Form A in the Third Schedule that the Act does not contemplate any dispute being brought before the Court of Small Causes for decision under the said provisions. The very basis of the provisions for application for distress warrant is that the liability is an admitted one. Unless the liability is undisputed, no application can be made under the section to the court by any person. When he states on oath in the affidavit or solemnly affirms that the amount is justly due to him, the enactment expects that he states the same truly and that there is no element of falsehood therein. Thus a person who swears to an affidavit under Sec.53 of the Act that the respondent to the application is liable to pay a particular sum of money, it ought to be true for the purpose of maintaining the grant of relief to him. *[Para 13]*

(B) Presidency Small Cause Courts Act (XV of 1882), Sec.60 - Application under - Disposal by Registrar of Small Cause Court - Competency.

There is a clear distinction between the provision in Sec.53 and Sec.60 of the Act. Under Sec.53 of the Act, the application could be considered by either the Judge of the Court or the Registrar of the court. But under Sec.60, it is only the Judge of the court who can dispose of the application. The Registrar has no jurisdiction to dispose of an application under Sec.60. For the purpose of administrative convenience, the application might

be presented in the office of the Registrar but orders should be passed on the application only by a Judge of the court. The significant omission to empower the Registrar under Sec.60 to dispose of the application should not be ignored and should never be forgotten. In this case, the Registrar of the Court of Small Causes has taken upon himself the responsibility of disposing of the application under Sec.60 and dismissed the same on certain grounds. That order is clearly beyond the jurisdiction of the Registrar. On that ground itself, the order under revision deserves to be set aside.

[Para 16]

(C) Presidency Small Cause Courts Act (XV of 1882), Secs.60 and 62 - Applications under - Disposal of - Procedure for - Instructions issued.

If the procedure which is now followed in the Court of Small Causes is for the Registrar of that court to dispose of applications under Sec.60 of the Act, it is clearly illegal. He has no jurisdiction to decide those applications. The Section refers only to the Judge of the court and the Registrar is nowhere in the picture. Hence the Chief Judge of Court of Small Causes is directed hereby to see that the applications under Secs.60 and 62 of the Act shall be posted before a Judge of the court and be decided only by such Judge. They shall not, in any event, be disposed of by the Registrar.

[Para 27]

Cases referred to:

Balkrishna v. Mohd.Ikbal, A.I.R. 1977 Guj. 160; Sadhanandham v. Leelavathy, (1988)1 L.W. 384; Shankar Kumar v. Ramachandran, 1979 T.L.N.J. 40; M.R.Nataraja Naicker v. Kamalanial, I.L.R. 1958 Mad. 913.

K.T.Palpandian, for Petitioner.

R.Karuppan for *K.N.Srinivasan,* for Respondent.

The Court made the following

ORDER:- This revision petition is directed against an order of the Registrar of Court of Small Causes, Madras, dismissing an application filed by the petitioner herein under Sec.60 of the Presidency Small Cause Courts Act, 1882, for discharging a distress warrant dated 13.9.1991 issued on an application filed by the respondent herein in Distress Application No.113 of 1991. The necessary facts for deciding this revision petition are as follows:

2. The petitioner and the respondent entered into an agreement on 25.2.1982 under which the respondent agreed to sell a flat allotted to him by the Tamil Nadu Housing Board and situated in the First Floor in 5th Avenue, Anna Nagar, Madras-40, Under that agreement, the petitioner was to pay a sum of Rs.1,75,000 as sale consideration and paid a sum of Rs.40,000 by way of advance. The agreement fixed the time for payment of the balance in stages. Under Clause (11) of the Agreement it is provided that till the date of execution of the deed of sale by the respondent in favour of the petitioner, the petitioner will be treated as a tenant and she shall pay a monthly rent of Rs.600 excluding the charges for amenities. On 14.7.1982, the respondent issued a receipt to the petitioner's daughter Mrs.K.V.Sudha for a sum of Rs.2,000 stating that it represented the rental advance for June, July, August, September and October, 1982, for the said premises. It was also provided in the receipt that if the sale deed gets registered in favour of the petitioner herein before October, 1982, the respondent would return the rent for the period from the date of registration to October, 1982.

3. The petitioner filed C.S.No.73 of 1983 on the file of the Original side of this Court for specific performance of the agreement for sale. One of the prayers in the plaint is for a declaration that the petitioner is not liable to pay any amount by way of rent to the respondent in respect of the said flat by way of rental on and from 7.10.1982. The respondent filed a suit in the City Civil Court, Madras, for recovery of possession with arrears of rent and damages for use and occupation. That suit was transferred to the file of this Court and numbered as C.S.No.487 of 1985. Both the suits were tried together and disposed of by a common judgment. A decree for specific performance was granted in favour of the petitioner herein and she was directed to deposit the balance of sale consideration in a sum of Rs.1,09,000 within 60 days from the date of the decree. The prayer of the petitioner for declaration that she is not liable to pay the rent on and from 7.10.1982 was negatived. It was held that the petitioner would be liable to pay rent as the relationship of landlord and tenant continued to exist till the execution of the sale deed in favour of the petitioner. The other suit filed by the respondent was dismissed. The judgment was rendered on 9.4.1991.

4. It is not in dispute that during the pendency of the suits, orders were passed by this Court directing the petitioner herein to deposit a sum of

Rs.15,000 and deposit a sum of Rs.600 every month from October, 1986 representing the rent for the building. Accordingly, the petitioner deposited the sum of Rs.15,000 and Rs.600 every month till April, 1991, when the suits were disposed of. Thus, a total sum of Rs.48,000 was deposited by the petitioner. It is not in dispute that the amount had been withdrawn by the respondent as and when the deposits were made.

5. By the judgment, this Court decided that the rent payable by the petitioner was only Rs.400 per mensem and not Rs.600 as contended by the respondent. The court relied on the receipt issued by the respondent on 14.7.1982 to the petitioner's daughter to which I have made reference already. The court held that from 14.7.1982 the rent was reduced to Rs.400 from Rs.600 per mensem. The court also held that the petitioner having deposited at the rate of Rs.600 per mensem in court was not liable to pay any amount by way of arrears of rent as the rent was only Rs.400 per mensem as decided by it.

6. On 16.7.1991, the petitioner through her counsel sent a letter to the respondent to the effect that there was an over-payment of Rs.7,600 and that the respondent was liable to refund the same. The letter made a reference to an application filed by the petitioner in court for an order to direct the respondent to refund the said amount. However, the letter added the following:

> "For the present assuming the rent is liable to be paid you are called upon to adjust a sum of Rs.400 each month against the rent payable from April, 1991 from and out of the said sum. As you have stated that you have filed an appeal, this matter also can be placed before the Appellate Court. For the present it is stated that my client calls on you to adjust the rental payment as mentioned above."

7. It appears that there was a reply by the respondent on 19.7.1991 raising certain contentions. A rejoinder was issued by the petitioner's counsel on 23.7.1991 in which the particulars about the claim for the sum of Rs.7,600 were given. The relevant portion of the rejoinder reads thus:

> "You have asked for particulars about the claim for a sum of Rs.7,600. The following are the particulars. As per the order of court the payments were made in the following manner.

1986 September		Rs.15,000.00
October, 1986 to December,	1986 for 3 months.	Rs. 1,800.00
January, 1987 to December,	1990 for 48 months.	Rs.28,000.00
January, 1991 to April,	1991 for 4 months.	Rs. 2,400.00
Total		Rs.48,000.00
As per the judgment rendered by the court the rent payable is at Rs.400 per month.		Rs.40,400.00
Balance		Rs. 7,600.00

Once again, the respondent was called upon to adjust the amount as against the monthly rent payable, if any. No doubt a contention was put forward in the letters by the petitioner that she was not liable to pay rent after the judgment delivered by this Court.

8. The respondent issued a notice on 7.9.1991 to the petitioner that he will be taking distress proceedings against the petitioner as she has committed wilful default in payment of rental dues. After making a reference to a petition for eviction filed under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, which was pending as R.C.O.P.No.2195 of 1986, the respondent stated that in obedience to the order of this Court the petitioner had remitted Rs.600 every month into court but stopped remitting the same from April onwards. Hence, the petitioner was called upon to pay a sum of Rs.3,000 being rent for 5 months at the rate of Rs.600 per month from April, 1991 to August, 1991. The respondent added that if she failed to comply with the notice, distress proceedings will be taken against her. The notice bears the date 7th September, 1991. That day happens to be a Saturday. It is seen that the notice was sent by Registered Post with Acknowledgment Due. Hence

the notice would have reached the petitioner at the earliest only on 9.9.1991 as 8.9.1991 happened to be a Sunday. The notice does not fix any time limit for payment of Rs.3,000. The respondent filed Distress Application No.113 of 1991 on 11.9.1991 without waiting for any reply from the petitioner. The application was ordered and distress warrant was issued on 13.9.1991. When it was taken to the petitioner by the bailiff, she gave a sum of Rs.3,004.50 to the bailiff 'under protest'. The amount was deposited in court by the bailiff.

9. The petitioner filed M.P.Nos.584 to 586 of 1991 for excusing the delay in filing the application for discharge of the distress warrant, for retention of the money recovered from her in court and for discharge of the distress warrant. The respondent filed M.P.No.575 of 1991 for payment of the amount to him. The Registrar of the Court of Small Causes passed an order on 11.10.1991 dismissing the application for retention of the amount in court and the discharge of distress warrant by two separate orders. In the order dismissing the application for retention of the amount in court, the Registrar observed that the remedy of the petitioner is only to file a separate suit for recovery of the excess amount paid to the respondent even if there is any dispute as regards the rent payable for the premises. In the other order, the Registrar held that the liability of the petitioner to pay rent was not in dispute as this Court had held that the relationship of landlord and tenant continued till the execution of the sale deed. He also observed that no doubt this Court had referred to the rent as Rs.400 per mensem; but, looking into all the circumstances, there was no justification for discharging the distress warrant". Consequently, the amount was paid out to the respondent by the court. Aggrieved by the order dismissing the application for discharge of the distress warrant, the petitioner has filed this revision petition.

10. It is argued that the Registrar of the Court of Small Causes had no jurisdiction to dispose of the application filed by the petitioner under Sec.60 of the Presidency Small Cause Courts Act, 1882 (hereinafter referred to as 'the Act'). It is also argued that the rent having been found by this Court to be Rs.400 per mensem, it is not open to the respondent to file an application for distress on the footing that the rent was Rs.600 per mensem. Hence the issue of distress warrant was illegal and consequently, the warrant should be discharged and the application for the issue of warrant should be dismissed in toto. Thirdly it is contended that even assuming that there is a dispute between the petitioner and the respondent as to the quantum of rent, the Registrar had no jurisdiction in an application under Sec.53 of the Act to decide the matter and on that ground, he ought to have rejected the application. Lastly it is argued that it is a malicious abuse of process of court by the respondent inasmuch as he had approached the court for the issue of distress warrant after the exchange of notices in July, 1991, referred to earlier.

11. *Per contra*, it is contended by learned counsel for the respondent that he has filed an appeal against the judgment in the suits and the decision of the court has not yet become final. According to learned counsel for the respondent, the matter not having attained finality, he had been *bona fide* believing that he was entitled to claim rent at the agreed rate of Rs.600 per mensem. It is also contended that, if an account is taken, the petitioner would be found liable to pay some more amount to the respondent and in those circumstances, there is no error in the issue of a distress warrant. It is further contended that this Court should not interfere with the issue of distress warrant in the interest of justice as the petitioner owes some more amount to the respondent.

12. In the course of arguments it was pointed out by learned counsel for the petitioner that, pursuant to the decree in the suits, a sale deed has been executed by the court on 20.9.1991 in favour of the petitioner and that, even if she had been liable to pay rent to the respondent, that liability came to an end on 20.9.1991 as per the judgment. Learned counsel for the respondent contended that his client was not aware of the execution of the sale deed and he was *bona fide* believing that he could file an application for the issue of a distress warrant. At any rate, according to him, the arrears claimed in the distress warrant related to the period ending with August, 1991 and the execution of the sale deed in favour of the petitioner would not affect the issue of the warrant.

13. Before considering the respective contentions of the parties, it is necessary to refer to the provisions in the Act. Sec.53 of the Act is a special provision enabling a landlord to claim arrears of rent by a summary process and recover the same by the issue of a warrant under the circumstances set

out in the section. The section reads thus:

> "Any person claiming to be entitled to arrears of rent of any house or premises to which this Chapter extends, or his duly constituted attorney, may apply to any Judge of the Small Cause Court, or to the Registrar of the Small Causes Court, for such warrant as is hereinafter mentioned.
>
> The application shall be supported by an affidavit or affirmation to the effect of the form (marked A) in the third schedule hereto annexed."

Form A in the Third Schedule enjoins the applicant to affirm and state that the respondent in the application is justly indebted to the applicant in a particular sum for arrears of rent of the house and premises described therein relating to a particular period. It is clear on a bare perusal of the two provisions that the Act does not contemplate any dispute being brought before the Court of Small Causes for decision under the said provisions. The very basis of the provisions for application for distress warrant is that the liability is an admitted one. Unless the liability is undisputed, no application can be made under the section to the court by any person. When he states on oath in the affidavit or solemnly affirms that the amount is justly due to him, the enactment expects that he states the same truly and that there is no element of falsehood therein. Thus a person who swars to an affidavit under Sec.53 of the Act that the respondent to the application is liable to pay a particular sum of money, it ought to be true for the purpose of maintaining the grant of relief to him.

14. No doubt the procedure prescribed does not warrant issue of notice at that time to the respondent and an enquiry. That again shows that the court acts on the statements made in the affidavit of the applicant and grants him relief initially without giving an opportunity to the respondent to contest the same. As and when the warrant is served on the respondent and he chooses to dispute the correctness of the statement contained in the affidavit filed by the appellant, the matter should be enquired into by the court only to find out whether there is an admitted liability or not.

15. Sec.60 of the Act provides for an application to discharge or suspend the warrant. Under the section, the respondent is entitled to apply within 5 days from the seizure of the goods under the warrant to any Judge of the court to discharge or suspend the warrant or release the distrained article. The Judge is enabled to discharge or suspend the warrant upon such terms as he thinks fit.

16. There is a clear distinction between the provision in Sec.53 and Sec.60 of the Act. Under Sec.53 of the Act, the application could be considered by either the Judge of the court or the Registrar of the court. But, under Sec.60 it is only the Judge of the court who can dispose of the application. The Registrar has no jurisdiction to dispose of an application under Sec.60. For the purpose of administrative convenience the application might be presented in the office of the Registrar but orders should be passed on the application only by a Judge of the court. The significant omission to empower the Registrar under Sec.60 to dispose of the application should not be ignored and should never be forgotten. In this case, the Registrar of the Court of Small Causes has taken upon himself the responsibility of disposing of the application under Sec.60 and dismissed the same on certain grounds. That order is clearly beyond the jurisdiction of the Registrar. He ought not to have disposed of the application. He ought to have placed the matter before a Judge of the court who could have disposed of the same. On that ground itself, the order under revision deserves to be set aside. This proposition has been clearly laid down by a Division Bench of the Gujarat High Court in *Balkrishna v. Mohd. Ikbal, A.I.R. 1977 Guj. 160.* The relevant passage in the judgment is found in paragraph 6 of the judgment which reads thus:

> "In our opinion, the Registrar has no jurisdiction to modify the distress warrant because the modification of a distress warrant presupposes a contest between the parties and determination by him. He has no jurisdiction to decide the contest between the parties. Rule 8(c) of the Ahmedabad Small Cause Court Rules, 1961 empowers the Registrar to hear and dispose of applications for issue of distress warrants made under Sec.53 of the Act. No section empowers him to decide the contest between the parties with a view to modifying the distress warrant. So far as discharge of an illegal distress warrant is concerned it is governed by Sec.60 of the Act. Now, Sec.53 deals with an application for distress warrant and Sec.54 deals with issue of distress warrant. Both these sections empower the Judge of a Small Cause

Court or its Registrar to exercise powers thereunder. It is in that context that Sec.8(c) of the Ahmedabad Small Cause Court Rules., 1961 has been made. When Rule 8(c) provides that "the Registrar shall have power to hear and dispose of.......applications for issue of distress warrants" it only means that the Registrar can exercise power under Sec.53 or Sec.54 of the Act. It does not enable him to exercise power under Sec.60 which requires an application to be made only to a Judge of the Court of Small Causes. In other words, whereas, Secs.53 and 54 confer power both on a Judge as well as the Registrar, Sec.60 confers power only upon the Judge. Therefore, if an application for discharge of a distress warrant which the tenant alleges to be illegal or unlawful is to be made, it must be made to a Judge. That it should be made to a Judge and not to the Registrar is otherwise also in conformity with the principles governing administration of Justice by the Court of Small Causes which do not contemplate the decision or adjudication of a dispute or a defended action by the Registrar except where he has been expressly authorised to decide such actions. In the instant case, therefore, when the tenant made an application for discharging the distress warrant, it ought to have been tried and decided by a Judge and not by the Registrar. The Registrar was, therefore, in error in assuming the jurisdiction to decide it."

17. In *Sadhanandham v. Leelavathy, (1988) 1 L.W. 384*, K.M.Natarajan, J., took the same view after referring to the Judgment of the Gujarat High Court. The learned Judge observed as follows:

"The above conclusion has been reached in view of the opinion of the Division Bench that the Registrar has no jurisdiction to modify the distress Warrant, because the modification of distress warrant presupposes a contest between the parties and determination by him, and he has no jurisdiction to decide the contest between the parties. Further, no section empowers him to decide the contest between the parties with a view to modifying the distress warrant. Sec.62 of the Small Cause Courts Act also refers only to a 'Judge' who is competent to award such compensation by way of damages to the applicant. It is no doubt true that a wrongful distraint is actionable at law."

18. I have no hesitation to hold that the Registrar of the Court of Small Causes had no jurisdiction to dispose of the application filed by the petitioner herein under Sec.60 of the Act. I have already referred to the fact that this Court held in the suits that the rent payable was only Rs.400 per mensem from 14.7.1982. If the respondent was aggrieved thereby, the remedy was only to file an appeal and he has already filed an appeal. After the judgment was rendered by this Court, being fully aware of the same, it is not open to the respondent to approach the Court of Small Causes with an application under Sec.53 for issue of distress warrant stating that the rent payable is Rs.600 per mensem and on that basis claiming a sum of Rs.3,000 for five months from the petitioner. The respondent has in his application under Sec.53 referred to the result of the suit for specific performance. In fact, he has relied on that part of the judgment whereby the contention of the petitioner that there was no relationship of landlord and tenant after 7.10.1982 was negatived. He makes an express reference to the declaration contained in the judgment that the relationship of landlord and tenant will continue till the execution of the sale deed in favour of the petitioner. After doing so, the respondent proceeds to state that the rent payable by the petitioner is Rs.600 per mensem and a sum of Rs.3,000 is due for five months from April, 1991 to August, 1991. The respondent has also made a reference to the interlocutory orders passed during the pendency of the suit in pursuance of which amounts were deposited by the petitioner in court towards the rent. Significantly, there is no reference whatever in the application to the notices exchanged between the parties in July, 1991. I have already referred to the circumstances that in the two notices dated 16.7.1991 and 23.7.1991 the petitioner had clearly called upon the respondent to adjust the rent of Rs.400 payable to him as against the sum of Rs.7,600 which, according to the petitioner, was in the hands of the respondent representing excess payment. Even assuming that the respondent does not admit that there was an excess payment of Rs.7,600 to him by the petitioner, it is only a matter in dispute and it is not open to the respondent to approach the Court of Small Causes as if there is an admitted liability to pay a sum of Rs.3,000 for five months at the rate of Rs.600 per mensem. Unless the liability is admitted and there is no dispute about the same,

an application under Sec.53 is not maintainable.

19. The respondent is certainly guilty of suppression of the relevant facts. He ought to have disclosed in the application under Sec.53 of the Act, the exchange of notices in July, 1991. His failure to make a reference to the notices while applying for issue of distress warrant shows that he has abused the process of court. Particularly, when this Court had decided that the rent payable was only Rs.400 per mensem, it was not open to the respondent to claim Rs.600 per mensem in a court subordinate to this Court. In this connection, my attention is drawn to a passage in the common counter affidavit filed by the respondent in M.P.Nos.584 to 586 of 1991. In paragraph 6 of the said counter, it is stated as follows:

> "Referring to the averments contained in para 4 of the Affidavit under reply, I humbly state that it is not for the High Court of Madras, to fix the rent at Rs.400 while the actual rent that should be paid by the tenant is Rs.600 and at no point of time, the High Court can clothe itself and reduce itself to the level of a Rent Control Court, which alone has got jurisdiction and competency to fix the rent in proper proceedings."

20. I have no doubt that the respondent is guilty of contempt of this Court when he signed the counter affidavit containing the above passage. I would have certainly initiated proceedings against him, but for the fact that he has been acting under legal advice and the real culprit is not himself but somebody else who has been misleading him by giving wrong advice. There is no necessity to point out that this Court did not fix fair rent or reduce the rent from the agreed rent. This Court found, as a fact, that the parties had agreed to a reduced rent from a particular date, *i.e.*, from 14.7.1982. That conclusion was arrived at on the basis of the evidence on record and the same can be disturbed only by an appellate court and it cannot be canvassed before the Court of Small Causes. It is very unfortunate that such passages are put in the mouth of a client and the person who is really guilty of drafting the counter affidavit on those lines escapes punishment.

21. I do not agree with learned counsel for the respondent that there is a *bona fide* dispute as to the quantum of rent inasmuch as he has filed an appeal against the judgment of this Court. The mere fact that he has filed an appeal will not enable him to go before a Subordinate Court and contend that the rent is Rs.600 and not Rs.400 as found by this Court. Even assuming that there is a dispute whether it is *bona fide* or *mala fide*, that itself is sufficient to throw out the application under Sec.53 of the Act. When according to the respondent there is a dispute as to the quantum of rent, he ought not to have approached the Court of Small Causes for issue of distress warrant. His remedy was only to approach the Appellate Bench as suggested by the petitioner in her notices dated 16.7.1991 and 23.7.1991. Even if the contention of learned counsel for the respondent that the petitioner is still liable to pay some amount to the respondent is correct, that will not enable the respondent to apply under Sec.53 for issue of distress warrant. At my instance a statement of calculation is filed before me by the respondent. As per that statement, a sum of Rs.1,266 is due by the petitioner to the respondent as on 20.9.1991. Even that statement shows that the claim for Rs.3,000 in the distress warrant is unsustainable. It has been held repeatedly by our courts that distress warrants cannot be sought for anything other than admitted rent.

22. In *S.Shankar Kumar v. Ramachandran, 1979 T.L.N.J. 40,* Chief Justice Ramaprasada Rao had occasion to consider the provisions of Sec.53 of the Act. He held that the word 'rent' used in the section would not include 'amenities' The learned Judge observed as follows:

> "Rightly, therefore, an objection was taken by the petitioner-tenant that as Sec.53 of the Presidency Small Cause Courts Act would only apply to a case for the application and issue of distraint warrant in cases where the entitlement of the claimant relates to arrears of rent simpliciter, and as in the present application, the respondent claimed such an issue of warrant not only for rent in the popular sense but also for incidental charges also such as amenities etc., Sec.53 of the Act cannot be invoked. The Small Cause Court Registrar held otherwise. Hence, these revision petitions.
>
> I agree with Miss.Bakula appearing for the petitioner that this is a case in which law should be understood in its strictest sense as it is a peculiar provision available to the City in favour of the landlord and it should not be taken undue advantage of by the landlords if strictly the text and the intendment of the

provision is not invokable in a given circumstances. Admittedly in this case, the distraint warrant is sought for from the Small Cause Court Registrar under Sec.53 of the Presidency Small Cause Courts Act on the ground that the petitioner-tenant is not only in arrears of the rent but also charges for amenities. Such consolidation and integration of the claim is not provided for under the Act. The Act only speaks of an application for the issue of distress warrant for recovery of rent alone. If any other claim is included in it and a distress warrant is sought for even for such a consolidated amount which could not be recovered under the provisions of the said Act, as stated above, then it follows that such an application is not maintainable in law."

23. In *Sadhananantham v. Leelavathy, (1988)1 L.W. 384,* to which I have already made a reference, K.M.Natarajan, J., has reiterated the same position in the following words;

"It is clear from the above decision that if the court finds that the distress was levied for an excess amount, the only course open to the court is to discharge the distress warrant in its entirety on the ground of illegality under Sec.60 of the Act. Thus it is clear that the proceedings under Chapter VIII of the Act are *sui generis* and are of the nature of an execution proceedings to recover arrears of rent on accepted facts. Further, under Chapter VIII of the Act, the court does not adjudicate upon the liability to pay rent nor on the question of rent payable. If these are disputed the court ceases to have jurisdiction over the matter."

24. Thus, there is no doubt whatever that the order passed by the Registrar, Court of Small Causes, is unsustainable. It is very strange that the Registrar who was provided with a copy of the judgment of this Court did not read the relevant parts thereof before passing order in question. When the petitioner had referred, in the affidavit filed in support of her applications, to the relevant portions of the judgment, the Registrar ought to have looked into the judgment himself and ascertained the correct position. In the order dismissing the application for discharge of the distress warrant be has chosen to state that this court had referred to the rent as Rs.400 at page 147 of Ex.P-1 (judgment of this Court). The last sentence that "on taking into account all the circumstances, there is no justification for cancelling the distress warrant" is inexplicable. I am unable to follow the reasoning of the Registrar. Once he finds that the amount claimed in the application for issue of distress warrant is in excess of what the High Court has found as rent, he ought to have cancelled the warrant if he had jurisdiction to deal with the application under Sec.60 of the Act. As pointed out earlier, he ought to have placed the matter before a Judge. But he has chosen to dispose of the application himself which he should have done at least in accordance with law on the subject. In the order passed by him, very curiously he states that the only remedy of the petitioner is to file a separate suit. That means, the Registrar accepts that what is collected by the respondent is in excess of what is due to him. If that is so, the Registrar should automatically have cancelled the warrant or discharged the same.

25. Learned counsel for the respondent places reliance on the judgment in *M.R.Nataraja Naicker v. Kamalammal, I.L.R. 1958 Mad. 913.*. In that case, an application was filed by the learned under Sec.41 of the act for eviction on the ground that the tenant had defaulted in payment of rent for two consecutive months which amounted to the breach of a condition in the lease deed executed by the tenant. A plea was raised by the tenant that the case of the landlord being based on alleged forfeiture of the lease, the court had no jurisdiction as the question involved related to title to immovable property and adjudication was barred by the provisions of Chapter VII of the Act. Justice Ramachandra Ayyar (as he then was), overruled the same and held that the termination of tenancy based upon the landlord taking advantage of the forfeiture clause came within Sec.41 of the Act and the court had jurisdiction to decide the question. It was held that the fact that the defence raised the question of title to the property in that the tenancy had not been validly terminated did not oust the jurisdiction of the court which was bound to decide the question under the provisions of Chapter VII of the Act.

26. That judgment has no relevance whatever to the present case. I am unable to appreciate how it helps the respondent herein. What is stated above is sufficient to set aside the order passed by the Registrar of Court of Small Causes. Hence, the Civil Revision Petition is allowed with costs and the order of the Registrar of Court of Small Causes, Madras, is set aside. The Distress Warrant issued

in Distress No.113 of 1991 is discharged. The natural consequence will be for the respondent to deposit the amount realised by him in court. Learned counsel for the respondent submits that the respondent would deposit the money in six weeks. Hence, the respondent is granted six weeks time for depositing the amount in the Court of Small Causes, Madras. Counsel's fee Rs.750.

27. Before parting with the case it is necessary for me to make the following observations regarding the procedure which should be followed in the Court of Small Causes, Madras, in disposing of applications under Sec.60 of the Presidency Small Cause Courts Act, 1882. The judgment in *Sadhananthamv. Leelavathy, (1988)1 L.W. 384,* was delivered on 10th September, 1987 and reported in the Law Weekly dated 9th and 16th April, 1988. Inspite of that, as late as in October, 1991, the Registrar of the Court of Small Causes, Madras, has chosen to decide an application under Sec.60 of the Act. If the procedure which is now followed in the Court of Small Causes is for the Registrar of that court to dispose of applications under Sec.60 of the Act, it is clearly illegal. He has no jurisdiction to decide those applications. The section refers only to the Judge of the court and the Registrar is nowhere in the picture. Hence, the Chief Judge of Court of Small Causes is directed hereby to see that the applications under Secs.60 and 62 of the Act shall be posted before a Judge of the Court and be decided only by such Judge. They shall not, in any event, be disposed of by the Registrar.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

C.M.A.No.259 of 1985 *1st October, 1991.*

National Insurance Company Ltd. ...*Appellant*

v.

Ramachandran and others ...*Respondents.*

(A) Motor Vehicles Act (IV of 1939), Sec.110 - Claims Tribunal - Award of compensation for motor accidents - Liability of insurance company restricted to Rs.50,000 as per policy - Tribunal cannot award compensation in excess of the amount specified, against insurance company.. [Paras 3 and 6]

(B) Motor Vehicles Act (IV of 1939), Sec.110-D - Civil Procedure Code (V of 1908), O.41, Rule 33 - Award of compensation by Claims Tribunal - Appeal by insurance company alone - No appeal or cross-objection filed by owner of vehicle against quantum of compensation - Owner cannot invoke O.41, Rule 33, C.P.C., for reducing the compensation awarded against him. [Para 5]

Cases referred to:

Manjula Devi Bhuta and another v. Manjusri Raha and others, 1968 A.C.J. 1; Assam Corporation v. Binu Rani, A.I.R. 1975 Gauhati 3; R.Govindarajulu v. S.Dharman, 1986 A.C.J. 178 (Mad.); Choudhary Sahu v. State of Bihar, A.I.R. 1982 S.C. 98: (1982)1 S.C.C. 238; Nirmala Bala Ghose v. Balai Chand Ghose, A.I.R. 1965 S.C. 1874.

N.Rosi Naidu, for Appellant.

Peppin Fernando, for Respondent Nos.1 to 8.

R.Madana Gopal, for Respondent No.10.

The Judgment of the Court was delivered by

Abdul Hadi, J.:- This civil miscellaneous appeal by the insurance company is against the Award of Rs.1,28,000 granted by the Motor Accidents Claims Tribunal below in respect of the motor accident, which took place on 3.9.1982 and which resulted in the death of one Prithivirajan, whose legal representatives are the claimants-respondents 1 to 8.

2. The learned counsel for the appellant insurance company submits that he is not attacking the finding of the tribunal below regarding the negligence of the 1st respondent-driver of the offending vehicle or the other finding regarding the quantum of compensation granted. But, his only contention is that the liability of the appellant insurance company is restricted to Rs.50,000 as per the policy and that this aspect has not been considered at all by the Tribunal below. In fact this very appeal is only with reference to the quantum of Award granted in excess of the above said Rs.50,000.

3. We also perused the policy and we also find that the contention of the insurance company must be upheld. The Tribunal below has not considered this aspect at all, and has made all the respondents 1 to 3 liable for the above said entire sum of Rs.1,28,000. The learned counsel for the 10th

respondent, the owner of the offending vehicle also could not dispute the legal position that the insurance company is liable in the present case only to the extent of Rs.50,000.

4. But, all that he contends is that the compensation awarded is excessive and should be reduced. But, he has not preferred any appeal or cross-objection against the Award of Rs.1,28,000. However, he contends that O.41, Rule 33, C.P.C. is applicable to the proceedings before the claims tribunal also and hence the appellate court could give the abovesaid relief of reduction of compensation as claimed by him. In support of this contention he also relied on the decisions in *Manjula Devi Bhuta and others v. Manjusri Raha and others, 1968 A.C.J. 1*, and *Assam Corporation v. Binu Rani, A.I.R. 1975 Gauhati 3*. No doubt, in those two decisions, the question was whether O.41, Rule 33, C.P.C. was applicable to Motor Accidents Claims Tribunal Cases. Certainly O.41 Rule 33, C.P.C. is applicable to the claims Tribunal cases. In fact, once the matter comes before this Court in appeal from the tribunal, C.P.C. would be applicable just like any other first appeal, which comes before this Court (*vide: R.Govindarajulu v. S.Dharman, 1986 A.C.J. 178 Mad.(D.B.)*. But the question here is how far O.41, Rule 33, C.P.C. can be invoked by the 10th respondent-owner for reducing the compensation already granted. Such an interpretation cannot be put to O.41, Rule 33, C.P.C. In interpreting O.41, Rule 33, C.P.C., the Supreme Court in *Choudhary Sahu v. State of Bihar, A.I.R. 1982 S.C. 98: (1982)1 S.C.C. 238*, quoted the following passage from its earlier decision reported in *Nirmala Bala Ghose v. Balai Chand Ghose, A.I.R. 1965 S.C. 1874:*

> "The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by O.41, Rule 33 may properly be invoked. The rule, however, does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from."

The Supreme Court in the above referred to *Choudhary Sahu v. State of Bihar, (1982)1 S.C.C. 238: A.I.R. 1982 S.C. 98*, after quoting the above passage also observed as follows:

> "The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the court appealed from.
>
> Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant, further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising the power under this rule the court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, *viz.*, the Law of Limitation or the Law of Court-fees etc.".

5. Applying the above ruling, it is obvious that in the present case, it is not open to the 10th respondent to invoke O.41, Rule 33, C.P.C. and to have the quantum of compensation itself be reduced. I may also add that in the above referred to *Assam Corporation v. Binu Rani, A.I.R. 1975 Gauhati 3* and *Manjula Devi Bhuta and another v. Manjusri Raha and others, 1968 A.C.J. 1*, O.41, Rule 33, C.P.C. was invoked to the respective facts of those two cases which were similar to the illustration found under O.41, Rule 33, C.P.C. But, the present claim made by the learned Counsel for the 10th respondent is entirely different and the 10th respondent cannot invoke O.41, Rule 33, C.P.C. for reducing the Award already granted.

6. So, in view of our finding in paragraph 3 above, the judgment and decree of the Court below are modified so as to restrict the liability of the appellant only to the extent of Rs.50,000 (out of the

abovesaid sum of Rs.1,28,000) with interest as awarded by the tribunal below. Accordingly, the appeal is allowed with costs.

V.K. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[Special Original Jurisdiction]

Present:- *Raju, J.*

W.P.No.3 of 1992 *6th January, 1992.*

Krishna Theatre, by its Licensee, Vellore ...*Petitioner*

v.

The Appellate Authority and Joint Commissioner I of Land Administration, Chepauk and another ...*Respondents.*

Tamil Nadu Entertainment Tax Act (X of 1939), Secs.9(1), 9(2) and 9-A - Relative scope of Secs.9(1) and 9(2) - Order passed under Sec.9(1) - Not appealable under Sec.9-A - Equation of conviction and composition not arbitrary or unreasonable - Not violative of Art.14 of Constitution of India.

Sec.9(1) and Sec.9(2) of the Act deal with two distinct and separate classes and categories of cases and circumstances under which there could be revocation or suspension of a licence. Sec.9(1) of the Act empowers the licensing authority when there has been a conviction under the relevant provisions of the Tamil Nadu Entertainment Tax Act, 1939 or when the licensee has been permitted to compound an offence under Sec.15 of the said Act etc. to revoke or suspend the licence. The provisions of Sec.9(2) provides for revocation and suspension in case where licence has been obtained on misrepresentation or by playing fraud as to essential fact or when the licensee has, without reasonable cause failed to comply with any of the provisions, of the Act or rules or any condition or restriction subject to which the licence has been granted. It is therefore obvious that whereas in a proceeding initiated under Sec.9(2), the basic fact on which action is contemplated or taken is obliged to be found and adjudicated upon on a consideration of the relevant material and the respective claims made, in cases wherein the provisions of Sec.9(1) of the Act are invoked, there is already a pre-existing conviction or order of composition. An order of composition though legally speaking may not amount to a conviction as such, it is obvious that the basic facts forming the subject matter of violation is in substance and virtually conceded or admitted by the licensee and only to avoid the unpleasantness of conviction the licensee concerned opts to have the offence compounded. That is the very basis underlying an order of composition. Thus, in case of conviction, the facts are found on trial and in a case of composition, the licensee concerned himself concedes the position and opts for compounding and therefore the provision of law in Sec.9(1) of the Act which equates the same for purposes of taking action cannot be said to be either arbitrary or unreasonable as contended before the court. If this vital difference between the nature and classes of cases that fall for being proceeded against, under Sec.9(1) on the one hand and Sec.9(2) on the other, is borne in mind, the object underlying the provision in Sec.9-A restricting the appeal to cases or orders passed under Sec.9(2) is not only well-founded but meaningful and purposeful. The mere fact that the original authority considered the order to be an appealable one is no effective answer to a consideration of an issue as to whether really such an appeal would lie in a given situation under the provisions of the enactment. The appellate authority while construing the provisions of the statute has come to a different conclusion that Sec.9-A will not be attracted in cases where the orders have been passed under Sec.9(1) of the Act. This is obvious and patent from the phraseology of Sec.9-A which provides for appeal against orders passed under Sec.9(2) of the Act. As referred to supra, Sec.9(1) of the Act deals with a distinct and separate category other than those covered by Sec.9(2) of the Act. There is no room for a challenge based upon Art.14 of the Constitution of India and the same has not been substantiated before the Court effectively. *[Para 4]*

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari*, calling for the records of the 1st respondent made in D.Dis. (1) C.A.No.179 of 1988 dated 19.12.1991 and of the 2nd respondent made in

Na.Ka.No.E.4/90654 of 1988, dated 16.11.1988 and quash the said proceedings of the 1st and 2nd respondent dated 19.12.1991 and 16.11.1988.

R.Muthukumaraswamy, for Petitioner.

The Court made the following

ORDER:- The writ petition is for the issue of a writ of certiorari to call for and quash the proceedings of the 1st respondent in D.Dis. (L) C.A.No.179 of 1988 dated 19.12.1991 and of the 2nd respondent made in Na.Ka.E4/90654 of 1988 dated 16.11.1988.

2. The petitioner is a licensee of a cinema theatre at Vellore. On 15.7.1988, when the theatre of the petitioner was inspected by the officers of the Commercial Tax Department, it was found that persons in excess of permitted capacity, were admitted into the theatre with admission tickets not duly sealed by the Department, and consequently, action was initiated against the petitioner for such an irregularity, and it appears, that the petitioner compounded the offence under the provisions of the Tamil Nadu Entertainment Tax Act, 1939 by paying Rs.1,000 and also a similar amount for the violations under the provisions of the Tamil Nadu Local Authorities Finance Act, 1961. Thereupon the licensing authority, the 2nd respondent, after issuing due notice, and after giving an opportunity to the petitioner, passed an order on 16.11.1988 suspending the running licence issued under Form C for a period of 15 days from 26.12.1988 to 9.1.1989. Thereupon the petitioner filed an appeal under Sec.9-A of the Tamil Nadu Cinemas (Regulation) Act, 1955 and the appellate authority, by its order dated 19.12.1991, rejected the appeal on the ground that the order of the 2nd respondent being one, passed under Sec.9(i) of the Act, no appeal as such is maintainable under Sec.9-A of the Act. Aggrieved with the above, the present writ petition has been filed.

3. R.Muthukumaraswamy, learned counsel appearing for Petitioner contended as follows:

(a) The power under Sec.9(i) of the Act cannot be considered to be of an independent source of power and that being an enabling provision, it has to be read along with Sec.9(2) of the Act, and consequently an appeal would lie.

(b) If the provisions under Sec.9(i) is considered to be an independent source of power having the effect of equating the conviction and composition as one and the same, the said provision is liable to be struck down, as being arbitrary and unconstitutional being violative of Art.14 of the Constitution of India.

(c) In the order of the 2nd respondent it has been mentioned at the end of the order that the petitioner shall be at liberty to file an appeal and that would mean that an appeal would lie in respect of similar orders also.

4. I have carefully considered the submissions of the learned counsel. I am unable to countenance any one of them. Sec.9-A of the Act provides that any person aggrieved by the decision of the licensing authority revoking or suspending a licence under Sub-sec.(2) of Sec.9 may, within such time as may be prescribed, appeal to such authority as the Government may specify in this behalf and such an authority may make such order in the case as it may think fit. The power to revoke or suspend a licence is contemplated under Sec.9 of the Act. Sec.9(1) and Sec.9(2) of the Act deal with two distinct and separate classes and categories of cases and circumstances under which there could be revocation of suspension of a licence. Sec.9(1) of the Act empowers the licensing authority, when there has been a conviction under the relevant provisions of the Tamil Nadu Entertainment Tax Act 1939 or when the licensee has been permitted, to compound an offence under Sec.15 of the said Act etc. to revoke a suspend the licence. The provisions of Sec.9(2) provides for revocation and suspension in case where licence has been obtained on misrepresentation or by playing fraud as to essential fact or when the licensee has, without reasonable cause failed to comply with any of the provisions of the Act or Rules or any condition or restriction subject to which the licence has been granted. It is therefore obvious that whereas in a proceeding initiated under Sec.9(2), the basic fact on which action is contemplated or taken is obliged to be found and adjudicated upon on a consideration of the relevant material and the respective claims made. In cases wherein the provisions of Sec.9(1) of the Act are invoked there is already a pre-existing conviction or order of composition. An order of composition though legally speaking may not amount to a conviction as such, it is obvious that the basic facts forming the subject matter of violation is in substance and virtually conceded or admitted by the licensee and only to avoid the unpleasantness of conviction the licensee concerned opts to have the offence compounded. That is the very basis underlying an

order of composition. Thus, in case of conviction the facts are found on trial and in a case of composition the licensee concerned himself concedes the position and opts for compounding, and therefore the provisions of law in Sec.9(1) of the Act which equates the same for purposes of taking action, in my view cannot be said to be either arbitrary for unreasonable as contended before me. If this vital difference between the nature and classes of cases that falls for being proceeded against, under Sec.9(i) on the one hand and Sec.9(2) on the other, is borne in mind the object underlying the provision in Sec.9(A) restricting the appeal to cases or orders passed in under Sec.9(2) is not only well founded but meaningful and purposeful. The mere fact that the original authority considered the order to be an appealable one, is no effective answer to a consideration of an issue as to whether really such an appeal would lie, in a given situation under the provisions of the enactment. The appellate authority while construing the provisions of the statute has come to a different conclusion that Sec.9(A) will not be attracted in cases where the orders have been passed under Sec.9(1) of the Act. This is obvious and patent from the phraseology of Sec.9-A which provides for appeal against orders passed under Sec.9(2) of the Act. As referred to supra, Sec.9(1) of the Act deals with a distinct and separate category other than those covered by Sec.9(2) of the Act. There is no room for a challenge based upon Art.14 of the Constitution of India and the same has not been substantiated before me, effectively.

5. For all these reasons, the writ petition fails and shall stand dismissed.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Dr.A.S.Anand, C.J.* and *Kanakaraj, J.*

W.A.No.1171 of 1991 *8th October, 1991.*

P.Jeyapal *...Appellant*

v.

The Governor of Tamil Nadu and others *...Respondents.*

Constitution of India (1950), Art.235 - Disciplinary control of High Court over subordinate judiciary - Scope and extent - Judicial First Class Magistrate accepting bribe - High Court if can recommend his dismissal to Governor after ordering departmental enquiry by a District Judge - Conduct of departmental enquiry by District Judge - If unauthorised delegation of powers - Duty of Governor to accept recommendation of High Court - Allegation of mala fides against High Court - Tenability.

The High Court made a recommendation to the Governor to terminate the services of the appellant, when during a departmental enquiry ordered by the High Court and conducted by the Principal District Judge, Madurai, it was found that the charges, *inter alia,* of demanding, receiving and accepting bribe from certain persons, while discharging the functions of a First Class Judicial Magistrate, had been established. The Governor accepted the recommendation of the High Court and terminated the services of the appellant. The order of termination was challenged, *inter alia*, on the following grounds: It was submitted that the departmental enquiry should have been conducted by the High Court itself as the disciplinary authority could not delegate its power to the District Judge. It was also contended that as the High Court was not the appointing authority it could not recommend the termination of services of the appellant. Further, it was suggested that the disciplinary enquiry should have been ordered by the Governor and not by the High Court and that the recommendation of the High Court was vitiated by *mala fides*. Rejecting all these contentions,

Held:- It is a recognised principle of administrative jurisprudence that a statutory functionary exercising administrative powers does not delegate its functions merely by deputing a responsible and competent officer to collect materials during a departmental enquiry and submit his report. Therefore, in the present case, the High Court delegated no power to the Principal District Judge, but only delegated certain functions by deputing him to enquire and report. *[Para 4]*

The law is well-settled that the High Court has the exclusive disciplinary 'control' over the subordinate judiciary, which includes proceedings against an officer departmentally, and that if the High Court, while exercising disciplinary control over the subordinate judiciary finds, after a proper inquiry, that the officer is unfit to be retained in

service, it shall make a recommendation to the Governor to pass the appropriate order. In view of the all pervasive control of the High Court over the subordinate judiciary, the recommendation of the High Court should always be accepted by the Governor. *[Para 10]*

It was at a meeting of the Judges of the High Court that the report of the enquiry officer came to be considered and a decision was taken in their collective wisdom to make a recommendation to the Governor for termination of the services of the appellant on being satisfied that the charges of corruption had been established against him. Allegations of *mala fide* against the collective body of judges of the High Court are totally meaningless. *[Para 12]*

Cases referred to:

State of W.B. v. Nripendra Nath, A.I.R. 1966 S.C. 447: (1966)2 S.C.J. 59: (1966)1 S.C.R. 771; State of Haryana v. Inder Prakash, A.I.R. 1976 S.C. 1841: (1977)1 S.C.J. 255: 1976 S.C.R. (Supp.) 603; Baldev Raj v. Punj & Har. H.C., A.I.R. 1976 S.C. 2490: (1977)1 S.C.R. 425; Chief Justice, A.P. v. L.V.A.Dikshitulu, A.I.R. 1979 S.C. 193: 1978 Lab. I.C. 1672: (1979)2 S.C.C. 54; Batuk Deo Pati Tripathi v. State of Uttar Pradesh, A.I.R. 1977 N.O.C. 279 (All); Barnard v. National Dock Labour Board, (1953)1 All E.R. 1113; Vine v. National Dock Harbour Board, (1956)3 All E.R. 939; Lingam v. Minister of Agriculture, (1948)1 All.E.R. 781; M.Chinnappa Reddy v. State, A.I.R. 1969 A.P. 234; Pradyat Kumar v. C.J. of Calcutta, A.I.R. 1956 S.C. 285: 1956 S.C.J. 259: 1956 S.C.C. 402: (1955)2 S.C.R. 1331.

Appeal under Clause 15 of the Letters Patent against the Order of Srinivasan, J., dated 16.2.1990 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.528 of 1990 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records on the file of the 1st Respondent herein in G.O.Ms.No.2610, Home (Court-I) Department passed against the petitioner in his proceedings G.O.Ms.No.2610, Home (Court-I) Department, dated 30.11.1989 and quash the order made therein.

K.S.Gnanasambandam, for Appellant.

The Order of the Court was made by

Dr.A.S.Anand, C.J.:- The termination of services of the appellant serving at the relevant time as a Judicial First class Magistrate, by the Governor, on the recommendation of the High Court was called in question by the appellant through W.P.No.528 of 1990. The Writ Petition was dismissed by a learned single Judge on 16.2.1991, giving rise to the filing of this appeal.

2. The High Court had made a recommendation to the Governor to terminate the services of the appellant when during a departmental enquiry ordered by the High Court and conducted by the Principal District Judge, Madurai, under directions of the High Court, it was found that the charges against the appellant *inter alia* of demanding, receiving and accepting bribe from certain persons, while discharging his functions as a Judicial Magistrate had been established. The Enquiry Officer submitted his report which was considered by the High Court and after following the formalities required by law, was accepted by the High Court. On the acceptance of the report, as already noticed, a recommendation was made to the Governor to terminate the services of the appellant.

3. Various contentions raised before the single Judge have been reiterated by the appellant before us.

4. The first submission of the learned counsel for the appellant is that the departmental enquiry should have been conducted by the High Court itself or that atleast one of the Judges of the High Court should have conducted the departmental enquiry and that the conduct of the enquiry could not have been entrusted to a district Judge as the disciplinary authority could not delegate its powers to the District Judge. The learned single Judge rightly rejected the argument. It is a recognised principle of administrative jurisprudence that a statutory functionary exercising administrative powers does not delegate its functions merely by deputing a responsible and a competent officer to collect materials during a departmental enquiry and submit his report. This is the ordinary mode by which administrative power is exercised. The High Court had appointed the Enquiry Officer, who was to collect the material and after enquiry, submit a report. The report was considered by the High Court as such. The recommendation was made by the High Court itself after accepting that report. The High Court, therefore, delegated no power to the Principal District Judge, but only delegated certain functions by deputing him to enquire and report. Learned counsel has failed to notice the distinction between delegation of certain administrative job and delegation of power.

The appellant had a fair opportunity during the enquiry and even subsequently, when the report was considered and the explanation of the appellant was taken into account by the High Court before recommending termination of the services of the appellant to the Governor. The first argument, therefore, has no force.

5. It was next argued by the learned counsel that action against the appellant could only be taken by the Government since at the relevant time, he was only working as a "borrowed" Judicial Magistrate. The argument is futile. The appellant had retained no lien in the Secretariat. On his own admission in the writ affidavit, he had been regularised in the judicial service and at the time when the order, impugned in the writ petition, was made, he was a regular Judicial Magistrate, First Class, borne on the cadre of the judiciary. The argument, therefore, has no merit.

6. The last argument of the learned counsel for the appellant was that the opinion of the High Court, which is not the appointing authority, ought not to have been considered by the Governor and that the Governor should have decided the case *de hors* the 'recommendation' of the High Court and that the High Court could not 'recommend' the termination of the services of the appellant. It was also suggested that the disciplinary enquiry should have been ordered by the Governor and not the High Court. We cannot agree.

7. A Constitution Bench of the Supreme Court in *State of W.B. v. Nripendra Nath, A.I.R. 1966 S.C. 447: (1966)2 S.C.J. 59: (1966)1 S.C.R. 771,* dealt with the ambit and extent of the disciplinary control of the High Court over the subordinate judiciary and opined that the High Court is the sole custodian of 'control' over the judiciary and that 'control includes something in addition to mere superintendence. It is the 'control' over the conduct and discipline of the Subordinate Judges and that the 'control' which is vested in the High Court is "a complete control" subject only to the power of the Governor, in the matter of appointment, including dismissal and removal. This view was reiterated in *State of Haryana v. Inder Prakash, A.I.R. 1976 S.C. 1841: (1977)1 S.C.J. 255: 1976 S.C.R. (Supp.) 603,* wherein after elaborating the scope of the word 'control' the Court opined that if in a given case the High Court is of the opinion that a particular Judicial Officer is not fit to be retained in service, the High Court will communicate that opinion to the Governor who, under the Constitution, is the authority to dismiss, remove, reduce in rank or terminate the appointment of such Judicial Officers and the recommendation made by the High Court will be accepted by the Governor.

8. Again, the *Baldev Raj v. Punj & Har. H.C., A.I.R. 1976 S.C. 2490: (1977)1 S.C.R. 425,* emphasis was laid by the Supreme Court on the concept of 'control' of the High Court over the Subordinate Courts and while answering the question as to whether the Governor is bound, under the Constitution, to accept the recommendation of the High Court and pass an order of removal of a Judicial Officer, if so recommended, the Supreme Court observed that when the High Court exercising disciplinary control over the subordinate judiciary finds, after proper enquiry, that a certain officer is guilty of gross misconduct and is unfit to be retained in service and, therefore, recommends to the Governor his removal or dismissal, such recommendation of the High Court in respect of the judicial officer "should always be accepted by the Governor."

9. In *Chief Justice, A.P. v. L.V.A. Dikshitulu, A.I.R. 1979 S.C. 193: 1978 Lab. I.C. 1672: (1979)2 S.C.C. 54,* the apex court once again reiterated that the 'control' vested in the High Court being *exclusive and not dual,* an enquiry into the conduct of a member of the judiciary can be ordered by the High Court alone and by no other authority.

10. The law is, thus, well settled that the High Court has the exclusive disciplinary 'control' over the subordinate judiciary, which includes proceeding against such an officer departmentally, and that if the High Court, while exercising disciplinary control over the subordinate judiciary finds, after a proper enquiry, that the officer is unfit to be retained in service, it shall make a recommendation to the Governor to pass the appropriate order. In view of the all pervasive control of the High Court over the subordinate judiciary, the recommendation of the High Court "should always be accepted by the Governor".

11. The complaint regarding the delay in the initiation of the disciplinary proceedings, in our view, is only an argument of despair, since no prejudice was either alleged or established to have been caused to the appellant by that alleged delay and the evidence on record, which was carefully

scrutinised by the enquiring authority and thereafter by the disciplinary authority and later on by the learned single Judge, established beyond any doubt the charges of corruption against the appellant.

12. Learned counsel then made a feeble attempt to say that the recommendation of the High Court was vitiated by *mala fides*. The argument needs a notice only to be rejected. It was at a meeting of the Judges of the High Court that the report of the Enquiry Officer came to be considered and a decision was taken in their collective wisdom to make a recommendation to the Governor for termination of the services of the appellant on being satisfied that the charges of corruption had been established against him. Allegations of *mala fide* against the collective body of Judges of the High Court are totally meaningless and even otherwise are based on no factual foundations in the writ petition.

13. Learned Counsel for the appellant relied upon certain judgments in support of his submissions and we may now briefly refer to those judgments.

14. In *Batuk Deo Pati Tripathi v. State of Uttar Pradesh, A.I.R. 1977 N.O.C. 279 (All)*, a Full Bench of the Allahabad High Court considered the question as to whether the decision of the administrative committee in matters of administration and disciplinary control could be treated to be the decision of the Full Court and opined in the negative. This case has no relevance to the instant case where it was the Full Court which had made the recommendation in its collective wisdom to the Governor.

15. Reliance placed on *Barnard v. National Dock Labour Board, (1953) 1 All E.R. 1113, Vine v. National Dock Harbour Board, (1956) 3 All E.R. 939,* and on *Lingam v. Minister of Agriculture, (1948) 1 All.E.R. 781,* is totally misplaced as the Court of Appeal was considering specific rules and regulations under various statutes. They have no relevance to the case on hand.

16. *M. Chinnappa Reddy v. State, A.I.R. 1969 A.P. 234,* on which also reliance has been placed by the learned counsel for the appellant cannot advance the case of the appellant because the judgment has no semblance of applicability to the facts of the present case. It was the indication of the proposed punishment in the memo of charges which was frowned upon in that case.

17. *Pradyat Kumar v. C.J. of Calcutta, A.I.R. 1956 S.C. 285: 1956 S.C.J. 259: 1956 S.C.C. 402: (1955) 2 S.C.R. 1331,* on which also reliance has been placed, expressly declared that though no *'judicial tribunal'* can delegate its functions unless it is enabled to do so expressly or by necessary implication, the exercise of the power "to appoint or dismiss an officer is the exercise *not* of judicial power but of administrative power". The Supreme Court went on to hold:

> "......It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides is the ultimate responsibility for the exercise of such power. A functionary who has to decide an administrative matter, such as the dismissal of a member of the staff, can obtain the material on which he is to act in such manner as may be feasible and convenient, provided only the affected party has a fair opportunity to correct or contradict any relevant and prejudicial material."

This judgment, therefore, instead of supporting the cause of the appellant, totally negatives what has been argued on his behalf and lends support to the judgment of the learned single Judge.

18. No other point was argued.

19. Thus, for what we have said above, we have not been persuaded to take a view different than the one taken by the learned single Judge who rightly dismissed the writ petition. The writ appeal consequently fails and is dismissed *in limine*.

V.K. ------ *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

S.A.No.731 of 1979 *10th October, 1991.*

Anbiah and others ...*Appellants*
v.
Rev.J.George Robinson and others ...*Respondents.*

(A) Civil Procedure Code (V of 1908), Secs.11 and 92 - Suit incompetent for want of leave under Sec.92 - Findings given of other issues - If can operate as res Judicata.

Held:- Once the court has found that the suit was incompetent for defect of want of leave under Sec.92, C.P.C., the court ought not to have considered the other issues in the suit and instead it should have rejected the plaint. Therefore the findings given on other issues have to be taken as no findings at all and as such they cannot operate as *res judicata* in the present suit against the defendants. *[Para 12]*

(B) Religious institution - Church in Andarkulam in Kanyakumari district - If belongs to Church of South India and under its administration.

Held: It is common case that the Church of South India itself was formed in the year 1947. According to the defendants, the present office-bearers of the suit Church, *viz.*, the Church in Andarkulam in Kanyakumari, many of the London Missionary Society Churches became Church of South Indian Churches but some of the Churches including the suit Church never joined the Church of South India and they remained independent. There is clear evidence on the side of the plaintiffs themselves that the suit Church did not become a Church of South India Church in 1947. The trial court was therefore right in holding that the plaintiffs were not entitled to a declaration of their right of management of the suit Church and its properties and for injunction restraining the defendants from interfering with their possession. *[Paras 15 and 24]*

Cases referred to:
Hira Lal Murarka and others v. Mangtulal Bagaria, A.I.R. 1947 Cal. 221; A.Subramanyan and others v. B.Yegyanarayaniah and another, (1971)1 M.L.J. 46; Syed Mohd. Salie Labbai v. Mohd. Hanifa, A.I.R. 1976 S.C. 1569: (1976)3 S.C.R. 721.

M.R.Narayanaswami, Senior Counsel, for *T.L.Ram Mohan*, for Appellants.
T.R.Rajagopalan, for Respondents.

The Court delivered the following

JUDGMENT:- This second appeal is preferred by the defendants who have suffered a decree in respect of the administration of the suit Church at the hands of the first appellate court even though the suit against them was dismissed by the trial court. The subject matter of the suit is a Church in Andarkulam in Kanyakumari District and its properties.

2. The case of the plaintiffs is that the first plaintiff is a Pastor of the Church and plaintiffs 2 to 7 are the elected deacons forming the Church Committee presided over by the first plaintiff as its Chairman. The Church and its properties are under the immediate control of the said committee and under the supervision of the Kanyakumari Diocese of the Church of South India. Originally 456 chuches in South Travancore including the plaint Church were under the L.M.S. Corporation in London, but after the Churches merged with the Church of South India (C.S.I.) in 1947 all the properties of the Churches including that of the plaint Church were transferred to the C.S.I. First defendant and some others wanted to break away from the C.S.I. due to the influence of defendants 8 and 9 who are members of an alien Church in America called National American Congregational Christian Church (NACCC), and claiming themselves as L.M.Christians filed 24 suits against the C.S.I. claiming all the 456 Churches and their properties for themselves. All the suits were dismissed. O.S.No.1 of 1960 filed by the first defendant and four others in Subordinate Judge's Court, Nagercoil in a representative capacity in which the suit Church was item No.9 in the schedule of properties, was dismissed. Thus the suit Church and its properties belong to or are in the administration and possession of the C.S.I. and they are not under the administration and possession of L.M.S. Society as claimed by the defendants. Defendants 2 and 3 are the sons of the first defendant and defendants 4 to 7 are mere worshippers in the Church. While so the defendants formed into an unlawful assembly and on 1.8.1970 broke open the lock of the gate of the Church and attempted to break open the Church. The plaintiffs gave a complaint to the police but in vain. On 2.8.1970 the defendants and

their henchmen surrounded the Church and obstructed the plaintiffs and other C.S.I. Christians from entering into the Church compound. Then on 9.8.1970 the defendants prevented the plaintiffs from conducting service in the Church. It has been held in O.S.No.1 of 1960 that only the C.S.I. are entitled to administer the Church and conduct services and that decision operates as *res judicata* against the claim of the defendants. On these pleadings the plaintiffs have prayed for a declaration that only the plaintiffs are entitled to the managment of the suit Church and for injunction restraining the defendants from obstructing the plaintiffs entering into the Church and its properties.

3. After filing of the suit, tenth defendant was impleaded on the allegation that as contended by the defendants he is not pastor in the Church and he is unlawfully residing in the school building of the Church and he is liable to be evicted therefrom, and it has been so prayed in the plaint. Then by way of amendment a further prayer has been made in the plaint that in case it is held that the defendants are in possession of the property a decree may be passed for possession.

4. Defendants 1 to 7 filed a joint written statement wherein they have denied that the suit Church and its properties belong to or are under the control of C.S.I. and contended that it belongs to L.M. Christians of Andarkulam. They further contended that it is true that some Churches joined the C.S.I. in 1947 but not the Andarkulam Church which continued as L.M. Church. Any transaction that purports that the suit Church has been transferred to C.S.I. is not true and valid and not binding on the Church or its members because such transfer was not authorised. It is then contended that it is true that the first plaintiff was a pastor and plaintiffs 2 to 7 were deacons of the Church and members of the Church committee but they have ceased to be so on and from 5.7.1970. The Churches and its properties have been administered by the present Church committee constituted by the defendants 1, 2, 4 and 6 and others. They have been elected in a meeting held on 12.7.1970. It is denied that any of the defendants ever formed themselves into an unlawful assembly and broke open the lock of either the gate or the Church door. There is no member in the Church who belongs to the C.S.I. and the plaintiff only are calling themselves as members of C.S.I. from 4.7.1970, and they never conducted any service in the Church after 5.7.1970. It is further contended that the question of possession of Church was never an issue in O.S.No.1 of 1960 and the decision if any about possession in that suit is without jurisdiction and incompetent and does not operate as *res judicata*.

5. Defendants 8 and 9, and also tenth defendant filed written statements similarly contending as in the written statement filed by defendants 1 to 7.

6. In a common judgment rendered in this suit and another suit in O.S.No.982 of 1970, the trial court on consideration of the pleadings and the evidence rejected the case of the plaintiffs that all London Mission Churches and London Mission Christians have become the members of Church of South India and therefore the suit Church and its properties are trust properties of C.S.I. and it accepted the case of the defendants that the previous office-bearers of the suit Church *viz.*, the plaintiffs ceased to hold office from 5.7.1970 and the defendants 2, 4 and 6 are the present office-bearers having been validly elected as office bearers. It also rejected the case of the plaintiffs that the claim of the defendants that the suit Church is a London Mission Church is barred by *res judicata* in view of the decision in O.S.No.1 of 1960 on the file of the Sub Court, Nagercoil. On these findings it held that the plaintiffs are not entitled to declaration of this right of management of the plaintiff Church and its properties and for injunction or in the alternative for recovery of possession of the plaint Church and its properties. On these findings it dismissed the suit.

7. In the appeal filed by the plaintiffs, the appellate court however disagreed with all the abovesaid findings of the trial court and instead held that the suit Church and its properties are the trust properties of Church of South India, and that the first plaintiff and plaintiffs 2 to 7 did not cease to hold office as contended by the defendants and the first plaintiff continues as a pastor and plaintiffs 2 to 7 continue to hold office as deacons, and the claim of the defendants that they were elected office bearers was rejected. It then held that the claim of the defendants is barred by *res judicata* in view of the decision in O.S.No.1 of 1960. In the result it set aside the judgment and decree of the trial court and decreed the suit declaring the plaintiffs' right of management of the plaintiff Church and its properties and the first plaintiff's right to conduct religious services in the Church. Even though

there is no finding with regard to possession of the Church and Church properties, the first appellate court has also decreed the suit for delivery of posession. It further held that the plaintiffs are entitled to take possession of the property which is now in occupation of the tenth defendant. Aggrieved, the defendants have come up with this second appeal.

8. Mr.M.R.Narayanaswamy, learned counsel appearing for the appellants-defendants 2 to 7 challenges the finding of the first appellate court that the claim of the defendants is barred by *res judicata* in view of the decision in O.S.No.1 of 1960, as erroneous in law. The learned counsel next contends that the trial court in its well considered Judgment has rightly held that the Church of South India (C.S.I.) has no right of management of the plaint Church and its properties, and the appellate court has without giving acceptable reasons therefor, on wrong presumptions, differed from that finding, and this is against law.

9. Considering the first point raised by the learned counsel, it is not in dispute that in O.S.No.1 of 1960 on the file of Sub Court, Nagercoil, the question as to who have the right of management of the Church, between the plaintiffs and the defendants herein, has been decided. But the learned counsel would submit that that finding in that suit ought not to have been given because that suit ought to have been rejected as unsustainable in law at the inception itself and therefore any finding given on the merits of the case was unwarranted and they have to be considered in law as *non est*. The learned counsel continues that it has been held in that case with a clear finding that the suit was defective inasmuch as the relief claimed in the suit falls under Sec.92 of the Code of Civil Procedure and for filing a suit seeking such a relief, as the law stood then, leave of the Advocate General under Sec.92, C.P.C. ought to have been obtained, but admittedly there is no such leave, and this goes to the root of the matter, and therefore the suit was not maintainable, and in view of this finding the court should not have considered the other issues in the matter. I find considerable force in this submission of the learned counsel.

10. In support of this contention Mr.Narayanaswamy cites a Division Bench ruling of the Calcutta High Court in *Hira Lal Murarka and others v. Mangtulal Baggria, A.I.R. 1947 Cal. 221*. In that case a question arose whether the findings given on merits of the case after it was found that the suit was bad for want of notice under Sec.80 of Code of Civil Procedure would be valid and operate as *res judicata* in a subsequent suit. As to the effect of not giving notice under Sec.80, C.P.C. the court said that,

> "Once the court has found that notice is necessary and has not been given and that the plaint does not contain an averment to that effect, no valid suit is before the court on which it can pronounce judgment and its sole duty is to reject the plaint under O.7, Rule 11(d). It having expressed its conclusions and findings regarding the necessity for notice to be given under Sec.80, the court proceeds to express findings upon the issues arising on the pleadings, its findings on the issues are *obiter* and cannot operate as *res judicata*."

Upon reference to two decisions by the Judicial Committee the court further stated that,

> "The substance of these two cases is: a finding upon an issue which has no occasion to be decided will not found a plea of *res judicata* although it will create a paramount duty on the party against whom it is given, to displace it; Sec.80 is mandatory and when the notice which it prescribes is not given before a suit is instituted the consequence is as if the suit had never been brought and it is unsustainable *in limine*."

11. Now, as per sub-sec.(2) of Sec.92, C.P.C., no suit claiming any of the reliefs claimed under Sub-sec.(1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions in that sub-section. Sub-sec.(1) as it stood then required leave of the Advocate General. No such leave having been obtained, as found by the court, O.S.No.1 of 1960 was incompetent. What all the Calcutta High Court said in *Hira Lal Mu rrka v. Mangtulal Baggria, A.I.R. 1947 Cal. 221*, is applicable to the suit O.S.No.1 of 1960 which has been filed without leave of the Advocate General.

12. In this connection Mr.Narayanaswamy has also referred to a single Judge decision of this Court in *A.Subramanyan and others v. B. Yegnanarayaniah and another, (1971) 1 M.L.J. 46*, wherein the learned Judge has said that,

> "What is barred by sub-sec.(2) of Sec.92 is the institution of the suit and not mere maintainability."

I am in respectful agreement with what is stated in *Hira Lal Murarka and others v. Mangtulal Baggria, A.I.R. 1947 Cal. 221* and *A.Subramanyan and others v. B.Yegnarayaniah, (1971)1 M.L.J. 46.*

13. The learned counsel then submits that the findings given in a suit which is not competent is like a fiding given by a court which has no jurisdiction, and in this connection the learned counsel cites a Supreme court decision in *Syed Mohd. Salie Labbai (dead) by L.Rs. and others v. Mohd. Hanifa (Dead) by L.Rs. and others, A.I.R. 1976 S.C. 1569: (1976)3 S.C.R. 721,* wherein it has been held as follows:

> "before a plea of *res judicata* can be given effect to, the following conditions must be proved:-
> (i) that the litigating parties are the same;
> (ii) that the subject-matter of the suit is identical;
> (iii) that the matter was finally decided between the parties; and
> (iv) that the earlier suit was decided by a court of competent jurisdiction."

I agree with the learned counsel that the findings given in an incompetent suit is like a finding given by a court without jurisdiction. Considering all these it appears to me that once the court has found that the suit was incompetent for defect of want of leave under Sec.92, C.P.C. the court ought not to have considered the other issues in the suit and instead it should have rejected the plaint. Therefore the findings given on other issues have to be taken as no findings at all, and as such they cannot operate as *res judicata* in the present suit against the defendants.

14. Coming to the second point raised by the counsel, on careful consideration of the judgments of both the courts below I entirely agree with the counsel. The first appellate court does not seem to have properly understood the plaint averments. The plaint averments proceeds on the basis of assumptions that it is the admitted fact that in 1947 all the 456 London Mission Society Churches in the South Travancore including the plaint Church merged with the C.S.I. It is the definite case of the defendants that there was no merger of the plaint Church with C.S.I. Therefore the utmost thing for the plaintiffs to prove is that in 1947 the plaint Church became a C.S.I. Church.

15. It is common case that the C.S.I. itself was formed in the year 1947. According to the defendants many of the L.M.S. Churches became C.S.I. Churches but some of the Churches including the plaint Church never joined C.S.I. and they remained independent. There is clear evidence on the said of the plaintiffs themselves that the suit Church did not become a C.S.I. Church in 1947. The first plaintiff Rasaiah as P.W.1 has stated in no uncertain terms that till 5.7.1970 Andarkulam Church (suit Church) was only L.M.S. Church, and on that day he was a pastor in that Church. He would further state that only after 4.7.1970 he entertained the idea of joining with C.S.I. He also states that even after 1947 Andarkulam and Palliyadi Churches were independent Churches without joining the C.S.I. He would admit that Palliyadi Church is even now a London Mission Church. In the face of this evidence of the first plaintiff (P.W.1) where is the case for the plaintiffs that the plaintiff Church joined or it became under the administration of C.S.I.? Therefore the plaintiff's case that after 1947 the plaint Church was C.S.I. Church falls to the ground. For this reason alone the plaintiffs are liable to be non-suited. When this is the case where is the question that the first defendant and some others wanted to break away from the C.S.I. under the influence of defendants 8 and 9 who according to the plaintiffs are agents of an alien Church in America?

16. True, the first defendant and four others including the father of the ninth defendant filed O.S.No.1 of 1960 for declaration that the suit Church therein including the present plaint Church belong to the London Mission Christians and for an injunction restraining the defendants therein from interfering with the possession of 'A' schedule properties (therein) by the London Mission Christians and for recovery of possession of 'B' schedule properties (therein) from the C.S.I. Christians, and in that suit it was held that the suit Churches therein including the present plaint Church did not belong to the London Mission Christians but belong to C.S.I. Christians, but that does not necessarily mean that it was in fact so. It must be remembered that in that suit the defendants have sought for an injunction against the defendants therein with regard to the 'A' schedule properties which are nine items of properties which would indicate, according to the defendants who are the plaintiffs therein, that they were in possession of the Church and Church properties etc. except the 'B' schedule properties. I have held

above that the findings in O.S.No.1 of 1960 cannot operate as *rès judicata* in this suit.

17. Be that as it may, what about the categorical admission of the first plaintiff himself, as pointed out above, that till 5.7.1970 the suit Church was L.M.S. Church and only after 4.7.1970 it had occurred to him that the Church should join the C.S.I.? Therefore it is beyond any shadow of doubt that the plaint Church never became a C.S.I. Church in 1947 is pleaded by the plaintiffs.

18. The first appellate court seems to say that the claim of the plaintiffs to the plaint Church is based on Ex.A-4 dated 24.2.1967, which is said to be an indenture made between London Missionary Society Corporation and the Church of South India Trust Association, as per which the former in accordance with a resolution of its Directors dated 27.6.1951 has transferred the plaint Church to the latter. But this is not the case of the plaintiffs at all. Nowhere it is stated so in the plaint. The question arises as to how the London Mission Society has any right to transfer the plaint Church to the C.S.I. It appears to me that the trial court is right when it states that it is for the entire congregational members of the plaint Church to agree for a transfer and the transfer cannot be made by L.M.Society. In this connction it is relevant to note Ex.A-1 which is a letter from the Foreign Secretary to one Zakharia who as per the evidence of the first plaintiff (P.W.1) was contending that the suit Church was a London Mission Church. A careful reading on this letter would show that far from helping the plaintiffs, it supports the case of the defendants for it is stated therein to the effect that any Church can choose to remain free from the Church of South India. It is further stated to the effect that the L.M. Society is not responsible for any particular Church or of any tradition. From the admission of the first plaintiff (P.W.1) that it was only in 1970 the transfer of the plaint Church to C.S.I. was thought of and till then the plaint Church remained as L.M. Society Church, it is apparent that Ex.A-4 had no effect or operation whatever as regards the plaint Church.

19. The first appellate court in more than one place states that by operation of law the plaint Church forms part of the C.S.I. This is rather ununderstandable. The first appellate court has referred to the evidence of P.W.1 stating that the plaint Church joined the C.S.I. two months after it broke up. No such thing is stated in the plaint, and apart from what P.W.1 has stated no one else has spoken so.

20. Ex.B-38 is a resolution passed by the Andarkulam Church on 21.9.1947. This resolution is not to join the C.S.I. in the proposed meeting of the London Mission Church at Kadamalaikundu on 27.9.1947. Hence it is hard to believe that the suit Church joined the C.S.I. Ex.B-104, dated 30.6.1960 is a letter by the first plaintiff as the President of the plaint Church Committee to the District Educational Officer. Therein he refers to a school as the school as the school of Andarkulam London Mission Church. This also clearly shows that even according to the first plaintiff himself as on 30.6.1960 the suit Church was a London Mission Church. Ex.B-105, dated 19.5.1964 is a letter addressed to the District Educational Officer by the sixth plaintiff as Secretary of Andarkulam L.M. Church wherein also it is emphasised that the school building to Andarkulam L.M. Church.

21. The plaintiffs have filed Ex.A-24, dated 4.7.1970 as a resolution passed by the Church Committee on 4.7.1970 unanimously deciding to join with the C.S.I., and Ex.A-25, dated 5.7.1970 as an approval by the congregation of the said resolution of the Church committee. First of all it is not the plaint averments at all that the suit Church joined the C.S.I. in 1970. As regards these documents Exs.A-24 and A-25 the first defendant who was one of the deacons has not signed Exs.A-24 or A-25. The trial court has rightly commented on Ex.A-25 that it has been written by P.W.1 himself and signed by him alone. Therefore these documents will not help to prove that there was valid resolution passed by the congregation for joining the suit Church with the C.S.I.

22. Ex.A-21, dated 2.7.1970 has been filed as a mass letter by the members of the suit Church to the Bishop of Kanyakumari expressing their desire to join the C.S.I. But this letter shows that it has been signed only by 33 communicants while admittedly as per the evidence of P.W.1 there are 140 communicants. Therefore Ex.A-21 is of no use to the plaintiffs to show that the members of the plaint Church wanted to join the C.S.I. In the context of these documents it is the case of the defendants that when the first plaintiff expressed his intention to the Church congregation on 5.7.1970 to join the C.S.I. there was loud protest from the entire congregation and as a

result the first plaintiff was not even allowed to conclude the morning services in the Church, and the first plaintiff and other plaintiffs left the Church even before the prayer meeting concluded and they have never again entered the premises of the plaint Church afterwards. It is the further case of the defendants that the first plaitiff ceased to be a pastor from 5.7.1970, and afterwards in the general body meeting held on 12.7.1970 in the Church the plaintiffs were removed from the respective offices and a fresh body of deacons were elected by the members of the congregation.

23. The plaintiffs have not produced any record to show that they are the office-bearers subsequent to 5.7.1970. The defendants claim that all through they have been in possession of the Church and its properties. In support of this claim they have filed tax receipts, receipts for payment of electricity charges and other documents for possession. The trial court has considered all these documents and held that the defendants are in possession. The appellate court also concurred with this finding of the trial court. It appears, realising that the plaintiffs will not be able to prove that they are in possession since as a matter of fact the defendants are in possession, they who have first asked for injunction against the defendants have subsequently made an alternative prayer for possession.

24. Thus considering, I find that the trial court after considering the entire evidence in the case has correctly held that there was no union of the plaintiff Church with the C.S.I. at any time, but the appellate court inspite of admissions by the first plaintiff as P.W.1 that there was no union of the plaint Church with the C.S.I. in 1947 as pleaded in the plaint, on pure wrong assumptions, has held that the plaintiffs have proved their case of union. In this view of the matter the Judgment of the first appellate court is liable to be held as erroneous in law. Accordingly the second appeal is allowed and the judgment and decree of the first appellate court are set aside and that of the trial court are restored. Considering the circumstances there will be no order as to costs.

V.K. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Janarthanam, JJ.*

W.A.No.620 of 1991 *21st August, 1991.*

Madanlal Steel Industries Ltd. ...*Appellant*
v.
Union of India and others . ...*Respondents.*

Customs Act (LII of 1962), Secs.47, 51, 110, 111 and 113 - Proper Officer satisfied that goods entered for home consumption were not prohibited goods, passing order under Sec.47 or 51 - If can act under Secs.110, 111 or 113 unless that order is set aside.

The writ petitioner appellant is a company engaged in importing of stainless steel melting scrap. It has got a licence for manufacturing ingots after melting such imported stainless scrap. In or about February, 1951, its Managing Director entered into an agreement with one Ramanlal and Company (P) Ltd., Singapore for the supply of 500 metric tonnes of stainless steel scrap. They offered to ship 120 metre tonnes out of which 90 metric tonnes would be coil ends and the remaining 30 metric tonnes would be general scrap and shipped the goods by six containers from Singapore. They arrived at the Madras Port. The petitioner-appellant filed by Bill by Entry for home consumption for the clearance of the goods. The goods were thereafter examined by the officers of the Customs Department who assessed the goods for duty by an order under Sec.47 of the Customs Act. Four of the six containers were cleared from the port premises and were stored at a godown. At this stage, the 3rd and 4th respondents seized the six containers under a seizure warrant. The petitioner appellant company questioned the seizure in a writ petition. It was dismissed. In appeal, it was contended that once goods were cleared under Sec.47 of the Act, unless that order was reversed, there could be no action under Sec.110 or 111 of the Act.

Held:- It is not in dispute and indeed it cannot be disputed that an order under Sec.47 of the Act is a quasi-judicial order. The proper Officer, before clearance of the goods for home consumption is required to be satisfied that the goods entered for home consumption were not prohibited goods

and the importer had paid the import duty if, any assessed thereon as well as any charges payable under the Act in respect of the same. This order shall thus be a good evidence to show that the imported goods were for home consumption and were not the prohibited goods and the importer had paid the import duty, if any as well as any other charges payable under the Act in respect of the same. The language in Sec.110 of the Act, however should not be mistaken to give some sort of an administrative power to the proper officer to seize any goods because the words therein are 'has reason to believe that any goods are liable to confiscation and there is some basis to believe that such goods are liable to confiscation under this Act, Unless the goods are liable to confiscation and there is some basis to believe that such goods are liable to confiscation under the Act were in the hands of someone or somewhere, it is obvious that there can be no seizure. Both the Bombay High Court in the case of *Union of India v. Popular Dyechem, (1987)28 E.L.T. 63,* and the Delhi High Court judgment in the case of *Jain Shudha Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43,* on their peculiar facts are good for taking notice of the order under Sec.47 of the Act and saying accordingly that unless that order was set aside, no proceeding for confiscation should have been taken. It is difficult, however to accept this as a law as once there is a clearance under Sec.47 and/or Sec.51 of the Act is ordered, unless that order is set aside, the proper officer cannot act on his reasonable belief under Secs.110, 111 or 113 of the Act. The Calcutta Full Bench Judgment in the case of *Euresian Equipments and Chemicals v. Collector of Customs, A.I.R. 1980 Cal. 188,* has, in substance pronounced that such proper officer's satisfaction for confiscation proceedings shall remain unaffected by the order of the proper (authority) permitting the clearance of goods under Sec.51 of the Act. That view is in consonance with the basis of the belief that goods have been improperly imported or exported and such belief being in relation to the goods and *in rem*, it will not be correct to read in the orders under Sec.47 or Sec.51 of the Act any inhibition upon the jurisdiction of the proper officer to act under Secs.110, 111 and 113 of the Act. *[Paras 3 and 6]*

Cases referred to:

Jain Shudha Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43; Euresian Equipments and Chemicals v. Collector of Customs, A.I.R. 1980 Cal. 188; Collector of Customs v. Boormull, (1974)2 M.L.J. (S.C.) 42: 1974 M.L.J. (Crl.) 482: (1974)2 S.C.J. 238: (1974)2 S.C.C. 544: 1974 S.C.C. (Crl.) 784: A.I.R. 1974 S.C. 859; Frankfurther v. W.L.Exner, (1947) Ch.D. 629; N.Devidas and Company v. Collector of Customs, Bombay, (1987) E.L.T. 247; R.K.Industries v. Collector of Customs and Central Excise, (1989)39 E.L.T. 316; Union of India v. Popular Dyechem, (1987)28 E.L.T. 63.

Appeal under Clause 15 of the Letters Patent against the Order of Kanakaraj, J., dated 19.4.1991 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.3880 of 1991 presented under Art.226 of the Constitution of India to issue a writ of *certiorarified mandamus*, calling for the records of the proceedings of the said Bill of Entry No.00.404, dated 19.2.1991, and quash the proceedings relating to the seizure of goods covered by the said Bill of Entry and direct the release of the goods to the petitioner's company unconditionally and without carrying out any such adjudication or other proceedings or recovery of any enhanced duty or any of the amount.

Dr.Nithin Kantawala, Senior Counsel, for *M/s. T. Muthuraman, A.K.Jayaraj* and *D.Gurumoorthy,* for Appellant.

P.Narasimhan, Senior Central Government Standing Counsel, for Respondents.

The Judgment of the Court was delivered by

Mishra, J.:- This appeal, under Clause 15 of the Letters Patent of this Court, is directed against the judgment of Kanakaraj, J., in W.P.No.3880 of 1991. The petitioner/appellant is the company engaged in importing of stainless steel melting scrap. It has got L-4 licence under the Central Excise and Salt Act, 1944 for manufacturing ingots after melting such imported stainless scrap. In or about February, 1991, according to the petitioner/appellant, its Managing Director contacted one Ashinkumar Kamdar, who was known as Indentor as well as Import Consultant in the field of iron and steel and other allied products, and informed him that the petitioner/appellant company would like to import stainless steel scrap at a competitive price. Kamdar suggested to import such scrap materials and also promised to help in securing materials. Thereupon, Kamdar floated enquiries and procured an offer from an exporter

of Singapore by name K.Ramanlal & Co., Private Limited. Accordingly, it is said that 500 metric tonnes of stainless steel scrap were agreed to be supplied by K.Ramanlal & Co., Private Limited of Singapore, who offered to ship 120 metric tonnes out of which, 90 metric tonnes would be coil ends and the remaining 30 metric tonnes would be general scrap and shipped the said goods under its invoice dated 14.2.1991 by six containers from Singapore to Madras. The said goods arrived at the Madras port per Vessel WASPADA VOY 9012, covered by a Bill of Lading dated 14.2.1991. On landing of the said goods, the petitioner/appellant company filed the Bill of Entry for home consumption for the clearance of the goods The said goods were thereafter examined by the officers of the respondents as per the normal practice of 20% check, who after necessary examination, assessed the goods for duty by an order under Sec.47 of the Customs Act, 1962 (hereinafter referred to as 'the Act'). After the order, four out of the six containers were cleared from the port premises and were stored at a godown belonging to one Gemini Warehousing. It was at this stage that respondents 3 and 4 carried out certain seizure and ultimately, seized the two containers in the port area as well as the goods removed to the warehouse, under a seizure warrant. Questioning the validity of the said seizure, the petitioner/appellant company contended *inter alia* that once the imported goods were cleared under Sec.47 of the Act, unless the order thereunder was reversed, no action could be taken either under Sec.110 or under Sec.111 of the Act and in any event, if there was any logical value of any suspicion of the third and the fourth respondents that the goods were likely to be used for any other purpose, they could act under Sec.24 of the Act and order mutilation of the said goods to render them unfit for any other purpose other than melting. After going into the above statements and other contentions raised on behalf of the petitioner/appellant, Kanakaraj, J., has said:

> "......... So long as the proper officer has reasonable belief under Sec.110 of the Act, I am of the view that the seizure must be upheld, as to the nature and the action that the respondents may take by issuing a show-cause notice. It is to be seen only hereafter. Whether such an action will be hit by lack of power to review an earlier order or whether the respondents have an independent power to issue show-cause notice and adjudicate on the matter under independent provisions of law are matters which will have to be seen only hereafter. All that I am laying down is that the authorities have the power of seizure in fit and proper cases. If such a power is not recognised, the implementation of the Act itself will become difficult. The argument that the respondents ought to have been careful before examining the case and before making the assessment is no doubt attractive. But in a given case, if a mistake has occurred or due to circumstances beyond the control of the proper officer, some of the containers had missed their examination, it does not mean that the importer can run away with the inadequate assessment that was made. I make it clear that I am not rendering a finding, but it is according to the respondents, that an inadequate assessment was made based on the goods being melting scraps whereas they are actually stainless steel sheets, the difference in duty is colossal. Should the revenue of the State and the economy of the country suffer because of the genuine mistake or an omission due to circumstances beyond his control made by the proper officer?
>
> "The argument that such mistakes can be corrected only by resorting to Sec.129-D of the Customs Act does not appeal to me, because we are only concerned with seizure of goods. The question is whether the proper officer has jurisdiction to seize the goods. In most of these revenue matters relating to Customs and Central Excise, once the goods goes out of the hands of the officers then the chances of recovery are either remote or nil. It is in this view of the matter, I am upholding the seizure of the goods in the instant case. The respondents are permitted to initiate action in accordance with law, but I direct that such action should be expedited, because the goods had once been cleared under Sec.47 of the Customs Act and the petitioner cannot wait for eternity to have custody of their goods........."

2. Before we deal with the contentions that have been raised before us on behalf of the petitioner/appellant company, since detailed arguments have been advanced as to the meaning, extent and reach of the provisions in Secs.24, 47, 110 and 111 of the Act, we propose to extract them in full:

"24. *Power to make rules for denaturing or mutilation of goods:* The Central Government may make rules for permitting at the request of the owner the denaturing or mutilation of imported goods which are ordinarily used for more than one purpose so as to render them unfit for one or more of such purposes; and where any goods are so denatured or mutilated they shall be chargeable to duty at such rate as would be applicable if the goods had been imported in the denatured or mutilated form.

47. *Clearance of goods for home consumption:* Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

110. *Seizure of goods, documents and things:* (1) if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods·

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

(1-A) The Central Government may, having regard to the perishable or hazardous nature of any goods, depreciation in the value of the goods with the passage of time, constraints of storage space for the goods or any other relevant consideration, by notification in the official Gazette, specify the goods or class of goods which shall, as soon as may be after its seizure under Sub-sec.(1), be disposed of by the proper officer in such manner as the Central Government may, from time to time, determine after following the procedure hereinafter specified.

(1-B) Where any goods, being goods specified under Sub-sec.(1-A), have been seized by a proper officer under Sub-sec (1), he shall prepare an inventory of such goods containing such details relating to their description, quality, quantity, mark, numbers, country of origin and other particulars as the proper officer may consider relevant to the identity of the goods in any proceeding under this Act and shall make an application to a Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking in the presence of the Magistrate, photographs of such goods, and certifying such photographs as true; or

(c) allowing to draw representative samples of such goods, in the presence of the Magistrate, and certifying the correctness of any list of samples so drawn.

(1-C) Where an application is made under Sub-sec.(1-B), the Magistrate shall, as soon as may be, allow the application.

(2) Where any goods are seized under Sub-sec.(1) and no notice in respect thereof is given under clause (a) of Sec.124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months.

(3) The proper officer may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act.

(4) The person from whose custody any documents are seized under Sub-sec.(3) shall be entitled to make copies thereof or take extracts therefrom in the presence of an officer of customs.

111. *Confiscation of improperly imported goods, etc.:* The following goods brought from a place outside India shall be liable to confiscation:

(a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of Sec.7 for the unloading of such goods;

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of Sec.7 for the import of such goods;

(c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;

(d) any goods which are imported or attempted to be imported or are brought within the

Indian Customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(e) any dutiable or prohibited goods found concealed in any manner in any conveyance;

(f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;

(g) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of Sec.32, other than goods inadvertently unloaded but included in the record kept under Sub-sec.(2) of Sec.45;

(h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of Sec.33 or Sec.34;

(i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;

(j) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;

(k) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under Sec.109 is not produced or which do not correspond in any material particular with the specification contained therein;

(l) any dutiable or prohibited goods which are not included or in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under Sec.77;

(m) any goods which do not correspond in respect of value or any other particular with the entry made under this Act or in the case of baggage with the declaration made under Sec.77 in respect thereof;

(n) any dutiable or prohibited goods transitted with or without transhipment or attempted to be so transitted in contravention of the provisions of Chapter VIII;

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;

(p) any notified goods in relation to which any provisions of Chapter IV-A or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened."

It may be relevant to notice that with regard to confiscation of improperly imported goods, besides confiscation of improperly imported goods as defined in Sec.111 of the Act, there are provisions for penalty for improper importation of goods, etc., as prescribed under Sec.112 of the Act, including a provision for penalty for contravention, etc., not expressly mentioned, as provided under Sec.117 of the Act. Sec.124 of the Act provides for issuance of show-cause notice before confiscation of goods, which, *inter alia* states that no order of confiscation of any goods, or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty; is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and is given a reasonable opportunity of being heard in the matter, provided that the notice referred to in clause (a) of Sec.124 of the Act and the representation referred to in clause (b) of the same section may, at the request of the person concerned, be oral. Chapter XV of the Act contains provisions for appeal to Collector (Appeals), procedure in appeal, appeal to Appellate Tribunal, procedure of Appellate Tribunal, powers of Board or Collector of Customs to pass certain orders, powers of revision of Board or Collector of Customs in certain cases, revision by Central Government, etc., including in certain types of cases, reference to the High Court on any question of law arising out of the orders of the Appellate Tribunal, etc.

3. We do not think that it will be of any assistance to us in determining the questions raised before us by learned counsel for the petitioner/appellant to refer to any of the statements in the counter-affidavit filed on behalf of the respondents. We shall, however, refer to certain facts brought on the record of this case on behalf of the respondents, while dealing with one of the ancillary questions in respect of the type of goods imported by the petitioner/appellant company. It is not in

dispute and indeed it cannot be disputed that an order under Sec.47 of the Act is a quasi judicial order. The proper officer, before clearance of the goods for home consumption, is required to be satisfied that the goods entered for home consumption were not prohibited goods and the importer had paid the import duty, if any, assessed thereon as well as any charges payable under the Act in respect of the same. This order shall thus be a good evidence to show that the imported goods were for home consumption and were not the prohibited goods and the importer had paid the import duty, if any, as well as any other charges payable under the Act in respect of the same. The language in Sec.110 of the Act, however, should not be mistaken to give some sort of an administrative power to the proper officer to seize any goods because the words therein are, "has reason to believe that any goods are liable to confiscation under this Act." Unless the goods are liable to confiscation and there is some basis to believe that such goods liable to confiscation under the Act were in the hands of someone or somewhere, it is obvious that there can be no seizure. Amongst the goods liable for confiscation, as in Sec.111 of the Act, are: "any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned" and "any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof." It is not disputed before us that the goods seized from the custody of the petitioner/appellant are dutiable. It is disclosed in the counter-affidavit:

> "......Measurement of the sheets clearly described at the beginning of page 5 of mahazarnama by stating that the rectangularly shaped stainless steel sheets of foreign origin measuring between 17" x 6" (49 x 154 cms.) and 50" x 132" (127 x 36 cms.) and at the bottom portion of the same page of the Mahazarnama, it is clearly stated that the rectangular shaped stainless steel sheets of the abovesaid measurements are not stainless steel melting scrap as declared by the importers in the Bill of Entry......"

Thus, according to the respondents, they seized such goods, which according to them, were rectangularly shaped stainless steel sheets and not stainless steel melting scrap. According to them, the petitioner/appellant never paid the requisite duty to import stainless steel sheets of foreign origin, as in its papers, including the import manifest, it had mentioned the goods as stainless steel melting scrap and not stainless steel sheets.

4. Learned counsel for the petitioner/appellant has contended that it is not open to the respondents to name the goods cleared under Sec.47 of the Act as anything else than stainless steel melting scraps and if they have any jurisdiction to proceed against such goods, that will be available to them only after the order under Sec.47 of the Act is reversed. He has, for this proposition, placed reliance upon a Division Bench Judgment of the Bombay High Court, in *Union of India v. Popular Dyechem, (1987)28 E.L.T. 63,* which in turn relied upon a Judgment of the Delhi High Court to state:

> "The only goods which remain now to be cleared are goods in respect of which it was contended by the appellants that the same were not plastic scrap but serviceable plastic articles when imported whereas the respondents contended that the said goods were plastic scrap. The order of clearance under Sec.47 was passed by the Assistant Collector concerned after physical verification of the goods. In view of this and in view of the decision of a Division Bench of the Delhi High Court reported in *Jain Shudh Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43,* it is clear that such goods cannot be confiscated, except in contemplation of an order or in pursuance of an order passed in revision under Sec.129-D of the Customs Act, 1962. No such order has been passed till today. In those circumstances, no interference with the trial Court's order is called for, except that we direct that in respect of the aforesaid disputed goods the appellants-respondents shall comply with the interim order by 4.00 p.m. on 15th December, 1986, unless proceedings are taken under Sec.129-D of the Customs Act before that time and appropriate orders to the contrary are passed therein."

We have been informed that faced with the order as above, the Customs officials preferred a revision under Sec.129-D of the Act forthwith and in fact, the order under Sec.47 of the Act was reversed, but when the revisional order was

challenged again before the Bombay High Court it found that the respondents therein had acted in violation of the principles of natural justice in utter haste only to defeat the direction of the Court. Thus, even that attempt of the Customs authorities to get the order under Sec.47 of the Act reversed in revision failed and the goods which were cleared as plastic scraps were released as such goods, even though according to the Customs authorities, they were serviceable plastic articles and thus chargeable to duty under a separate head. Has the Bombay High Court stated an omni-bus rule that once it is found in respect of any goods that it had been released after clearance under Sec.47 of the Act, no action to seize or confiscate could be taken? To understand the real import of the Bombay Court judgment thus, one has to see the Delhi High Court's Judgment in *Jain Shudh Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43*. Jain Shudh Vanaspati Ltd. had imported edible oil in stainless steel containers. The import of stainless steel as a consumer item was banned and prohibited at the relevant time. But under the relevant rules and instructions, the goods which were permitted to be imported under open General Licence were also permitted to be imported in containers. The question thus before Court for determination was, whether the stainless steel drums, which were used for importing palm oil by the petitioner therein were imported as a separate item of stainless steel or were imported as mere containers for the palm oil and thus, was there any violation by such import of the prohibition by the petitioner. The Delhi High Court on such facts, said:-

> "It might sound anomalous that stainless steel as such is prohibited item but stainless steel containers for carrying permitted goods are not. It can even be said that this is a lacuna in the law as it stood on the date of the importation in the present case. But neither the Department nor the Court can fill this lacuna by stretching the language of law. We are interpreting a taxing statute and subjecting a citizen to a possibility of very heavy customs duties, and other harsh penalties under the Customs Act....."

Coming to Sec.47 of the Act, the Court said:

> "An order under Sec.47 is one of the orders against which a revision can lie under Sec.130 of the Act. Sec.130 required that before revising any order, party affected, should be heard. It is thus clear that the Act does not provide for any review of an order passed under Sec.47 of the Act. Admittedly there is no order passed by the concerned authorities under Sec.130 of the Act. Respondents, however, contend that notices under Sec.28 or Sec.124 are not in nature of review. They further contend that power to issue such notices is an independent power and can be issued even after the goods are cleared under Sec.47. Respondents rely upon a judgment of the Calcutta High Court reported in *A.I.R. 1961 Cal. 616*. This ruling is of no assistance to the respondents. The said decision was rendered on interpretation of Sec.89 of the Sea Customs Act which is different from Sec.47 of the Customs Act, 1962, in material particulars. So also the Sea Customs Act did not contain any provision of revision similar to Sec.130 of the Customs Act. Sec.89 of the Sea Customs Act can be noted in this context."

After referring to the objects and reasons of the Customs Bill, 1962, which read:

> "Clause 47 corresponds to existing Sec.89 with an amendment which provides specifically that the officer shall allow clearance of the goods, if he is satisfied that the import of the goods is not prohibited."

The Court observed as follows:

> "Considering Sec.47 of the Customs Act in the light of the legislative history, we are clear that the section attaches finality to the satisfaction of the officer that the goods are not prohibited. The finality cannot be disturbed unless the Department successfully shows that there was fraud or deliberate suppression. The respondents have alleged that the containers were painted and thus the original identity of the drums was suppressed by the petitioners. This allegation is on the assumption that stainless steel drums was a prohibited item. We do not agree. The law as it then stood, did not require of an importer to disclose the nature of the material or the price of the containers. A new requirement in this regard was introduced for the first time by public notice dated September 6, 1979 *i.e.*, after the importation of oil by the petitioner. We, therefore, hold that the proper officer's satisfaction, that the goods were not

> prohibited goods, had reached finality by the time the goods were cleared."

The two judgments thus read together state that: (1) an order under Sec.47 of the Act determines that the goods are not prohibited and that it has been cleared of duty payable on it; (2) an order under Sec.47 of the Act is final; (3) the finality cannot be disturbed unless the Department successfully shows that there was fraud or deliberate suppression; and (4) this finality, however, will give way to the appellate or revisional order. We may, however, take notice of one important fact that in our view will substantially distinguish the case on hand with the cases decided by the Delhi and Bombay High Courts. In the Bombay Court judgment, even though all the relevant facts are not available, yet, it is possible to find that the Assistant Collector who cleared the goods under Sec.47 of the Act had done so after physical verification of the goods had been started. In the case before the Delhi High Court, notices under Secs.28 and 124 of the Act had been issued and they were under challenge, which shows that proceedings for confiscation had already been initiated and along with the proceedings for confiscation, notice for payment of duty short-levied had also been issued. With a little difference in the facts, but none-the-less relevant for understanding the legal position, we have a judgment of this Court in *A. Subbaraj and another v. Union of India, represented by the Assistant Collector of Customs, Madras-1, W.P.Nos.5296 of 1973 etc.,* a judgment by Ismail, J., (as he then was) dated 22.10.1973. That was a case in which one Perumal Naidu had applied to the Joint Chief Controller of Imports and Exports, Madras, seeking information about the currency policy regarding the export of Bone Meal to overseas countries, by a letter dated 23.4.1973, the Joint Chief Controller of Imports and Exports replied to him stating that under the current policy, there was no restriction whatsoever regarding the export of Bone Meal to overseas countries. He thereafter entered into correspondence with overseas buyers for the export of this material and ultimately, entered into a contract with Messrs. J.C.Gilbert Ltd., London, for the supply of Bone Meal, subject to the specifications laid down in the contract. Having entered into the contract, he exported the goods and necessary documents were presented to the Customs authorities for clearance. The Assistant Collector of Customs passed the "Let Export" order, meaning that he permitted the export of the goods in question. When the goods were, however, loaded into the steamer, but before the steamer actually sailed, the Assistant Collector of Customs changed his mind and gave a direction to the shipping agents to unload the cargo on the ground that the goods in question were really fertilizers which could not be exported without a licence. Dealing with that matter, the learned Judge held:

> "....The original order passed by the Assistant Collector of Customs, namely, "Let Export" order dated 8.9.1973, clearly falls within the scope of Sec.51 of the Customs Act, which says:
>
> "Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon, and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation."
>
> Thus the order of the Assistant Collector of Customs passed on 8.9.1973 being a statutory order, the order can be revised or reviewed only in accordance with the provisions contained in the said Act and Mr.K.Parasaran, the learned counsel for the respondent, was not able to draw my attention to any provision contained in the Customs Act which enabled the Assistant Collector of Customs to change his mind and to revise or review the order passed by him on 8.9.1973."

Sec.51 of the Act, which concerns with clearance of goods for export, is similar to Sec.47 of the Act in its purport and effect, the latter being concerned with import of goods. A Full Bench of the Calcutta High Court in *Eresian Equipments and Chemicals v. Collector of Customs, A.I.R. 1980 Cal. 188,* dealt with a case in which the company engaged in exports had been subjected to a notice to show cause why penal action should not be taken under Sec.114 of the Act. In the said notice, it had been alleged that the company exported 11 consignments against shipping bills between 29th December, 1969 and 16th June, 1970 and M/s. Eresian Equipments and Chemicals Ltd. and others, Calcutta, therefore, appeared to have contravened the provisions of Sec.12(1) of the Foreign

Exchange Regulation Act, 1947, as amended by the Foreign Exchange Regulation Amendment Act, 1949 read with Government of India, Ministry of Defence (E.A.D.) Notification No.G.S.R.No. 2641, dated 14.11.1969. Lakshmi Prasad Jajodia, a director of M/s.Euresian Equipments and Chemicals Ltd. Calcutta, signed the 11 shipping bills confirming the truth of the declaration of those shipping bills and also the G.R.I. Forms. The total quantity and F.O.B. value of the goods covered by the said 11 shipping bills were 9495 kilograms and Rs.12,37,706.30 while the value of magnesium silicate for the equivalent quantity was Rs.28,395 (approximately) at the rate of Rs.3 per kilogram. Manik Chand Jajodia and Jugal Kishore Jajodia, directors of M/s.Euresian Equipments and Chemicals Ltd., Calcutta, also actively helped in the matter of export of the above 11 consignments by issuing bearer cheques in favour of fictitious and non-existing suppliers of bismuth citrate, which goods were subsequently alleged to have been exported to M/s.Modist Corporation, as was evidenced by relative stock book and accounts register. By virtue of the amendment of Foreign Exchange Regulation Act, 1947, it was necessary for the exporter to submit the G.R.I. Forms declaration true in all material particulars under the provisions of Sec.12(1) of the said Act. Since this was not done, the export of the goods were liable to prohibition under the above notification No.G.S.R.No.2641, dated 14.11.1969. By virtue of Sec.23A, the prohibition also came under Sec.11 of the Customs Act, 1962, and hence the goods were liable to confiscation under Sec.113(d) and (i) of the Customs Act, 1962. The validity of the said notice was challenged in a writ petition. The matter finally came before a Full Bench to consider the following questions:

"(1) Whether, by virtue of Sec.23-A of the Foreign Exchange Regulation Act, 1947, the provisions of Secs.113 and 114 of the Customs Act, 1962 are attracted for the contravention of Sec.12(1) of the Foreign Exchange Regulation Act, 1947, in relation to goods which had been exported beyond India.

(2) Whether, when goods have been exported beyond India such goods may be said to be "export goods" as defined in Sec.2(19) of the Customs Act, 1962 and liable to confiscation under Sec.113 for the purpose of imposition of penalty under Sec.114 of the said Act."

The Full Bench stated the law in these words:

"We have earlier set out the provisions of Sec.11 of the Customs Act which confers power on the Central Government to prohibit importation or exportation of goods for purposes mentioned therein. These purposes indeed cover very very wide fields. Some of the purposes for which the prohibition may be imposed as stated in Sec.11(2) are, prevention of smuggling, prevention of shortage of goods of any description and prevention of the contravention of any law for the time being in force. Sec.113 provides for liability of the goods to confiscation in case of any violation of the prohibition imposed under Sec.11 of the Act and Sec.114 provides for personal penalty for those whose acts or omissions render the goods liable to confiscation under Sec.113. To construe the said sections to mean that Sec.114 can only be attracted when the goods are attempted to be exported and will have no application when goods have in fact been exported will defeat the purpose and object for which the said provisions have been introduced. The submissions that the legislature has so intended by using the words "attempt to export" in Sec.113(a), (b) and (d) and the analogy of the offence of attempt to commit suicide given in this connection are, in our opinion, misleading and devoid of merit. An attempt to commit suicide is indeed an offence and the act of committing suicide resulting from the successful attempt may not be considered to be an offence. This is so far the simple reason that once a person attempting to commit suicide succeeds in his attempt he places himself beyond the reach of law and no punishment is intended to be inflicted on the dead person or his heirs and legal representatives by imposing any fine or penalty, as they may in no way be liable or responsible for the said act. As we have earlier observed, the liability of the goods to confiscation arises under Sec.113(d), as soon as the goods are attempted to be exported and the attempt to export the goods necessarily proceeds the actual export of the goods. Goods become liable to confiscation as soon as the attempt is made. There is no provision in the Act to suggest that this accrued liability is wiped out or extinguished with the exportation of the goods. It may be that after the goods had

in fact been exported the liability of the goods to be confiscated may not be enforceable by actual confiscation of the goods. Personal penalty of any person who, in relation to the goods, does or omits to do any act which act or omission renders the goods liable to confiscation under Sec.113 or abets the doing or omission of such an act has been provided in Sec.114. This provision is attracted as soon as the goods incur the liability to confiscation under Sec.113 and such liability, as we have earlier held, arises when the goods are attempted to be exported contrary to any prohibition. It is to be noted that at the time when the goods are sought to be exported they are undoubtedly 'export goods' within the meaning of Sec.2(19) of the Customs Act. The liability of personal penalty provided in Sec.114 of the Act, which arises with the accrual of the liability of the goods to confiscation under Sec.113 of the Act at the stage of the attempt to export the said goods, clearly remains and the said liability is capable of enforcement. In the case of illegal export of any goods contrary to prohibition the effect may be that the liability of the goods to confiscation which arises and accrues may not be capable of enforcement but the personal liability which arises with the accrual of liability of the goods to confiscation can be enforced and by enforcement of the personal liability the offender can still be brought to book and this kind of offence may be checked. We must, therefore hold that by virtue of Sec.23-A of the Foreign Exchange Regulation Act, 1947 the provisions of Secs.113 and 114 of the Customs Act, 1962 are attracted, when there is a contravention of Sec.12(1) of the Foreign Exchange Regulation Act, 1947 in relation to goods which had in fact been exported......"

The Full Bench also observed:

"An order by the proper officer permitting clearance and loading of the goods under Sec.51 of the Customs Act does not affect the position."

Coming to the confiscation, we may notice the observations of the Supreme Court in *Collector of Customs v. Boormull, (1974)2 M.L.J. (S.C.) 42: 1974 M.L.J. (Crl.) 482: (1974)2 S.C.J. 238: (1974)2 S.C.C. 544: 1974 S.C.C. (Crl.) 784: A.I.R. 1974 S.C. 859,* in which it has been pointed out that a proceeding for confiscation is one *in rem* rather than one *in personam,* like *e.g.*, penalty under Sec.112 of the Act, one in relation to the goods rather than in relation to the person in any way concerned. Further, in *Frankfurther v. W.L. Exner, (1947) Ch.D. 629,* it was said:

"Confiscation is an act of appropriation of private property for State or Sovereign use and usually been the result of the doing by the owner of some prohibited act. The seizure and appropriation of property as a punishment for breach of the law whether municipal or international was held to be confiscation."

There are other authorities also who have taken then view, however, like the Calcutta Court, that a confiscation proceeding shall not be controlled by a provision like one under Sec.47 or Sec.51 of the Act and that it would be incorrect to say that for initiating a confiscation proceeding, it would be necessary to find out whether the goods have been duly cleared by the Customs or not. Such a view has been expressed by a Special Bench of the Customs Tribunal in the case of *N. Devidas and Company v. Collector of Customs, Bombay, (1987) E.L.T. 247,* and by the North Regional Bench of the Customs Tribunal in the case of *R.K. Industries v. Collector of Customs and Central Excise, (1989)39 E.L.T. 316.* They have stated in no uncertain words that clearance under Sec.47 of the Act cannot oust the jurisdiction of the Customs authorities to confiscate goods under Sec.111 of the Act, if later on it is found that the conditions, subject to which the goods were permitted to be imported were not fulfilled or complied with. Consensus of judicial opinion thus is: (1) that an order for clearance of the goods for home consumption is a quasi-judicial order and some sort of finality has to be attached to it. Ordinarily, no action to confiscate such goods which are cleared for home consumption will be taken but there may be exceptions to it, such as those indicated in the Delhi Court judgment in the case of *Jain Shudh Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43* and (2) that an action to confiscate goods does not depend on clearance of the goods for him consumption or export, but on conditions enumerated under Sec.111 of the Act in so far as improperly imported goods are concerned and Sec.113 of the Act in so far as goods attempted to be improperly exported are concerned. As in the case of goods already exported, it cannot be said that there was no attempt to

improperly export, with respect to goods already cleared for home consumption also, it will not be possible to say that they have not been improperly imported.

5. Courts which have taken the view that an order under Sec.47 of the Act is final and on the face of such an order in favour of the importer action to confiscate the goods cleared for home consumption cannot be taken, have also taken notice of the exceptions that may arise and even goods cleared in such circumstances can be subjected to confiscation. The Delhi Court's judgment supra has taken notice of these exceptional circumstances saying, "The finality cannot be disturbed unless the Department successfully shows that there was fraud or deliberate suppression." Both the Bombay Court and the Delhi Court in the cases of *Union of India v. Popular Dyechem, (1987)28 E.L.T. 63* and *Jain Shudh Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43,* however, have not taken notice that the seizure and confiscation are acts *in rem* unlike any penal action under the Act itself being one in relation to the goods rather than in relation to the person and such proceedings, however, depend not on anything else, but the reasonable belief of the proper officer that the goods are liable to confiscation, whether for the reason of being improperly imported goods or for the reason of improper export. Such a belief may be found to be reasonable for the reasons of fraud of suppression, as noticed by the Delhi Court in *Jain Shudh Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43,* or such other reasons or such other ground which render the import or the export illegal and liable to confiscation. It would be only in the notice under Sec.124 of the Act that grounds would be disclosed and then only it would be possible to know whether there has been any fraud, suppression of fact and/or any other invalidity in the import or export, or not.

6. Both the Bombay Court Judgment in the case of *Union of India v. Popular Dyechem, (1987)28 E.L.T. 63,* and the Delhi Court Judgment in the case of *Jain Shudh Vanaspati Limited and others v. Union of India and others, (1982)10 E.L.T. 43,* on their peculiar facts, are good for taking notice of the order under Sec.47 of the Act and saying accordingly that unless that order was set aside, no proceeding for confiscation should have been taken. It is difficult, however, to accept this as a law, as once there is a clearance under Sec.47 and/or Sec.51 of the Act is ordered, unless that order is set aside, the proper officer cannot act on his reasonable belief under Secs.110, 111 or 113 of the Act. The Calcutta Full Bench Judgment in the case of *Euresian Equipments and Chemicals v. Collector of Customs, A.I.R. 1980 Cal. 188,* has, in substance, pronounced that such proper officer's satisfaction for confiscation proceedings shall remain unaffected by the order of the proper permitting the clearance of goods under Sec.51 of the Act. That view is in consonance with the basis of the belief that goods have been improperly imported or exported and such belief being in relation to the goods and *in rem,* it will not be correct to read in the orders under Sec.47 or Sec.51 of the Act any inhibition upon the jurisdiction of the proper officer to act under Secs.110, 111 and 113 of the Act. The petitioner/appellant came to this Court challenging the seizure without waiting for the notice under Sec.124 of the Act. Such materials upon which it will be possible to predicate whether there are reasons for misrepresentation or fraud in importing or exporting of any prohibited goods or dutiable goods in violation of the conditions under which such import or export is permissible, will be available only in the notice, which, as we have already noticed, has to contain the grounds on which the proposal to confiscate is based, to afford an opportunity to the importer or the exporter or any other person from whose custody such goods are seized, to make a representation in writing and thereafter heard. We thus find that it is not a fit case in which this Court can declare the seizure invalid.

7. We would have disposed of the appeal and accordingly the writ petition leaving the question whether the seizure and any consequent confiscation is warranted on the facts of this case to be determined at a later stage when notice under Sec.124 of the Act is given to the petitioner/appellant, which, in our opinion, would have also in no way affected the petitioner/appellant's right to invoke Sec.24 of the Act, had we not been provided with certain material information both by the petitioner/appellant as well as the respondents. It is stated in the counter-affidavit filed on behalf of the respondents that they had addressed a letter to the Executive Director, M/s. Salem Steel Plant and requested them to depute a technical officer to inspect and verify the nature, quality and

value of the goods under seizure. A team of officials of M/s.Salem Steel Plant inspected the seized goods on 6.3.1991. In their report, they have said:

"(a) the material cannot be classified as primes or seconds as per Salem Steel Plant's classifications;

(b) the material cannot be classified as melting scrap excepting the few sheets which are having severe edge bond weld and gripper mark;

(c) from the grade indicated on the stage and the non-magnestic nature of the sheets and their general appearance the sheets appear to be of stainless steel of autonitic series;

(d) such material is used for fabrication of non-critical components;

(e) the material can also be re-rolled sheet by sheet to thinner gauges and proceeded further in re-rolling Units for utensil or any other non-critical application."

It is not disputed before us that stainless steel melting scrap has a specific identification as per para 26(2) (viii) of the Import and Export Policy AM 90-93 Vol.I (page No.10). According to this, a stainless steel melting scrap means such waste and scrap of stainless steel with the following dimensions:

Length	153 cms.	(6") Maximum
Width	102 cms.	(1") Maximum
Thickness	6.5 cms.	(1/4") Maximum

According to the respondents, and it seems there is nothing in the hands of the petitioner/appellant to dispute this fact, the goods seized were sheets having an assorted thickness in the range 1.05.5 mm. approximately, the width in the range of 1220 to 1275 mm. and a few sheets around 1000 mm. and the length varying from approximately 1750 to 5000 mm. The respondents, however, appear to concede in the counter-affidavit that the materials cannot be classified as primes or seconds, but they can also be not classified as melting scrap. They assert; however, in the counter-affidavit that such defectives would mean those varieties semifinished/finished products which are neither prime as per relevant specification nor melting scrap. Such products are characterised, according to them, by metallurgical/surface imperfections, but are usable as such either for re-rolling or in some direct industrial applications. We have every reason to resist interference with the seizure and withhold any judgment on the merits of the issue until the proper stage of notice comes and further materials are available. We feel however, for these facts, constrained to observe there would be substantial justice to the parties in the instant case not to go for any elaborate proceedings, either for confiscation or imposition of penalty, as recourse to Sec.24 of the Act shall protect the interest of the Customs on the one hand and save the petitioner/appellant from the protracted proceedings from the stage of the confiscation and penalty, if any, to the stage of appeal, revision, etc. We are induced to take this view by learned counsel for the petitioner/appellant for the facts that have been revealed in the counter affidavit, which facts make us feel that course which would save any further complications would be in the interest of justice. Learned counsel for the petitioner/appellant has stated before us that the petitioner/appellant would be ready and willing to any denaturing or mutilation of the goods, so that they are usable only for the home consumption by them and for no other purpose. He has also stated that they would have no objection to any Customs Officer deputed at their factory when they use the goods for the purpose of steel ingots only. Sec.24 of the Act, in our view, is a provision introduced with the object of removing any chance of abuse of the import by any person fo home consumption. The respondents say in the counter-affidavit that there is a chance of these goods being re-rolled or used directly in industrial applications other than used as melting scrap. By denaturing/moulding so that they are brought within the prescriptions in para 26(2)(viii) of the Import and Export Policy AM 90-93 Vol.I (page No.10), that is to say, of such length width and thickness as will qualify the goods as stainless steel melting scrap, the respondents shall only aid in and advance the interest of justice. Keeping this in view, we are inclined to order that in case an application to this effect is filed on behalf of the petitioner/appellant before the appropriate authority, the same will be entertained and orders passed in conformity with

the requirements envisaged in Sec.24 of the Act and goods accordingly released from seizure and any further action for confiscation/prosecution under the Act. This, however, will not mean that the respondents in any manner acted illegally in seizing the goods. In case an order in terms of Sec.24 is passed and goods are denatured or mutilated so that they are identified as stainless steel melting scrap, it is obvious that any notice for confiscation will have to be recalled.

8. In the result, this appeal is dismissed with a direction as above to the respondents to entertain the application of the petitioner/appellant under Sec.24 of the Act and dispose of the same in the light of the observations made above. No costs.

B.S. ---- *Appeal dismissed with directions.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Govindasamy, J.*

W.P.No.9609 of 1983 *23rd September, 1991.*

P.Pon Kailasam, Saraswathi Narayanan College, Perungudi, Madurai ...*Petitioner*

v.

The Secretary, Saraswathi Narayanan College, Perungudi, Madurai and others ...*Respondents.*

(A) Tamil Nadu Private Colleges (Regulation) Act (XIX of 1976), Sec.14(1)(c) - Disciplinary action against teachers of Private College - Power to take - Vests in the college Committee - Principal of College, a member of the Committee - Whether can exercise the power.

(B) Tamil Nadu Private Colleges (Regulation) Act (XIX of 1976) - Disciplinary proceedings against teacher of Private College - Enquiry conducted by an authority other than Disciplinary Authority - Copy of report of Enquiring Authority to be furnished - to the delinquent.

(C) Constitution of India (1950), Arts.12 and 226 - Writ against educational institution - Respondents acting according to statutory provisions - Writ, is maintainable.

The petitioner was originally appointed as a tutor in the 1st respondent college. On 12.7.1975, he appeared for an interview before a Committee held for the purpose of filling up a post of Assistant Professor. When the college reopened on 16.7.1975 after the summer recess, the Principal of the College issued a memo to the petitioner calling on him to explain why action should not be taken against him for his alleged misbehaviour towards the Principal on 12.7.1975. An enquiry was conducted by an advocate of Madurai and the 1st respondent imposed the punishment of withholding of increments for three years. His appeal to the Government failed. He filed a writ petition. The High Court directed the Government to consider his appeal on merits. The appeal was again dismissed. He filed another writ petition contending (1) that only the college committee was competent to initiate the disciplinary action and (2) that the enquiry was vitiated as the petitioner was not favoured with a report of the Enquiring Authority.

Held:- Sec.14(1)(c) of the Tamil Nadu Private College (Regulation) Act specifies that the College Committee shall have the power to take disciplinary action against the teachers of the Private College. The said Act does not specify that such a power can be exercised by any other Authority other than the College Committee. In the instant case, it is not disputed that the Principal is involved in the incident in respect of which the disciplinary proceedings were initiated against the petitioner. It may be that the Principal is one of the members of the College Committee. But that does not mean that the principal himself can be considered as the College Committee. In the absence of initiation of the proceedings by the competent authority, namely, the College Committee and on the sole ground that the disciplinary proceedings have been initiated against the petitioner by the Principal who has no jurisdiction to do so the entire proceedings are vitiated.

[Para 4]

Admittedly the petitioner was not favoured with a copy of the Enquiry report so as to enable him to submit his explanation challenging the findings of the enquiry officer since the Enquiring Authority is different from the Disciplinary Authority. The law is well-settled that the Report of the Enquiring Authority should be furnished to the Delinquent Officer so as to enable him to submit his

explanation under reference to the findings of the Enquiring Authority especially when enquiry was conducted by an authority other than the Disciplinary Authority. *[Para 4]*

With reference to the maintainability of the writ petition, the 1st respondent-college being an educational institution imparting education and which is for a public cause, the writ petition is maintainable. Further, the respondents have acted according to the statutory provisions and, therefore, the writ petition is maintainable. *[Para 6]*

Cases referred to:

Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others v. V.R.Rudani, A.I.R. 1989 S.C. 1607.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st respondent herein in its Order dated 5.12.1977 as confirmed by order of the 3rd respondent in G.O.Ms.No.1778, dated 4.9.1983 withholding the increments for 3 years commencing from June, 1975 to 1977 and quash the said order of the respondents, dated 5.12.1977.

P.Shanmugham, for Petitioner.

S.Jayaraman, for Respondent Nos.1 and 2.

R.Sengottuvel, Government Advocate, for Respondent No.3.

The Court made the following

ORDER:- The petitioner was originally appointed as a Tutor in the Department of Tamil in the 1st respondent College in the year 1971. The petitioner appeared for an interview before a Committee held for the purpose of filling up a post of Assistant Professor in Tamil on 12.7.1975. When the College re-opened on 16.7.1975 after Summer Recess, the Principal of the College, by memo dated 16.7.1975 informed the petitioner that he (Principal) was shocked at the petitioner's behaviour towards him on the evening of 12.7.1975 and called upon the petitioner to explain why suitable disciplinary action should not be taken against him for the alleged behaviour of the petitioner towards the Principal. Then again, the Principal by another memo dated 21.7.1975 framed the charges specified therein and called upon the petitioner to submit his explanation. In the preamble portion of the said memo, it is stated that the petitioner was asked to show cause why the Principal should not report to the Management his behaviour for suitable disciplinary action on the charges set forth therein. Later on, the petitioner submitted his explanation on 9.8.1975. Subsequently, the petitioner was informed that there was an enquiry on 7.10.1975 with reference to the charges framed against him. On 7.10.1975 the petitioner was given a communication with a direction to meet the Correspondent of the College to face the enquiry to be conducted by one L.N.V.Subramanian, Advocate, Madurai. It is alleged that at the request of the petitioner, the enquiry was adjourned. Later, on one Thiru J.R.Satchidanandam, Advocate, Madurai was said to be appointed as the Enquiry Officer. The petitioner was directed to appear for the Enquiry to be held by the said Advocate on 24.11.1977. Admittedly, the petitioner did not participate in the enquiry for the reasons set forth in the affidavit filed in support of the above writ petition. Thereafter, based on the Report of the said Enquiring Authority, the 1st Respondent, by Order dated 5.12.1977, imposed the punishment of withholding of increments in the scale applicable to the petitioner for three years commencing from June, 1975 on the basis that the misconducts committed by the petitioner, *viz.*, gross misbehaviour, in subordination and wilful neglect of duty are serious acts of misconduct and such acts of misconduct, if not checked, would be deleterious to the maintenance of discipline, especially in an educational institution for higher studies. Aggrieved by the said Order, the petitioner preferred an appeal to the Government and the Government, by an order dated 17.4.1979, rejected the appeal on the ground that the petitioner's request was not feasible of compliance. Aggrieved by the said Order, the petitioner filed Writ Petition No.2653 of 1979, on the file of this Court, and this Court, by Order dated 13.4.1983, directed the Government to dispose of the appeal on merits. Thereafter, the Government by G.O.Ms.No.1778, dated 14.9.1983, rejected the appeal on the ground that the appeal preferred by the petitioner is not maintainable having due regard to the statutory provisions contained in the Tamil Nadu Private Colleges (Regulation) Act. It is at this stage, the petitioner herein has preferred the above writ petition for the issue of a writ of *certiorari* to quash the aforesaid Order of the 1st respondent dated 5.12.1977,

as confirmed by the Order of the third respondent, namely, the Government, dated 14.9.1983, withholding the increment for three years commencing from June, 1975.

2. Mr.P.Shanmugham, learned counsel appearing for the petitioner, contended that the initiation of the proceedings by the Principal who himself is involved in the incident in respect of which the proceedings were initiated, is not maintainable in law. Learned counsel further contended that as per Sec.14(1)(c) of the Tamil Nadu Private Colleges (Regulation) Act, only the College Committee is competent to initiate the disciplinary proceedings against the teachers of the Private College. In the instant case, the College Committee did not initiate the disciplinary proceedings and consequently the entire proceedings are vitiated. Secondly, the enquiry was held by an Authority not competent to hold the same as per the instructions issued by the University in this behalf. Thirdly, the petitioner was not favoured with a report of the Enquiring Authority. Finally, the enquiry has been re-instituted after a lapse of two years. For all these reasons, learned counsel for the petitioner contended that the impugned proceedings are vitiated.

3. Mr.S.Jayaraman, learned counsel appearing for respondents 1 and 2 vehemently contended that the Principal being one of the members of the College Committee, he is competent to initiate the proceedings. Learned counsel further contended that the writ petition as instituted by the writ petitioner is not maintainable. It is further contended that the Committee can depute another Officer to hold that enquiry and accordingly in the instant case, an Advocate-third party had conducted the enquiry and consequently the proceedings are sustainable in law. The delay is explained by saying that the Advocate who was originally appointed was not in a position to hold the enquiry and, therefore, the 1st respondent-College had to appoint a fresh Enquiry Officer and consequently there was delay in conducting the enquiry.

4. I have considered the rival submissions of the learned counsel appearing for both parties. Sec.14(1)(c) of the Tamil Nadu Private Colleges (Regulation) Act specifies that the College Committee shall have the power to take disciplinary action against the teachers of the Private College. The said Act does not specify that such a power can be exercised by any other Authority other than the College Committee. In the instant case, it is not disputed that the Principal is involved in the incident in respect of which the disciplinary proceedings were initiated against the petitioner. On a perusal of the impugned proceedings, it is magnified the proceedings. It may be that the Principal is one of the members of the College Committee. But that does not mean that the Principal himself can be considered as the College Committee. In the absence of initiation of the proceedings by the Competent Authority, namely, the College Committee, and on the sole ground that the disciplinary proceedings have been initiated against the petitioner by the Principal who has no jurisdiction to do so, the entire proceedings are vitiated. Admittedly, the petitioner was not favoured with a copy of the Enquiry Report so as to enable him to submit his explanation challenging the findings of the Enquiry Officer, since the Enquiring Authority is different from the Disciplinary Authority. The law is well-settled that the Report of the Enquiring Authority should be furnished to the Delinquent Officer so as to enable him to submit his explanation with reference to the findings of the Enquiring Authority especially when enquiry was conducted by an authority other than the Disciplinary Authority.

5. Finally, there is a delay of two years in continuing the disciplinary proceedings. However, learned counsel appearing for the 1st respondent-College explained it by saying that there was change in the Enquiry Officer and hence there was delay. The delay is not satisfactorily explained. Even assuming that the Enquiry Officer who was originally appointed was not in a position to conduct the enquiry within a reasonable time, nothing prevented the Disciplinary Authority from appointing another person to hold the enquiry. The Madurai-Kamaraj University has specifically instructed the Principals and Managements of Private Colleges not to delegate the powers of holding enquiry to third parties. The relevant portion of the communication dated 12.12.1978 sent by the Registrar of the Madurai-Kamaraj University to the Secretaries of the College Committee and the Principals of all colleges reads as follows:

"In accordance with the provisions of the Tamil Nadu Private Colleges (Regulation) Act and Rules "the enquiry has to be conducted only by

the college has to be conducted only by the college committee." There is no enabling provision under this Act or Rules enabling the delegation of the powers of the said committee to any third party. The college committee has to decide the matter covering all States. The secretary cannot himself make an enquiry, nor can his power be delegated to a sub-committee of the college committee."

In the instant case, contrary to the instructions issued by the University, the 1st respondent-Institution has appointed an advocate to conduct the enquiry.

6. With reference to the maintainability of the writ petition, the 1st respondent-College, being an educational institution imparting education and which is for a public cause, the writ petition is maintainable. Further, the respondents have acted according to the statutory provisions and, therefore, the writ petition is maintainable. *vide*: the decision of the Supreme Court in *Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others v. V.R.Rudani, A.I.R. 1989 S.C. 1607.*

7. For the reasons set forth hereinabove, the impugned Orders are not sustainable in law and consequently they are hereby quashed. Accordingly, the writ petition is allowed. No costs.

B.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram, Actg.C.J.* and *Somasundaram, J.*

W.A.No.1226 of 1991 *27th November, 1991.*

Veeramani ...*Appellant*

v.

The Management of Tamil Nadu Electricity Board, and another ...*Respondents.*

Industrial Disputes - Re-instatement - Normal rule of award of full back wages - Departure from - When justified.

The normal rule is that award of full back wages must follow when the relief of reinstatement is given and if there is going to be a departure from the normal rule, compelling circumstances necessitating such departure must be established by the employer. *[Para 3]*

In the present case, the Labour Court found that the charges levelled against the petitioner workman have not been proved and hence the order of dismissal is illegal. Yet, the Labour Court by merely stating "but considering the circumstances of the case" directed the award of 50% of the back wages. This court is not enlightened as to whether any exceptional circumstances were pleaded and established by the employer to deny the petitioner the full back wages. Hence the denial of 50% of the back wages to the petitioner by the Labour Court is not justified. *[Para 4]*

The Workmen represented by W.S.Insulators of India Ltd. Workers and Staff Progressive Union v. The Management of W.S. Insulators of India Ltd., W.A.No.623 of 1981; judgment dated 1.11.1988 (Mad. H.C.), Followed.

Appeal under Clause 15 of the Letters Patent against the Order of Raju, J., dated 19.6.1991 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.10539 of 1989 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the 2nd respondent in connection with the award in N.O.No.188 of 1982 published in part II Sec.II (Supplement) Tamil Nadu Government Gazette issue dated 11.11.1987 and quash the same and consequently direct the first respondent to reinstate the petitioner with full back wages, continuity of service and attendant benefits.

V.Prakash, for Appellant.

P.Ibrahim Kalifullah, for Respondent No.1.

The Judgment of the Court was delivered by *Nainar Sundaram, A.C.J.:-* This writ appeal is directed against the order of the learned single Judge in W.P.No.10539 of 1989. The petitioner in the writ petition is the appellant in this writ appeal. The respondents in the writ petition are the respondents in this writ appeal. For the sake of convenience, we are referring to the parties as per their nomenclature in the writ petition. The petitioner succeeded before the second respondent in I.D.No.188 of 1982 in setting aside the order of dismissal made by the first respondent, and the second respondent by the award in I.D.No.188 of 1982 directed the reinstatement of the petitioner

in service with continuity of service. However, on the question of backwages, the second respondent awarded only 50% of the same. The first respondent was aggrieved with regard to that portion of the award of the second respondent directing the reinstatement of the petitioner with continuity of service and the first respondent came to this Court by way of W.P.No.3524 of 1988. The petitioner was aggrieved with reference to the denial of backwages to the extent of 50% and the petitioner preferred W.P.No.10539 of 1989. Both the writ petitions had a common disposal at the hands of the learned single Judge. The learned single Judge did not countenance the cases of the petitioner and the first respondent and dismissed both the writ petitions. As already stated, this writ appeal is directed against the order of the learned single Judge in W.P.No.10539 of 1989.

2. Mr.P.Ibrahim Kalifullah, appears for the first respondent. Mr.V.Prakash, learned counsel for the petitioner would submit that when the order of dismissal had been found to be not sustainable, the normal rule of award of full back wages ought to have been adhered to by the second respondent and in the instant case no exceptional circumstances have been established by the first respondent to make a departure from the normal rule. As against this P.Ibrahim Kalifullah, learned counsel for the first respondent would submit that on the available evidence, the petitioner must be held to be guilty of the charges levelled against him and the second respondent only after considering the circumstances of the case deemed fit to award 50% of the backwages and this court should not interfere with the discretion exercised by the 2nd respondent on this question.

3. The normal rule is that award of full backwages must follow when the relief of reinstatement is given and if there is going to be a departure from the normal rule, compelling circumstances necessitating such departure must be established by the employer. As to how this question has got to be assessed was the subject matter of consideration by a pronouncement of a Bench of this Court to which one of us (Justice S.Nainar Sundaram, as he then was) had been a party in *The Workmen represented by W.S.Insulators of India Ltd. Workers and Staff Progressive Union, Porur v. The Management of W.S. Insulators of India Ltd.*, *W.A.No.623 of 1981, judgment dated 1.11.1988* and the discussion runs as follows:

"It is true that a workman cannot claim either reinstatement or payment of back wages as of right. Neither is a common law right. But the industrial adjudication by the forums, constituted therefor, takes is the question of granting these reliefs. When an order of dismissal is set aside and the workman is reinstated, the question of back wages arises. The general rule is that the award of full wages stands annexed to the relief of reinstatement. But, there can be exceptional circumstances compelling a departure from the general rule. If a workman is found guilty of gross misconduct and grievous lapses in the discharge of his obligations towards the employer, certainly the discretion is that of the industrial forum not to award back wages during the period the non-employment took place, even though the workman gets the benefit of reinstatement. For making this departure, cogent reasons must be found and expressed. The grant of reliefs, though it is a matter of discretion by the Industrial forums, certainly that discretion is not as arbitrary one; but must be a judicious and a well balanced one. When the Industrial forum gives the relief of reinstatement to the workman, the resultant position is the workman is entitled to be restored to the position in which he stood prior to his non-employment, and the service statue and the emoluments that are legitimately due to him during the said period must normally be awarded to the workman. Reinstatement means, the employer must have taken away illegally, or denied a warrantedly the right of workman to work and consequently deprived him of his emoluments. If the workmen has been kept out of employment on account of the illegal or invalid act on the part of the employer, the Industrial forum could not be normally justified in not awarding the workers, the full back wages to which he was legitimately entitled to. A contrary approach has been viewed as a premium on the unwarranted litigative activity of the employer. If the employer wants the workman to stand deprived of the full back wages, even though he gets reinstated it is for the, employer to establish the compelling circumstances which necessitated such departure.

4. Coming to the present case, the second respondent found that the charges levelled against the

petitioner have not been proved and hence the order of dismissal is illegal. Yet, the second respondent by merely stating "but considering the circumstances of the case", directed the award of 50% of the back wages. This court is not enlightened as to whether any exceptional circumstances are pleaded and established by the first respondent to deny the petitioner the full back wages. The learned single Judge dealt with this aspect in the following terms:

> "Though normally full back wages is the rule, in this case, the Labour Court thought fit, having regard to the circumstances of the case, to grant only 50% back wages, which in its view, "will be just and proper". In the above circumstances, I do not see any reason to interfere with the exercise of the discretion by the Labour Court on this account also."

We find that the norms as set out to govern and guide a decision on this question have not at all been thought about and the question has not been decided in accordance with these norms. Here we find a case where the first respondent did not seek for an opportunity to adduce evidence before the second respondent to prove the charges. The second respondent on the evidence available came to the conclusion that the charges were not at all proved. The first respondent did not place any material to substantiate exceptional circumstances to deny the petitioner the award of full back wages. In our view, the learned single Judge ought not have to lend support to the decision of the second respondent on the question of denial of 50% of back wages to the petitioner. In view of the foregoing discussions, we are obliged to interfere in writ appeal and accordingly this writ appeal is allowed; the order of the learned single Judge in W.P.No.10539 of 1989 is set aside; and the award of the second respondent in I.D.No.188 of 1982 is so far as it denied 50% of the back wages to the petitioner is quashed and in addition to the relief of reinstatement with continuity of service accorded to the petitioner, the petitioner is also entitled to the relief of full back wages. We make no order as to costs.

V.K. ------ *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.2417 of 1991 *9th January, 1992.*

Gnanambal ...*Petitioner*

v.

Perumal Pillai and another ...*Respondents.*

Civil Procedure Code (V of 1908), Secs.48 and 153, Or.6, Rule 17 - Limitation Act (IX of 1908), Art.182 - Execution petition pending - Prayer for amendment of petition for attachment of properties included - Limitation for.

So long as the execution petition is pending and it has been filed within time, it is open to the decree-holder to have the process of execution carried out by attaching the properties of the judgment-debtor. There is no separate period of limitation for a prayer for attachment. If the execution petition is within, the period of limitation, any prayer for enabling the court to carry out the execution and realise the fruits of the decree is not subject to any period of limitation. Such a prayer can be made so long as the execution petition is pending. Even otherwise, the execution petition can certainly be amended even if the relief sought is barred by limitation. *[Paras 6 and 7]*

(B) Civil Procedure Code (V of 1908), Sec.115 - Order of lower court in the interests of justice - The lower court has no jurisdiction to pass such order - Whether High Court can interfere with such orders.

It is seen that the judgment-debtor has kept the decree-holder in abeyance for nearly 21 years by now and prevented him from executing the decree. In such circumstances, this Court refuses to exercise its discretionary power under Sec.115, Civil Procedure Code. A bench of this Court has held in *S.N.Kuha v. P.P.I. Vaithyanathan, 1983 T.L.N.J. 1*, that if the order of the court below is in the interests of justice, the court can refuse to interfere under Sec.115, Civil Procedure Code, even if the court below had no jurisdiction to pass such an order. Applying that principle, the court holds in this case that the order of the court below does not warrant any interference as justice has been done to the decree-holder. *[Para 8]*

Cases referred to:

D.Seshaiah v. Veerabhadrayya, A.I.R. 1972 A.P.,

134; Leuch and Company Ltd. v. Jardine Skinner and Company, A.I.R. 1957 S.C. 357: 1957 S.C.J. 313: 1957 S.C.R. 438: 1957 S.C.C. 237: P.M.Patil v. K.S.Patil, A.I.R. 1957 S.C. 363: 1957 S.C.J. 371: 1957 S.C.R. 595: 1957 S.C.C. 264; A.K.Gupta & Sons v Damodar Valley Corporation, A.I.R. 1967 S.C. 96; S.N.Kuha v. P.P.I. Vaithyanathan, 1988 T.L.N.J. 1.

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Cuddalore, dated 3.7.1991 and made in R.E.P.No.169 of 1986 in O.S.No.87 of 1968.

V.Krishnan, for Petitioner.

M.N.Padmanabhan, for *M.N.Muthukumaran*, for Respondent No.1.

The Court made the following

ORDER:- There is no merit in this revision petition. The first respondent filed the suit O.S.No.87 of 1968 on the file of Sub Court, Cuddalore, and obtained a decree on 6.8.1969 against the petitioner and the second respondent. That was challenged in Appeal and it was confirmed on 16.11.1970 by the dismissal of the appeal. Thereafter, the petitioner filed a suit O.S.No.194 of 1972 for setting aside the decree and for restraining the decree-holder from executing the decree. Injunction was granted during the pendency of the suit stopping execution. Ultimately, the suit was dismissed. An appeal was filed against it in A.S.No.34 of 1975 which was dismissed on 30.8.1978. The matter was brought to this Court in S.A.No.531 of 1979 which was dismissed on 30.10.1983. Thus, the decree holder was not in a position to execute the decree from 6.8.1969 to 30.10.1985.

2. Apart from that, the petitioner claimed benefits of the Debt Relief Acts 4 of 1938, 10 of 1975 and 15 of 1976. She got also an order of stay of execution proceedings from 19.11.1974 onwards. The moratorium was in force for 4 years and 9 days. If that period is added to the period of 12 years normally allowed for execution the last date for filing the execution petition was 16.11.1986.

3. The decree-holder filed the present execution petition on 8.7.1986. He brought some of the properties which were attached during the pendency of the suit to sale. The sales were held on 16.4.1987 and 22.2.1988. Applications were filed by the petitioner for setting aside the sales on several grounds. One of the grounds was that the execution petition was barred by limitation. By order dated 17.8.1990 the Subordinate Judge, Cuddalore, set aside the sales on the ground that there was no subsisting attachment on the dates of sales. He took the view that the attachment was affected during the pendency of the suit and it came to an end when a prior execution petition was dismissed because of the order of injunction in O.S.No.194 of 1972. However, the Subordinate Judge negatived the plea of the petitioner that the execution proceeding was barred by limitation. He wrote a detailed order holding that the execution petition was in time. He also held that the properties were liable to attachment.

4. After the setting aside of the sales, the decree-holder filed a memo on 15.10.1990 for amending the execution petition by including a prayer for attachment of the properties set out therein. The amendment was granted. It is against the said order, the present revision has been filed.

5. It is the contention of the petitioner that the execution petition is itself barred by limitation. That contention is not available to the petitioner in view of the order dated 17.8.1990 in E.A.Nos.364 of 1987 and 220 of 1988 to which I have already made a reference. Even apart from that order, it is clear from the facts stated above that the execution is in time and the plea of Limitation is without any substance.

6. It is next contended that in any event when the memo was filed for amendment of the execution petition, it was very much out of time and it is as if a new relief is sought in the execution proceeding which is not available to the decree holder. There is no substance in this contention. So long as the execution petition is pending and it has been filed within time, it is open to the decree-holder to have the process of execution carried out by attaching the properties of the judgment debtor. There is no separate period of limitation for a prayer for attachment. If the execution petition is within the period of limitation, any prayer for enabling the court to carry out the execution and realise the fruits of the decree is not subject to any period of limitation. Such a prayer can be made so long as the execution petition is pending.

7. Even otherwise, an execution petition can certainly be amended even if the relief sought is barred by limitation. A Full Bench of the Andhra Pradesh High Court in *D.Seshaiah v. Veerabhadrayya, A.I.R. 1972 A.P. 134*, held that petitions for amendment of execution proceedings are on par

with petitions for amendment of pleadings in a suit. Learned Judges have taken the view that the court has a discretion to grant an amendment even if by granting such amendment the right of the respondent which had accrued to him by virtue of the law of limitation will be effected. The relevant discussion is found in the following passage:

"The principles on which the power to amend should be exercised by now are fairly well settled. The principles underlying O.VI, Rule 17, C.P.C. are substantially the same as underlying Sec.153, C.P.C. The width and the amplitude of this power is well illustrated in *L.J.Leach and Company Ltd. v. Jardine Skinner and Company, A.I.R. 1957 S.C. 357: 1957 S.C.J. 313: 1957 S.C.R. 435: 1957 S.C.C. 237, P.M.Patil v. K.S.Patil, A.I.R. 1957 S.C. 363: 1957 S.C.J. 371: 1957 S.C.R. 595: 1957 S.C.C. 264* and *A.K.Gupta & Sons v. Damodar Valley Corporation, A.I.R. 1967 S.C. 96.*

One class of cases in which it is quite often pointed out that amendment might work injustice to the other side is where it takes away from that party a right accrued to him by expiration of certain time. In such class of cases it is now thoroughly well established that ordinarily a decree-holder will not be allowed to amend his execution on petition by including a new relief which since the date of decree has become barred by the provisions prescribing limitation.

There is no reason to make any distinction between cases to which Sec.48, C.P.C or Art.182 applied on the one hand and the cases covered by Sec.3 of the Indian Limitation Act read with relevant entries in the schedule to the Indian Limitation Act.

It is a mistake to think that Sec.48, C.P.C. lays down any inflexible rule in not allowing any amendment whatever may be the circumstances of the case, to the execution petition merely on the ground that if permitted it would be contrary to Sec.48, C.P.C. or Art.182 of the Limitation Act. The same argument can relevantly be raised in regard to suits in which amendment is sought, and is quite often so raised. The two situations therefore are similar and not different in so far as the principle underlying the amendment is concerned. In either case the amendment would not normally be allowed if the effect of the amendment is to deprive the other side of a valuable right to plead limitation. Nevertheless, there can be exceptional cases where special circumstances demand that in order to do substantial Justice between the parties and with a view to settle all disputes necessary for the effective disposal of the cases amendment may be allowed. The rule therefore that ordinarily in such cases amendment should not be allowed is not a universal rule and in peculiar or special circumstances an amendment may be allowed even where it has the effect of depriving the other side of his right to plead limitation. What follows is that the question of limitation, is one of the factors to be taken into account in the exercise of the courts discretion as to whether the amendment should be allowed. It would be erroneous to confuse this discretion of the court with its power to permit amendment. It does not affect the power of the court to order amendment, if that is required in the interests of justice."

8. In any event, I am of the view that on the facts of this case, justice has been rendered to the decree-holder. It is seen that the judgment debtor has kept the decree-holder in abeyance for nearly 21 years by now and prevented him from executing the decree. In such circumstances, I refuse to exercise my discretionary power under Sec.115, C.P.C. A bench of this Court has held in *S.N.Kuha v. P.P.I. Vaithyanathan, 1988 T.L.N.J. 1*, that if the order of the court below is in the interest of Justice, this Court can refuse to interfere under Sec.115, C.P.C. even if the court below had no jurisdiction to pass such an order. Applying that principle I hold in this case that the order of the court below does not warrant any interference as justice has been done to the decree-holder.

9. The civil revision petition is dismissed with costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

A.S.No:199 of 1982 *11th February, 1992.*

Sultan Abdul Khader ...*Appellant*
v.
The Corporation of Madras represented by its Commissioner ...*Respondent.*

Madras City Municipal Corporation Act (IV of 1919), Sec.137-B and Schedule IV, Rule 3 - Enhanced Property tax - Levy of - Procedure for - Non-issue of notice under Sec.137-B - Effect - Claim for enhanced tax, if maintainable.

The plaintiff, Corporation of Madras filed a suit for recovery of property tax of Rs.10849 for the period from second half of 1964-65 to second half of 1968-69 (both inclusive). The amount related to enhanced tax levied under Sec.137-B of the Madras City Municipal Corporation Act. The suit was decreed. In appeal, the appellant-defendant contended that the suit would not lie as the notice required under Sec.137-B had not been served at all. For the respondent-plaintiff it was contended that the notice contemplated under Sec.137-B was only a notice calling for objection to a proposed enhancement of the property tax.

Held: The notice spoken to under Sec.137-B is only a notice assessing the owner to tax and demanding payment thereof. It is not a notice proposing to enhance the property tax and calling for objection therefor. That notice is actually issued under Rule 3 of Schedule IV to the Act. Pursuant to such a notice under Rule 3, the party concerned may give his objections and enquiry would be held and the enhancement of assessment is completed thereby. Thereafter pursuant to Sec.137-B, notice assessing the property concerned to tax and demanding payment thereof from him should go. In view of the fact that such a notice as contemplated under Sec.137-B has not been issued in the present case, the respondent/Corporation cannot make the suit claim and the suit on that account has to necessarily fail. *[Paras 3 and 5]*

Case referred to:

Smt.Nafisa Zahara Begum v. The Corporation of Madras, (1965) 2 M.L.J. 157: A.I.R. 1965 Mad. 515.

M.I.Meera Sahib, for Appellant.

K.R.Tamizhmani for Respondent.

The Court delivered the following

JUDGMENT: Defendant is the appellant in this appeal against the decree in favour of the respondent/Corporation of Madras, in the latter's suit O.S.No:5943 of 1969, on the file of the VII Assistant Judge, City Civil Court, Madras, for recovery of property tax amounting to the tune of Rs.10,849 for the period from second half of 1964-65 to second half of 1968-69 (both inclusive). The suit amount admittedly relates to enhanced tax levied under Sec.137-B of the Madras City Municipal (Corporation) Act, 1919. No doubt the defendant has purchased the suit property only on 25.10.1966 and one contention of the Learned counsel for the appellant is that his vendor had not been impleaded in the suit. But under the Act even the purchaser will be liable for the property tax on the property purchased by him, even with reference to the period prior to his purchase.

2. But the substantial contention of the learned counsel for the appellant is that even assuming the procedure prescribed under Schedule IV to the Act has been followed by the Corporation for enhancing the tax, the notice required under Sec.137-B has not been served at all on the defendant and that therefore the present suit would not lie. On the other hand, the learned counsel for the respondent/Corporation contends that the notice contemplated under Sec.137-B is only a notice calling for objection to a proposed enhancement of the property tax.

3. I have considered the rival submissions. The argument of the learned counsel for the respondent/Corporation has absolutely no basis in the light of what is specifically spoken to in Sec.137-B of the Act. Sec.137-B runs as follows:

> "Notwithstanding anything to the contrary contained in this Act or the rules made thereunder, if for any reason any person liable to pay any of the taxes or fees leviable under this chapter has escaped assessment in any half-year or year (or has been assessed in any half-year or year at a rate lower than the rate at which he is assessable or, in the case of property tax has not been duly assessed in any half year or year consequent on the building or land concerned having escaped, proper determination of its annual value, the Commissioner may, at any time within three years from the date on which such person should have been

assessed, serve on such person a notice assessing him to the tax or fee due and demanding payment thereof within fifteen days from the date of such service; and the provisions of this act and the rules made thereunder shall so far as may be apply as if the assessment was made in the half-year or year to which the tax or fee relates."

So it is clear that the notice spoken to under Sec.137-B is only a notice assessing the owner to tax and demanding payment thereof, It is not a notice proposing to enhance the property tax and calling for objection therefor. That notice is actually issued under Rule 3 of Schedule IV to the Act. Pursuant to such a notice under Rule 3 the party concerned may give his objections and enquiry would be held and the enhancement of assessment is completed thereby. Thereafter pursuant to Sec.137-B, notice assessing the property concerned to tax and demanding payment thereof from him, should go.

4. In *Smt.Nafisa Zahara Begum v. The Corporation of Madras (1965)2 M.L.J. 157: A.I.R. 1965 Mad. 515,* both the notice proposing to enhance the tax and calling for objections and the notice demanding the enhanced tax were sent to the assessee on the same day and on that ground the notice demanding the tax was quashed. In that context after quashing the said notice the learned Judge observed that it would be open to the Commissioner to issue a fresh notice under the rules, amend the property tax books after giving notices to the petitioner to make a representation and thereafter invoke, if so advised, the powers under Sec.137-B for the realisation of the tax. This observation of the learned Judge in the said decision also makes it clear that after completion of the procedure prescribed under Schedule IV for enhancement of the tax the notice contemplated under Sec.137-B has necessarily to be issued before the tax could be collected.

5. In view of the fact that such a notice, as contemplated under Sec.137-B has not been issued in the present case, the respondent/Corporation cannot make the suit claim and the suit on that account has to necessarily fail. In the present case there is no dispute that such a notice under Sec.137-B has not been served on the defendant. The learned trial Judge himself says that the plaintiff has not proved that notice of demand was served on the defendant. But the learned Judge proceeds to say that it is not necessary to maintain the suit claim. That is not correct, as I have pointed out earlier.

6. I may also point out that in the evidence recorded I find that D.W.1 (defendant) has deposed

"டி மாண்டு நோட்டீஸ் ஒன்றும் வரவில்லை"

Further even P.W.1 has not asserted positively that the notice under Sec.137-B had been served on the owner. He only said that he could not say whether the said notice was served on the owner. He also had deposed that he did not know whether the procedure under Sec.137-B was followed at all.

7. In the light of the above evidence and in the light of the law as stated above, the suit has to necessarily fail and hence the suit is hereby dismissed. The appeal is allowed. In the circumstances of the case there will be no order as to costs throughout.

B.S. ------ *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Raju, J.*

W.P.No.2022 of 1984 *12th December, 1991.*

Subbu Reddiar and another ...*Petitioners*

v.

The District Revenue Officer, Tiruchirappalli and another ...*Respondents.*

Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (X of 1969), Sec.2(aa) - Cultivating tenant - Who is - Heir - Cultivating tenant's wife's sister's son, whether an heir to the tenant.

One Konda Moopan was a cultivating tenant under the petitioners who owned lands measuring about 2.17 acres in S.No.364(6) of Balakrishnapatti Village of Thuraiyur Taluk. The 2nd respondent is alleged to have been assisting the said Konda Moopan. After the death of Konda Moopan, the second respondent claiming to be a tenant in respect of 0.85 acre of petitioners' lands, moved the authorities under the Tamil Nadu Agricultural Lands

Record of Tenancy Rights Act, 1969 to have his name recorded as a tenant. The Tahsildar, Musiri rejected the application on 10.5.1982. The appeal filed before the Revenue Divisional Officer, Musiri also failed. Thereupon the 2nd respondent filed a revision under Sec.7 of the Act and the Revisional Authority (1st respondent) set aside the orders of the authorities below and directed registration of the name of the second respondent as tenant to the tenancy records relating to the land in question. The owner of the land filed a writ petition contending that the 1st respondent could not come under the definition of cultivating tenant under Sec.2(aa) of the Act and that he could not also claim the right on the ground that he was assisting and participating in the cultivation of the lands by Konda Moopan.

Held:- It could be seen from the provisions of Sec.2(aa) of the Act that even an heir of a deceased tenant could claim benefits only if the heir contributed his own physical labour or that of any member of his family in cultivation of suit lands and consequently it has to be established by anyone claiming to be an heir for claiming benefits of the Act that he is an heir and that he contributed his own physical labour or that of any member of the family in the cultivation of such lands. The mere fact that a person who cannot otherwise be classified as an heir was assisting the erstwhile tenant cannot confer him with any tenancy rights in his own right or as a successor in interest of the erstwhile tenant. At best such person can be a mere collaborator and even if the plea in that regard is established, it is to be seen that in *Sathu Konar v. Duraisami, (1967) 2 M.L.J. 473,* this Court has held that a mere collaborator, a person who renders assistance to a cultivating tenant would not, by himself by reason of such collaboration or assistance become a cultivating tenant himself. That apart, on the materials on record also, the Court does not find any positive evidence or substantive proof of such joint cultivation or collaboration. That apart, the claim of the second respondent has to fail on the simple ground that the second respondent cannot claim himself to be an heir of the deceased Konda Moopan. The first respondent committed an error in not properly adverting to this aspect, by merely stating in his order that the definition of cultivating tenant does not concern itself with any other class either Class I or Class II heir, little realising that he will not be an heir under either of these categories of heirs even, and that such consideration is necessary and vital before the claims of the second respondent can be countenanced as heir of the deceased Konda Moopan. A Division Bench of this Court has held in *Sri Annamalainathaswamy Devasthanam Anthanapettai by its Executive Officer v. Nagammal, 1978 T.L.N.J. 531,* that though the definition of cultivating tenant is an inclusive one and includes an heir of the person who is cultivating the land belonging to another, provides that both the person and his heir or of any member of the family should contribute physical labour in the cultivation of the lands. Consequently, the claim of the second respondent as an heir cannot be countenanced unless he can be shown to be one of the heirs for the purpose of law relating to succession. The question of heirship is to be always determined with reference to the personal law relating to succession of the parties claiming such benefit. In respect of Hindus non-testamentary law relating to succession is governed by the Hindu Succession Act, 1956. Sec.3(f) defines that an heir means any person, male or female, who is entitled to succeed to the property of an intestate under this Act. It is not the claim of anyone particularly of the second respondent that he was given any rights to succeed the deceased Konda Moopan by any testament and consequently the claim has to be considered in the light of the provisions contained under the Hindu Succession Act, 1956. A perusal of Sec.8 of the said Act with the Schedule to the Act would show that on the claimed relationship of the second respondent he cannot be considered to be an heir of either Class I or Class II and consequently, the claim of the second respondent could not be recognised as an heir of the deceased cultivating tenant. The order of the first respondent is liable, to be set aside for the reasons stated above alone. *[Paras 5, 6 and 7]*

Cases referred to:

Sri Annamalainathaswamy Devasthanam Anthanapettai by its Executive Officer v. Nagammal, 1978 T.L.N.J. 531; S.Gomathy Ammal and another v. Sivakasi Hindu Nadars Girls' School Committee through its Secretary, 1977 T.L.N.J. 374; A.Kuppuswamy v. Government of Tamil Nadu, 90 L.W. 13.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the

High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent relating to his order R.Dis.No.189131 of 1982, dated 7.12.1983 and quash the same.

T.V.Ramanujam, for Petitioners.

S.T.S.Morthy, Government Advocate, for Respondent No.1.

M.Sathyanarayanan, for Respondent No.2.

The Court made the following

ORDER:- The above writ petition has been filed for a writ of *certiorari* to call for the records and quash the proceedings of the first respondent in R.Dis.No.189131 of 1982, dated 7.12.1983.

2. The petitioners, in the affidavit filed in support of the writ petition, claim that they are owners of the land measuring about 2.17 acres in S.No.364(6) of Balakrishnapatti Village of Thuraiyur Taluk, Tiruchirappalli District, and that the second respondent claiming himself to be a tenant in respect of an extent of 0.85 acre out of the said 2.17 acres moved the authorities under the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act, 1969 (hereinafter referred to as 'the act') to have his name recorded as a tenant. The Tahsildar, Musiri, before whom the application was filed, is said to have rejected the application on 10.5.1982. The appeal filed before the Revenue Divisional Officer, Musiri also appears to have been rejected by the Appellant Authority on 18.10.1982. Thereupon, the second respondent filed a revision under Sec.7 of the Act and the revisional authority, by the impugned proceedings dated 7.12.1983 set aside the orders of the authorities below and directed the registration of the name of the second respondent as tenant in the tenancy record relating to the land in question. Aggrieved, the owners of the land have filed the above writ petition.

3. Mr.T.V.Ramanujam, learned counsel appearing for the petitioners, contended that the concurrent orders of the Original and appellate authority did not call for any interference at all and that it was wrong on the part of the first respondent, revisional authority to have interfered with such concurrent orders of the authorities below on pure questions of fact. The learned counsel also contended that the second respondent cannot come under the definition of cultivating tenant as defined under Sec.2(aa) of the Tamil Nadu Cultivating Tenants Protection Act, 1955, the definition of which gets attracted for consideration of the claim of the tenant, having regard to the provisions contained in sec.2(8)(i) of the Record of Tenancy Act. To sustain the said plea, the learned counsel contended that the second respondent, can neither claim the right of a tenant on the ground that he is the son of the sister of late Konda Mooppan's wife who was the tenant, nor for the reason that he was himself assisting and participating in the cultivation of the lands with the deceased Konda Mooppan.

4. Mr.M.Sathyanarayanan, learned counsel for the second respondent, vehemently contended that the order of the revisional authority is well justified on the materials and for the reasons relied upon by the said authority and that this Court exercising jurisdiction under Art.226 of the Constitution of India may not be pleased to interfere with the order of the first respondent. The revisional authority, as could be seen from the order under challenge, has chosen to give relief to the second respondent on the ground that the petitioners have not proved personal cultivation by sufficient records, that the fact that the second respondent failed to produce records like manure cards or rent receipts does not militate against the claim of the tenant and that the claim of the second respondent as a tenant has to be recognised on the ground that the second respondent was jointly looking after the cultivation of the lands in question and was also said to be living as one family when Konda Mooppan was alive. The revisional Authority was also of the view that it is not stated in the definition of the provision contained in Sec.2(aa) of the Tamil Nadu Cultivating Tenants Protection Act, that an heir should be either of Class I or Class II.

5. I have carefully considered the submissions of the learned counsel appearing on either side. In my view, the order of revisional authority suffers from serious infirmities, in that the first respondent has wholly misconstrued the relevant provisions of law and also exceeded its limits of consideration while exercising powers as revisional authority under Sec.7 of the Record of Tenancy Act. Sec.2(aa) of the Tamil Nadu Cultivating Tenants Protection Act, defines a "cultivating tenant" as hereunder:

"2. *Definitions*:- In this Act, unless the context otherwise requires-(aa) 'Cultivating tenant'-

(i) Means a person who contributes his own physical labour or that of any member of his

family in the cultivation of any land belonging to another, under a tenancy agreement express or implied; and

(ii) Included—

(a) any such person who continues in possession of the land after the determination of the tenancy agreement;

(b) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land;

(c) a sub-tenant if he contributes his own physical labour or that of any member of his family in the cultivation of such land; or

(d) any such sub-tenant who continues in possession of the land notwithstanding that the person who sublet the land to such sub-tenant ceases to have the right to possession of such land; but

(iii) does not include a mere intermediary or his heir."

It could be seen from the above provisions, that even an heir of a deceased tenant could claim benefits, only if the heir contributes his own physical labour or that of any member of his family in the cultivation of such lands and consequently it has to be established by any one claiming to be an heir for claiming benefits of the Act that he is an heir and that he contributed his own physical labour or that of any member of the family in the cultivation of such lands. The mere fact that a person who cannot otherwise be classified as an heir, was assisting the erstwhile tenant cannot confer him with any tenancy rights in his own right or as a successor in interest of the erstwhile tenant. At best, such person can be a mere collaborator and even if the plea in that regard is established it is to be seen that in *Sathu Konar v. Duraisami, (1967)2 M.L.J. 473,* this Court has held that a mere collaborator, a person who renders assistance to a cultivating tenant, would not, by himself, by reason of such collaboration or assistance, become a cultivating tenant himself. That apart on the materials on record also, I do not find any positive evidence or substantive proof of such joint cultivation or collaboration.

6. That apart, the claim of the second respondent has to fail on the simple ground that the second respondent cannot claim himself to be an heir of the deceased Konda Mooppan. The first respondent committed an error in not properly adverting to this aspect, by merely stating in his order that the definition of cultivating tenant does not concern itself with any other class either class I or class II heir, little realising that he will not be an heir under either of those categories of heirs even, and that such consideration is necessary and vital before the claims of the second respondent can be countenanced as an heir of the deceased Konda Mooppan. As a matter of fact, a Division Bench of this Court in *Sri Annamalainathaswamy Devasthanam Anthanapettai by its Executive Officer v. Nagammal, 1978 T.L.N.J. 531,* had occasion to advert to this aspect of the matter and it was held that though the definition of cultivating tenant is an inclusive one and includes an heir of the person who is cultivating the land belonging to another, it provides that both the person and his heir or of any member of the family should contribute physical labour in the cultivation of the lands. In *S.Gomathy Ammal and another v. Sivakasi Hindu Nadars Girls' School Committee through its Secretary, 1977 T.L.N.J. 374,* a learned single Judge of this court, while construing the provision of Sec.2(aa) of the Tamil Nadu Cultivating Tenants Protection Act, held in the context of a claim from an illegitimate son as to whether he can be recognised as an heir for purposes of claiming benefit as a cultivating tenant, that illegitimate children cannot be considered to be related to legitimate kinship and as such would not be eligible to claim tenancy rights as an heir. In coming to such a conclusion, the learned Judge has placed reliance upon the provisions of Hindu Succession Act to ascertain the position relating to the heirs who can be taken into account even for the purposes of the Cultivating Tenant's Protection Act. Mr.Ramanujam invited my attention to a decision of another learned single Judge in *A.Kuppuswamy v. Government of Tamil Nadu, 90 L.W. 13,* where the word 'heir' employed in the Tamil Nadu Village Offices Services Rules, 1970 was construed with reference to the provision of Sec.8 of the Hindu Succession Act.

7. Consequently the claim of the second respondent as an heir cannot be countenanced, unless he can be shown to be one of the heirs for the purpose of law relating to succession. The question of heirship is to be always determined with reference to the personal law relating to succession of the parties claiming such benefits. In respect of Hindus non-testament any law relating to succession is governed by the Hindu Succession Act, 1956,

Sec.3(f) defines that an heir means any person, male or female, who is entitled to succeed to the property of an intestate under this Act. It is not the claim of any one particularly of the second respondent that he was given any rights to succeed the deceased Konda Mooppan by any testament and consequently the claim has to be considered in the light of the provisions contained under the Hindu Succession Act, 1956. A perusal of Sec.8 of the said Act, with the Schedule to the Act would go to show that on the claimed relationship of the second respondent, he cannot be considered to be an heir of either class I or Class II and consequently the claim of the second respondent could not be recognised as an heir of the deceased cultivating tenant. The order of the first respondent is liable to be set aside for the reasons stated above, alone. That apart, I am of the view that the first respondent without proper or due application of mind, has chosen to interfere on mere surmises with the well considered findings of the original and appellate authority that the second respondent was not entitled to claim benefits as a tenant so as to entitle him to be recorded as a tenant in respect of the property claimed by him under the provisions of the Record of Tenancy Act. For all the reasons stated above, the order of the first respondent is hereby set aside and the writ petition shall stand allowed as prayed for, but in the circumstances, there shall be no order as to costs.

B.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

Appeal Against T.M.A.No.5 of 1990

13th September, 1991.

Toshniwal Instruments, Madras represented by Partner Mr.K.M.Toshniwal ...*Appellant*

v.

Toshniwal Brothers Private Limited, Bombay and another ...*Respondents.*

(A) Trade and Merchandise Marks Act (XLIII of 1958), Sec.46 - 'Person aggrieved' - Person applying for registration of a trademark - Opposed by registered proprietors who owned an identical trade mark - Person if person aggrieved on the ground that scope of use of the trade mark is limited and exclusive benefit affected - Person not showing that because of existence of impugned trade mark, he could not do a thing lawfully which he could otherwise do - Fact that person will not be able to file suit for infringement, if can make person a person aggrieved.

(B) Trade and Merchandise Marks Act (XLIII of 1958), Sec.46 (1)(a) - Trade mark registered - Person contending that it was not for bona fide use - Onus lies on him to show for what other purpose, registration was done.

(C) Trade and Merchandise Marks Act (XLIII of 1958), Sec.46 (1)(b) - Trade Mark registered in names of nine partners - Changes in partnership - Only two of the original partners remaining - Use of trademark by the two, if can be said to amount to non-user.

(D) Trade and Merchandise Marks Act (XLIII of 1958), Sec.109 - Application for rectification of Trade mark already registered - Assistant Registrar allowing application - Appeal against order - If can be maintained by only one of the partners while the registration was in the names of nine partners.

An application for rectification of a Registered Trade Mark was filed by the 1st respondent against the appellant. The applicant, a leading company are engaged as sole selling agents in the sale and distribution of Scientific and Technical Instruments. In 1960, they adopted the Word 'Toshniwal' as a trade mark. In 1961, they sought for registration of this trade mark but due to some difficulty in obtaining some particulars, they did not pursue the matter. In 1964, the appellant company consisting of nine partners sought and got the mark 'Toshniwal' registered in their names. On 30.12.1977, the applicants advertised in the Trade Marks Journal. It was opposed by the appellant. That objection was rejected by an order of the Deputy Registrar of Trade Marks and the application of the 1st respondent company was being registered. The appellant filed the appeal before the High Court and contended, that the 1st respondent, did not say how they were a 'person aggrieved' to file an application under Sec.46 of the Act, that they did not show how the registration was not made for *bona fide* use or that there was non-user. The 1st respondent on the other hand, contended that the registration being in the names of nine partners,

the appeal by one only of the partners was not maintainable.

Held:- In the application, no reason has been given as to how the applicant is a person aggrieved. But some reason has been given in the 'statement of case'. This reason is that when the applicant applied for registration of its trade mark, it was opposed by the registered proprietors who owned an identical trade mark and because of the existence of the trade mark of the registered proprietors, the scope of the use of the applicant's trade mark is limited and the applicant's exclusive benefit of the trade mark is affected. From this, certainly, by no stretch of imagination one can say that the applicant is a person aggrieved. How can the applicant who got his trade mark registered in 1984 say that his application for registration was opposed to by the registered proprietors whose trade mark was registered in 1964 and thereby he is aggrieved of the existence of the trade mark of the registered proprietors? The trade mark the applicant wanted to be registered being identical with the trade mark of the registered proprietors which was already existing, it is quite natural that they would oppose the application for registration. Therefore, there is absolutely nothing wrong in it. The applicants must show that because of the existence of the impugned trade mark, it could not do a thing lawfully which it could otherwise do. Nothing is shown which the applicants could not do because of the impugned trade mark which they could otherwise do lawfully. Unless there is an infringement, the applicant is not entitled to file a suit. Merely saying that the applicant will not be able to file a suit for infringement will not make a person aggrieved. *[Para 8]*

When a trade mark is registered, the presumption would be that it is for use as such. If any one contends that the registration was not *bona fide* to use that trade mark, then he must state as to for what other purpose the registration was made. *[Para 8]*

There is nothing in Sec.46 or anywhere in the Act to show that the use of the trade mark by only two of the nine partners in whose name it was registered, along with some strangers amount to non-user of the trade mark. In fact, a careful reading of Sec.46 would show that there should not be use of the trade mark by any proprietor which would mean that user by any one of the partners in whose name the trade mark was registered would be sufficient not to attract Sec.46. Therefore, there is absolutely no room for this ground *i.e.*, the ground under clause (b). *[Para 9]*

It is not in dispute that the nine persons were trading as partners in the firm names 'Toshniwal Instruments', Madras. K.M.Toshniwal who has filed the appeal as representing the firm is one of the nine persons in whose name the trade mark has been registered. The trade mark having been registered in the joint names of nine persons, any one of these nine persons can act representing himself and the others. There is no legal impediment to this. It is, however, said that there are only two partners in the firm out of the original nine partners and the others have either expired or retired. In that case, the joint registration of the trade mark as regards these two persons continues. The order of the Assistant Registrar is against these two persons also. Therefore, being aggrieved certainly they could come on appeal. Hence there is absolutely no point in saying that the appeal is not maintainable. It is not the case of the applicant that any of the nine persons claimed to use the trade mark independently. If some of the joint owners are dead or retired, the remaining joint owners can use the trade mark: jointly and *vis-a-vis* them the aggrieved trade mark does not become *non-est*. *[Para 13]*

Cases referred to:

Powell v. Birmingham Vinegar Brewery Company, (1884)11 R.P.C. 4 (H.L.).

Appeal against the order of the Assistant Registrar of Trade Marks, Shastri Bhavan, Madras-6, dated 22.1.1990 and made in Rectification No.M.A.S.No.284/221473/Class 9.

Aravind P.Datar, for Appellant.

U.N.R. Rao, Senior Counsel, for *C.Daniel,* for Respondent No.1.

The Court made the following

ORDER:- This appeal is directed under Sec.109 of the Trade and Merchandise Marks Act, 1958 against an order passed by the Assistant Registrar of Trade Marks, Madras in an application filed under Secs.46 and 56 of the Act for rectification of a Registered Trade Mark. The rectification prayed for has been ordered by the Assistant Registrar.

2. The application for rectification was filed by "Toshniwal Brothers Private Limited" and it was filed against "Toshniwal Instruments, Madras". The rectification sought for was ordered by the Assistant Registrar. As against that Toshniwal

Instruments, Madras have filed this appeal. They will he hereinafter called the "registered proprietors". The respondent-Toshniwal Brothers Private Limited will be hereinafter called the "applicants".

3. The case of the applicants is that they are a leading company incorporated under the Indian Companies Act, 1913 and are engaged since 1948 as sole selling agents in the sale and distribution of Scientific and Technical Instruments and apparatus of various kinds, indigenously manufactured both by associated and non-associated manufacturing firms of the applicants as well as imported from abroad. In order to distinguish their goods in their trade they adopted in 1960 the word "TOSHNIWAL" as a trade mark. Due to the extensive use of the said trade mark 'Toshniwal' from 1961 this trade mark has become distinctive of their goods. In 1960 the applicants sought for registration of this trade mark but due to the reason that some particulars required in the Registrar's office could not be furnished that application was not pursued. Then a fresh application was filed on 30.12.1977. When that application was advertised in the Trade Mark Journal it was opposed by M/s."Toshniwal Instruments, Madras". The opposition was on the ground that the trade mark "TOSHNIWAL" has been registered in their name under Registration No.221473 in class 9 in respect of the same goods *i.e.*, Scientific and Technical Instruments and Apparatus. That objection was rejected by an order of the Deputy Registrar of Trade Marks, Bombay dated 29.2.1984 and the application of the applicants is being registered.

4. Since it was on the basis of the registered trade mark No.221473 the applicant's application for registration of their trade mark was opposed, and since the said trade mark No.221473 limits and is in derogation of the exclusive right of the applicants in the property of the trade mark 'Toshniwal' the applicants are aggrieved by the existence of the Trade Mark No.221473 of "Toshniwal Instruments, Madras". Therefore they are interested and are entitled to apply for the removal of the trade mark registered under No.221473. The applicants in their application and the statement of case would further state, as reasons for rectification, that the registered proprietors (Toshniwal Instruments, Madras) got the registration of the trade Mark fraudulently by making false and misleading representations as to the use and proprietorship of the trade mark. Then stating that considering the exclusive use of the trade mark "toshniwal" by the applicants and the reputation acquired by them in respect thereof the registration of the impugned trade mark was wrongful, and also just reproducing the words of Sec.46(1)(a) and 46(1)(a) the applicants have stated that the impugned trade mark is contrary to Secs.11, 32, 46(1)(a) and (1)(b) and 56 and therefore, it is liable to be removed. On these grounds the applicants have prayed for removal of the trade mark in question from the register.

5. This was opposed by the registered proprietors on several grounds. They contended that the applicants have ceased to carry on business from 1.1.1981 and as such they are not aggrieved persons within the meaning of Secs.46,47 and 56 of the Act. The trade mark of the registered proprietors has been registered more than seven years ago and hence that registration cannot be questioned now. The applicants have not satisfied any of the conditions set out in Sec.32 for enabling them to seek removal of registration under that Section. The registered proprietors have been carrying on their business since 1961 and the applicants were selling the goods manufactured by them till 1979. The application has been filed on the strength of the concurrent registration granted to the applicants under Sec.12(3) of the Act, and against that grant by the Registrar the Registered proprietors have gone on appeal to the Bombay High Court and that appeal is pending. They have denied that their registration of the trade mark was obtained by fraud. They have also denied that the registration was obtained without the intention of using it and it was not used, and would submit that their trade mark 'Toshniwal' has been used continuously by them till date from the date of registration. The applicants conceded this position before the Registrar and it was only on this basis they were granted concurrent registration under Sec.12(3). They further denied that their registration was contrary to Sec.11 of the Act. On these contentions the registered proprietors have prayed for dismissal of the application.

6. The Assistant Registrar who heard the application, on consideration of the pleadings and the evidence adduced, held that the applicants are persons aggrieved and that the applicants have proved that the trade mark of the registered

proprietors has been registered without any *bona fide* intention on the part of them for registration that it would be used in relation to their goods, and there has in fact been no *bona fide* use of the trade mark in relation to the goods by the registered proprietors up to the date of one month before the application, and that for a continuous period of five years up to the date of one month before the date of application there was no *bona fide* use of the trade mark in relation to the goods of the registered proprietors, and therefore the registered trade mark is liable to be taken off the register under Sec.46(1)(a) and (b). He further held that the trade mark of the registered proprietors which is identical with the applicant's trade mark is likely to deceive or cause confusion and therefore the registration of the trade mark of the registered proprietors contravenes Sec.11(a) of the Act and therefore the said trade mark is liable to be expunged under Sec.56(2) of the Act. The Assistant Registrar however rejected the applicant's claim that the impugned registration has been obtained fraudulently by making false and misleading representations. Ultimately the Assistant Registrar directed the trade mark No.221473 in clause 9 registered in the name of the registered proprietor to be removed from the register. Hence this appeal by the registered proprietors.

7. The appellant assails every finding of the Assistant Registrar which are against it as against law and contrary to the evidence adduced. As seen from the application for rectification the application has been filed under Secs.46(4) and 56, Rule 94. There is no Sec.46(4) in the Act since Sec.46 has only 3 sub-sections. Sec.46 is under the heading "Removal from register and imposition of limitations on ground of non-use", and Sec.56 is under the heading "power to cancel or vary registration and to rectify the register." The application as well as the statement of case filed by the applicant do not clearly indicate under what grounds the applicant seeks the relief under Sec.46 and on what grounds under Sec.56.

8. We will deal with Sec.46 first. As per this section, on application by any person aggrieved, a registered trade mark may be taken off the register on any of the grounds mentioned in clauses (a) and (b) of Sub-sec.(1). Therefore the pre-requisite for an application under this section is that the applicant must be a person aggrieved.

Mr.Datar, learned counsel for the appellant - registered proprietors submits that there is nothing to show that the applicant is a person aggrieved but the Assistant Registrar has held that the applicant is a person aggrieved on absolutely untenable grounds. Here it would be useful to remember that the trade mark of the registered proprietors has been registered in the year 1964 whereas the applicant has submitted its application for registration of its trade mark in 1977 and that was registered in 1984. Thus the registered proprietors' trade mark has been registered much earlier *i.e.*, about 20 years earlier than the registration of the applicant's trade mark.

In the application no reason has been given as to how the applicant is a person aggrieved. But some reason has been given in the 'statement of case'. This reason is that when the applicant applied for registration of its trade mark it was opposed by the registered proprietors who owned an identical trade mark, and because of the existence of the trade mark of the registered proprietors the scope of the use of the applicant's trade mark is limited and the applicant's exclusive benefit of the trade mark is affected. From this certainly by no stretch of imagination one can say that the applicant is a person aggrieved.

How can the applicant who got his trade mark registered in 1984 say that his application for registration was objected to by the registered proprietors whose trade mark was registered in 1964 and thereby he is aggrieved of the existence of the trade mark of the registered proprietors. The trade mark the applicant wanted to be registered being identical with the trade mark of the registered proprietors which was already existing, it is quite natural they would oppose the application for registration. Therefore there is absolutely nothing wrong in it. The trade mark of the registered proprietors having been registered much earlier to the registration of the applicant's, if at all one can complain of the similarity, it can be only by the applicant. Therefore Mr.Datar is absolutely right when he contended that there is no tenable ground to show that the applicant is a person aggrieved.

In *Powell v. Birmingham Vinegar Brewery Company, (1884) 11 R.P.C. 4 (H.L.)*, Lord Herschell has held:

"Wherever it can be shown, as here, that the applicant is in the same trade as the person

> who has registered the trade mark, and wherever the trade mark, if remaining on the Register, would, or might, limit the legal rights of the applicant, so that by reason of the existence of the entry on the Register he could not lawfully do that which, but for the existence lawfully do, it appears to me he has a *locus standi* to be heard as a person aggrieved."

The applicants must show that because of the existence of the impugned trade mark it could not do a thing lawfully which it could otherwise do. Nothing is shown which the applicants could not do because of the impugned trade mark which they could otherwise do lawfully.

In Narayana's "Trade Marks and Passing off" third edition, at page 394, it is stated,

> "The mere fact that a man is engaged in the same trade is not sufficient to mark him a person aggrieved. In order to show that he is a person aggrieved, he must establish that in some possible way, possible in a practical sense and not merely in a fantastic view, he may be damaged or injured if the trade mark is allowed to stand."

There is absolutely no such thing shown in this case.

Mr.U.N.R.Rao, learned counsel for the respondent-applicant would however contend that the applicant will not be able to file a suit for infringement against the appellant so long as the trade mark is not rectified and hence the applicant is an aggrieved person. First of all there is no such plea raised in the application or the statement of case. It is indeed a fantastic plea. Unless there is an infringement the applicant is not entitled to file a suit. Merely saying that the applicant will not be able to file a suit for infringement will not make a person aggrieved. Thus I find the applicant has not proved that it is a person aggrieved.

On behalf of the registered proprietors it is also contended that the applicant cannot be said to be a person aggrieved because in 1981 the applicant has transferred its business to four new private limited companies and from then on it has ceased to carry on any business, and has become dormant and therefore there is no question of the applicant being a person aggrieved. But I do not think there is any merit in this contention. It may be the applicant company transferred its business to four other companies and from then on it has not transacted any business. But it has not become defunct, and is still alive. Therefore at any moment it can revive the business of its own. The said four new companies are the applicant company's own newly floated companies and not privately owned companies to which the applicant has sold away all its rights including the right over trade mark. Hence rightly the Assistant Registrar did not accept this contention of the registered proprietors raised before him.

However, for the afore-mentioned reasons I hold that it has not been established by the applicant that it is a person aggrieved coming within the meaning of Sec.46.

9. Now we will see whether even if the applicant is a person aggrieved, any of the grounds under clauses (a) and (b) in Sec.46(1) has been proved. As regards clause(a) it must be proved, as far as the present case is concerned, first that the trade mark was registered without any *bona fide* intention on the part of the registered proprietors that it should be used in relation to those goods in respect of which it was registered; and secondly that in fact there has been no *bona fide* use of the trade mark in relation to those goods by the registered proprietors for the time being up to the date of one month before the date of the application for rectification.

As regards the first part, the Assistant Registrar has held that there was no *bona fide* intention. When a trade mark is registered the presumption would be that it is for use as such. If any one contends that the registration was not *bona fide* to use that trade mark then he must state as to for what other purpose the registration was done. There is absolutely nothing stated regarding this in the pleadings *i.e.*, either in the application or in the statement of case. Any one can say many things in his affidavit, but that would be useless unless there is a pleading first. It is the case of the appellant-registered proprietors that they have been using the trade mark before and after it was registered. The Assistant Registrar, to arrive at a finding that there was no intention to use the trade mark when it was registered and it was not used, seems to have relied on an affidavit of one G.S.Toshniwal. But this person himself was one of the signatories as a partner in the application for registration of the registered proprietor's trade mark.

In his affidavit he has not stated that there was no intention to use it by the registered proprietors

when it was registered, and he has only stated that subsequent to the registration it was not used. On behalf of the registered proprietors one K.M.Toshniwal has filed an affidavit in reply to the affidavit of G.S.Toshniwal wherein he has stated that even from 1959 they have been using the trade mark in respect of their goods *viz.*, scientific and technical instruments and they continue to use the trade mark throughout after it was registered. In support of his affidavit he has also filed sample invoices dated 27.6.1984, 25.3.1985 and 20.6.1986, purchase invoices of the dates 8.8.1981 15.1.1983, 19.6.1984, 5.11.1984 and 16.1.1986. He has also filed turnover statement for the years 1981-82 to 1985-86. He has also filed Auditors' certificate dated 19.11.1986 stating that they have been auditing the accounts of the appellants for the last 20 years. He has further filed sample advertisements, instruction manual etc. With all these can it be ever said that the registered proprietors had no intention to use the trade mark and they have not used it at all. This affidavit of K.M.Toshniwal and the said records filed by him have not been taken note of by the Assistant Registrar. Considering all these I find absolutely no truth in the case of the applicants that the trade mark was registered without any *bona fide* intention on the part of the registered proprietors that it should be used in relation to their goods and that it has never been used. Thus the applicant has not made out a case under clause (a) of Sec.46(1).

Coming to Clause (b) of Sec.46(1), no particulars as to from which date there was non-user of the trade mark by the registered proprietors has been stated, and merely the words of the section has been re-stated just omitting some of them. We have seen above that the trade mark has been registered as early as 1964, and from then on the registered proprietors have been making use of it up to date.

Before the Assistant Registrar the learned counsel for the applicants seems to have contended that the trade mark was registered in the names of 9 partners and in the names of all these partners the trade mark continues, but there has been many changes in the partnership and now there are only two original partners and therefore it cannot be said that the trade mark was being used by the persons in whose name it was registered and thus there is non-user. In this regard too there is no pleadings. There is nothing in Sec.46 or anywhere in the Act to show that the use of the trade mark by only two of the nine partners in whose name it was registered, along with some strangers, amounts to non-user of the trade mark. In fact a careful reading of Sec.46 would show there should not be use of the trade mark by *any proprietor* which would mean that user by anyone of the partners in whose name the trade mark was registered would be sufficient not to attract Sec.46. Therefore there is absolutely no room for this ground *i.e.*, the ground under clause (b). It is therefore manifest that the applicant has not made out a case for removal of the trade mark under Sec.46.

10. Next coming to Sec.56, this Section, as stated above, deals with the power to cancel or vary registration and rectify the register. In this section also there are two grounds contained in Sub-secs.(1) and (2) that give power to the High Court or to the registrar to cancel or vary registration and to rectify the register. As per Sub-sec.(1) the ground is contravention or failure to observe a condition entered on the register in relation to the trade mark. It is not mentioned anywhere by the applicants as to what condition entered on the register in relation to the trade mark had been contravened or failed to observe. Therefore this Sub-sec.(1) is not relevant to the case.

To attract Sub-sec.(2) an applicant must be a person aggrieved by the absence or omission from the register of any entry or by any entry made in the register without sufficient cause, or by any entry wrongly remaining in the register or by any error or defect in entry in the register. Here too no mention of anything of which the applicant is aggrieved has been mentioned anywhere either in the application or in the statement of case. Apart from just mentioning Sec.56 nothing else has been stated in the pleadings.

11. It is now argued that the impugned trade mark contravenes Sec.11 of the Act and therefore it comes within the purview of Sec.56(2). Sec.11 prohibits registration of certain trade marks. As to what are those trade marks it has been enumerated under Clauses (a), (b), (c), (d) and (e) in the Section. It is not stated under which clause the impugned trade mark comes. It appears it has been argued before the Assistant Registrar that the impugned trade mark comes under Clause (a) which deals with the use of a trade mark which would be likely to deceive or cause confusion. But

there is no such plea at all. It is pleaded that the registration of the impugned trade mark has been obtained by fraud by making false and misleading representation. This may come under Clause(e). But rightly the Assistant Registrar has held that no fraud has been proved. Against this finding no argument was advanced before me by the first respondent applicant. Thus I find that no ground under Sec.56 also has been established by the applicants.

12. Mr.Datar would submit that as the Assistant Registrar has held on the affidavit filed by G.S.Toshniwal that the applicants have acquiesced in the use of the trade mark by the registered proprietors and it is only after 20 years the rectification application has been filed and no reason has been given either in the pleadings or evidence as to why after acquiescence for such a long time of 20 years the application is filed, the application is liable to be dismissed.

Mr.U.N.R.Rao, learned counsel for the respondent-applicant would however contend that the applicant's application for registration was filed in 1977 and it was registered in 1984 and only thereafter the applicant could file the rectification application without any hindrance. This contention is without any merit because it is not the law that only a registered proprietor can file a rectification application. Considering the entire circumstances of the case it appears to me that the applicant wished to have the removal or cancellation of the trade mark of the registered proprietor somehow so that they can become the sole proprietors of the trade mark which is possibly a reputed one. In this connection it may be relevant to note that Mr.G.S.Toshniwal is one of the partners of the firm of the registered proprietors and now he is one of the partners of the applicant's firm.

13. Mr.U.N.R.Rao, learned counsel for the respondent-applicant raised a point as regards the maintainability of the appeal itself. According to the learned counsel the Assistant Registrar ordered rectification of the trade mark No.221473 registered in the names of nine persons trading as "Toshniwal Instruments, Madras" but the appeal has been filed by 'Toshniwal Instruments, Madras' represented by partner K.M.Toshniwal, and this does not amount to filing an appeal by the said nine persons and therefore the appeal is incompetent. He further submits that the trade mark has been registered in the joint names of nine persons and therefore appeal could be filed jointly by the said nine persons and not by one person. But in my view this submission is devoid of any merit. It is not in dispute that the nine persons were trading as partners in the firm names "Toshniwal Instruments, Madras". K.M.Toshniwal, who has filed the appeal as representing the firm, is one of the nine persons in whose name the trade mark has been registered. The trade mark having been registered in the joint names of nine persons anyone of those nine persons can act representing himself and others. There is no legal impediment to this. It is however said that there are only two partners in the firm out of the original nine partners and others have either expired or retired. In that case the joint registration of the trade mark as regards these two persons continues. The order of the Assistant Registrar is against these two persons also. Therefore being aggrieved certainly they could come on appeal. Hence there is absolutely no point in saying that the appeal is not maintainable. In this connection for the applicant Sec.24 of the Act was read. There is nothing in it that would support the contention of the learned counsel for the applicants. As stated above, the trade mark has been registered in the names of nine persons as joint proprietors, and it is not the case of the applicants that any of them claimed to use the trade mark independently. If some of the joint owners are dead or retired the remaining joint owners can use the trade mark jointly and vis-a-vis them the registered trade mark does not become *non-est*. Therefore the arguments regarding the maintainability of the appeal has to be rejected.

14. For the above mentioned reasons the order of the Assistant Registrar granting the rectification of the trade mark in question cannot be sustained. The result is, the appeal is allowed, the order of the Assistant Registrar is set aside and the rectification application is dismissed. There will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Janarthanam, J.*

A.A.O.No.166 of 1985 *9th December, 1991.*

P.L.V.Giri *...Appellant*

v.

A.Subramaniam and another *...Respondents.*

(A) Stare decisis - Earlier judgment of Bench of Three Judges - should be preferred to latter judgment of Bench of two Judges.

On the principle of *stare decisis*, it goes without saying, the latter pronouncements being that of a smaller Bench consisting of two learned Judges of the Supreme Court will have to give way to the earlier pronouncement of the larger Bench of three learned Judges of the apex Court. *[Para 21]*

(B) Civil Procedure Code (V of 1908), O.21, Rules 64, 66 and 90 - Misdescription of property in sale proclamation - Bringing more extent of property than is required to sale for satisfying decree - Existence of material irregularity or fraud in publishing or conducting sale - If sale is vitiated - Substantial injury to judgment-debtor, if necessary to be proved - Judgment-debtor, not raising objection during the course of execution proceedings - If can raise such objection after the sale.

The so called misdescription of the property as well as bringing more extent of property than what is required for purposes of satisfying the decree, to say, offending respectively Rules 64 and 66 of O.21, C.P.C. cannot at all be construed as vitiating or nullifying circumstances rendering the sale itself invalid and if at all such factors can be termed as irregularities which would be taken into consideration in an application filed under O.21, Rule 90, C.P.C. on the face of the decision of the Supreme Court in *Dhirendra Nath v, Sudhir Chandra, A.I.R. 1964 S.C. 1300.* For Rule 90 of O.21, C.P.C. to come into operation, mere existence of material irregularity or fraud in publishing on conducting the sale is not sufficient to set aside the sale, but what is further necessary is that such irregularity or fraud has caused substantial injury to the judgment-debtor. To put it otherwise, there must be nexus between material irregularity or fraud and the substantial injury suffered thereby. Even assuming for argument's sake that there was existence of material irregularity or fraud in the impugned sale as contended by the judgment-debtor since the judgment-debtor had not taken any such objection at any point of time during the course of elongated execution proceedings which was pending from 1974 onwards, he cannot be allowed to raise such an objection after the impugned sale on the face of the express and explicit provisions adumbrated in sub-rule (3) of Rule 90 of O.21, C.P.C. which is based on the salutary principle that waiver of the necessity for fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the proclamation. *[Paras 29, 36, and 38]*

(C) Civil Procedure Code (V of 1908), O.21, Rule 69(2) - Sale originally notified to take place on 17.8.1983 - Sale actually held on 28.9.1983 beyond thirty days of the date of sale originally fixed - In between adjournment of sale on 17.8.1983 at instance of judgment-debtor - Sale on 14.9.1983 and 21.9.1983 adjourned as presiding officer was on leave - Continuous spell of 30 days in between the adjournments of sale on days when Presiding Officer was on leave not expiring, consent of judgment-debtor for fresh proclamation held not necessary - Sale, held, not vitiated since substantial injury to judgment-debtor not shown.

In the case on hand, the sale was originally notified to take place on 17.8.1983. But the sale was actually held on 28.9.1983. In between those two dates, there was one adjournment of sale on 17.8.1983 at the instance of the judgment-debtor, besides two other adjournments of sale namely on 14.9.1983 and 21.9.1983 as a result of the Presiding Officer of the Court availing of leave. Since the continuous spell of the period of thirty days, in between the adjournments of sale on two occasions, as a result of the presiding officer availing of leave immediately preceding the date on which the impugned sale took place did not expire, there was no need to obtain the consent of the judgment-debtor for a fresh proclamation of sale to be put up and in such state of affairs, it goes without saying that there was any violation or refraction of Sub-rule (2) of Rule 69 of O.21, C.P.C. Inasmuch as the sale originally scheduled to take place as per the proclamation got adjourned at the instance of the judgment-debtor to another date which was very well within thirty days from the date of sale originally fixed. Assuming the said sub-rule has been

violated or refracted, even then such violation cannot at all be construed as a factor vitiating the sale and if at all, the same can be construed as an irregularity, which can be raised as a ground in an application under O.21, Rule 90, C.P.C. if so desired. As already stated, by reason of mere irregularity, without substantial injury having been caused to the judgment debtor as a result of such an irregularity, a sale cannot be set aside and there being dearth of materials available on record as respects that aspect of the matter in the instant case, the impugned sale has to be allowed to remain as it is. *[Paras 41 and 42]*

Cases referred to:

Dhirendra Nath v. Sudhir Chandra (1965)2 S.C.J. 219: (1965)6 S.C.R. 1001: A.I.R. 1964 S.C. 1300; T.P.S.Reddi v. Padmavathamma, A.I.R. 1977 S.C. 1789: (1977)3 S.C.C. 337: (1977)2 S.C.J. 293; Ambati Narasayya v. M.Subba Rao and another, (1991)1 L.W. 602; M/s.Kayjay Industries v Asnew Drums, A.I.R. 1974 S.C. 1331; Satyanarayana Soni v. State of Andhra Pradesh, (1987)2 Cur.C.C. 118; His Holiness Mahant Chathondosji Varu (Died) His Holiness Dioyadassan Rajendra Ramdasjee Varu v. The Board of Trustees, Tirumalai, A.I.R. 1965 A.P. 334; Radhey Shyam v. Shyam Bihari Singh, A.I.R. 1971 S.C. 2337.

Appeal against the order of the Subordinate Judge, Poonamallee, dated 16.2.1985 and made in E.A.No.10 of 1984 in E.P.No.10 of 1984 in O.S.No.145 of 1972.

A.Venkatesan, for Appellant.

K.Govindarajan, for Respondent No.1.

R.Alagar, Senior Counsel, for *P.Gopalan,* for Respondent No.2.

The Court made the following

ORDER:- The appellant herein, namely, P.L.V.Giri is the judgment-debtor while respondents 1 and 2, namely, A.Subramaniam and Palaniappan are respectively the decree-holder and Court-auction purchaser.

2. Pursuant to a mortgage decree passed in O.S.No.145 of 1972 on the file of the Subordinate Judge, Chengalpattu, for a sum of Rs.1,44,045.85, execution had been levied in E.P.No.95 of 1974 and despite best of efforts, substantial amounts could not be realised, notwithstanding the fact that the execution proceedings had been pending quite long and consequently, the Execution Petition was closed on 15.6.1980.

3. However, second round of battle commenced by way of levy of execution by filing E.P.No.246 of 1980 before Subordinate Judge, Chengalpattu, for realisation of Rs.1,07,069, by way of sale of the property, which is of the following description.

"All those parts and parcels of land situate in Nandambakkam village sub-registration district of Alanthur, registration district of Madras, bearing Survey Nos.178/1, 178/2, 178/3 and 51/1 part and bounded:

On the north	:	by Poonamallee High Road;
south	:	by Ethirajulu Pillai's land;
east	:	by part of land bearing S.No.178/1, 178/2, 178/3 and 51/1 part purchased by M/s.Nachiappa Metal Corporation.
west	:	by the lands belonging to late A.K.D.Venkataraja, and Chella Nattar

within this, land measuring 79 cents (seventy nine cents) in all and as marked 'green' with letter 'A' in the blueprint plan annexed with the sale deed dated 3.3.1965, together with factory buildings, built with trusses, purlins and asbestos sheet roofing, measuring 100' x 50' x 40' respectively, well, trees and other appurtenances thereto-Nandambakkam Panchayat Ward No.1."

4. On 19.6.1981, the property was ordered to be proclaimed for sale to be held on 22.7.1981 originally, by notifying the plaintiff's value at Rs.50,000 subject to encumbrances; Amin's value at Rs.6,75,000 and the upset price at Rs.5,00,000 subject to encumbrance. However, the sale was stopped at the instance of the judgment-debtor and 2.9.1981 was fixed as the date of sale, on the same terms, but by including the valuation of Rs.12,00,000, as given by the judgment-debtor.

5. The sale, however, as expected, could not take place on the respective dates, either as a result of adjournments of sale, at the instance of the judgment-debtor, by making payments in piecemeal towards part satisfaction of the decree or for want of bidders, inspite of reduction of upset price on two occasions.

6. Finally on 30.6.1983, upset price was reduced to Rs.3,00,000 and the sale was notified to be held on 17.8.1983. Consequently, a fresh proclamation was issued on 7.7.1983 fixing the date of sale as 17.8.1983

on the same terms, excepting the upset price, which was fixed at Rs.3,00,000 subject to encumbrance.

7. On the date fixed for sale, the judgment-debtor filed an application in E.A.No.300 of 1983 for adjournment of sale, by making payment towards part-satisfaction of the decree and consequently, the sale was adjourned, on the same terms, to 14.9.1983, on which date, the Presiding Officer was on leave and therefore, the sale got adjourned to 21.9.1983. Again on 21.9.1983, the Presiding Officer was on leave and therefore the sale got adjourned to 28.9.1983 on which date, the property was sold for Rs.3,52,000 to the 2nd respondent-auction purchaser. The said sale price, and the poundage had been deposited into court.

8. It is worthwhile to note at this juncture that the sale got adjourned not less than eight occasions till 14.9.1983, at the instance of the judgment-debtor on his applications in E.A.Nos.497/81, 124/82, 287/82, 352/82, 358/82, 388/82, 437/82 and 41/83, of course, by making payments in piecemeal towards part-satisfaction of the decree.

9. Subsequently, the said E.P.No.246 of 1980 was transferred to Sub Court, Poonamallee and renumbered as E.P.No.10 of 1984 on its file.

10. The judgment-debtor thereafter filed a petition in E.A.No.10 of 1984 under O.21, Rule 90, C.P.C. for setting aside the sale, *inter alia* contending that the sale was conducted without proper publication; that the description of the property mentioned in the proclamation is not correct; that the property was sold for a very low price; that the amounts paid by the judgment-debtor have not been given due credit to; and that there was collusion between the decree-holder and the auction-purchaser, the brother's son of the judgment-debtor, who bears ill-feelings with him.

11. The court-auction purchaser resisted the said application categorically denying the misdescription of the property and the collusion, as stated by the judgment-debtor and in pith and substance, contended that the sale had been adjourned many a time, for want of bidders, necessitating the reduction of the upset price. That apart, the sale had been adjourned innumerable times, at the instance of the judgment-debtor by making piecemeal payments towards part-satisfaction of the decree, consenting to have the sale on the same proclamation; that the non-compliance of the provisions of O.21, Rule 66, C.P.C. will not *per se* make the sale illegal, in the absence of objections regarding non-compliance at the proper time; and that there had been no nexus between inadequacy of the price and material irregularity.

12. Taking into consideration the respective claims and contentions of the parties, the Court below framed the lone and sole point for consideration, namely,

> "Whether the sale should be set aside on the ground of material irregularity of fraud in publishing or conducting the sale?"

The point, so framed, was answered against the judgment-debtor, leading to the dismissal of the petition, with a direction to the parties to bear their respective costs. Aggrieved by the said order, the Judgment-debtor came forward with the present action.

13. Learned counsel appearing for the appellant/Judgment-debtor pressed the following points for consideration:

> "(1) The failure on the part of the Court below to comply with the salutary provisions adumbrated under O.21, Rules 64 and 66(2)(a), C.P.C., in the sense of not bringing in such portion of the property, as may seem necessary to satisfy the decree; by bringing the entirety of the property to sale, renders the very sale itself invalid, as being illegal and without jurisdiction, and in any event, the said sale has got to be set aside as having caused substantial and irreparable injury to the judgment-debtor, attracting the provisions of O.21, Rule 90, C.P.C.;
>
> (2) The failure to issue fresh proclamation for the sale held on 28.9.1983, which is beyond thirty days of the date of sale originally fixed, *i.e.*, on 17.8.1983, vitiates the very sale itself, by reason on non-compliance of the provisions adumbrated in Sub-rule (2) of Rule 69 of O.21, C.P.C.; and
>
> (3) The failure to publish a proper proclamation as respects the correct description of the property to be brought for sale is a material irregularity, rendering the sale a nullity."

14. Learned counsels for the decree-holder and auction-purchaser, have, however, repelled such contentions.

15. Of the three points urged for consideration, points 1 and 3 may conveniently be grouped together and disposed of inasmuch as the arguments on those points are built upon the edifice of

foundation of the salient principles adumbrated under O.21, Rules 64 and 66 of the Code of Civil Procedure.

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16. The effect of non-compliance of these provisions came to be considered on occasions more than once before the apex court of this country and the principles evolved in those decisions may be penned down hereinafter to serve as guidelines for arriving at a just decision in this case.

17. In *Dhirendra Nath v. Sudhir Chandra (1965)2 S.C.J. 219: (1965)6 S.C.R. 1001: A.I.R. 1964 S.C. 1300,* the Supreme Court expressed the view that non-compliance of the provisions of O.21, Rules 64 and 66, C.P.C. by selling more extent of property than necessary is not per force a nullity; but is a material irregularity in publishing or conducting the sale and the Court under the first proviso to O.21, Rule 90, C.P.C. cannot set aside the sale, unless it is satisfied that the applicant had sustained substantial injury by reason of such irregularity and further a party, who received the notice of proclamation, but did not attend at the drawing up of the proclamation or did not object to the said defect cannot maintain an application under that provision.

18. In *T.P.S.Reddi v. Padmavathamma, A.I.R. 1977 S.C. 1789: (1977)3 S.C.C. 337: (1977)2 S.C.J. 293.* Their Lordships of the Supreme Court expressed thus:

> "It is manifest that where the amount specified in the proclamation of sale for the recovery of which the sale was ordered is realised by sale of certain items, the sale of further items should be stopped. This, in our opinion, is the logical corollary which flows from O.21, Rule 64 of the Code, which may be extracted thus:
>
> "Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."

Under this provision the Executing Court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words 'necessary to satisfy the decree' clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. In other words where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the Court should stop at the stage......The fact that the judgment-debtor did not raise an objection on this ground before the Executing Court is not sufficient to put him out of Court because this was a matter which went to the very root of the jurisdiction of the Executing Court to sell the properties and the non-compliance with the provisions of O.21, Rule 64 of the Code was sufficient to vitiate the same so far as the properties situated in village Gudipadu were concerned."

19. In *Ambati Narasayya v. M.Subba Rao and another, (1991)1 L.W. 602,* the Supreme Court, referring to the earlier decision in *T.P.S.Reddi v. Padmavathamma, A.I.R. 1977 S.C. 1789: (1977)3 S.C.C. 337: (1977)2 S.C.J. 293,* further elucidated the sanguine principles adumbrated under O.21, Rule 64, C.P.C. and expressed thus:

> "It is of importance to note from this provision that in all execution proceedings the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provisions of law only such portion of the property should be sold. This, in our opinion, is just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."

20. The latter two decisions did not at all refer to the former decision in the case of *Dhirendra Nath v. Sudhir Chandra (1965)2 S.C.J. 219: (1965)6 S.C.R. 1001: A.I.R. 1964 S.C. 1300.* Worthy it is to note at this juncture, that the latter two decisions of the Supreme Court were decided by two learned Judges, whereas the former decision of the apex Court happened to be decided by a larger Bench

comprising of three learned Judges.

21. On the principle of *stare decisis*, it goes without saying, the latter pronouncements, being that of a smaller Bench consisting of two learned Judges of the Supreme Court, will have to give way to the earlier pronouncement of a larger Bench of three learned Judges of the apex court.

22. Let me now make an endeavour to sift the materials available on record, in the light of the principles evolved in the former decision rendered by a larger Bench of the apex court.

23. There can be no pale of controversy as to the fact that the property, in respect of which a mortgage has been created alone, got attached and brought to sale in execution of the decree. The case on hand is not an exception to this rule. The property brought to sale is an extent of land measuring 79 cents in certain specified survey numbers, bounded on three sides by lands belonging to individuals and on the other side by Poonamallee High Road, of course, with a factory building measuring 100' x 50' x 40'. The very property is subjected to a mortgage. This can very well be vouchsafed from the description of the property, given in the sale proclamation. As such, there can be no misdescription of the property brought to sale causing any sort of prejudice to the judgment-debtor.

24. Of course, during the course of the appeal, the judgment-debtor would contend that many constructions had been put up in the suit property and those constructions had not been included in the sale proclamation and because of such non-inclusion, a substantial injury had been caused to him by the fetching of a low price for the property sold in the auction. This sort of a contention had been raised for the first time during the course of appeal. Worthy it is to note that the execution proceedings commenced as early as 1974 and many a sale proclamation had been settled and in all those settlements of proclamation, he had been a lively participant and he did not at all demur or whisper anything as to the misdescription of the property, given in the sale-proclamations settled now and then. As such, this sort of objection cannot but be viewed as one which is made as an objection for objection's sake at this distance of time, obviously with a view to protract the proceedings.

25. Yet another objection emerging from the judgment-debtor revolves on the question of sale of the suit property in one lot. He would say, if the suit property had been divided into various plots, the plausibility of fetching a more price cannot be ruled out of consideration. It is further said that if such a procedure had been adopted, the decree amount could have been satisfied by the sale of plots comprised only in half of the extent of the suit property, and there could have been no occasion for excessive execution, in the sense of selling more extent of the property than what was required for the satisfaction of the decretal amount. Such an objection, of course, looks credible, on the face of it. But the sordid fact is that no tangible materials had been placed before the Court that division of the property into various plots is feasible and selling of such plots would not at all cause any detriment in fetching a fair price. It cannot at all be visualised in all situations that the division of the property into various plots and consequent sale of those plots will fetch a price better than the one if the property is sold in one lot. Possible it is to visualise in certain situations that the selling of the property in one lot will be advantageous, in the sense of attracting the best of the price for the property to be sold. It all depends upon the location of the property and the purpose for which such a property is capable of being utilised.

26. In the case on hand, the property brought to sale is admittedly a piece of land measuring an extent of 79 cents with a factory building located thereon, surrounded on three sides by lands belonging to individuals and on the one side a public road. From the description of the property, it appears that the suit property is capable of being utilised as a factory site, rather than house sites. If it is to be utilised as a site for factory purposes, division of certain portion of that property into plots and selling them as such could have detrimentally affected the rest of the property, in the sense of such remaining part of the property not capable of being utilised as a site for factory purposes, which, in turn, would cause substantial injury to the judgment-debtor, in not procuring the best of a price for the property. That perhaps appears to be the reason why he was keeping mum and quiet all along without the emergence of any request from him for the sale of the suit property into plots towards the satisfaction of the decree.

27. Another signal factor that has to be taken note of is that despite taking of so many adjournments

of sale, at this instance, it was not a possible feature for him to sell any portion of the property by way of private negotiations towards the satisfaction of the decree. What is further worse is that the sale of the suit property never attracted bidders at all on occasions more than once, the consequence of which was that the Court was impelled to the necessity of gradually reducing the upset price from Rs.5 lakhs to Rs.3 lakhs. The possible reason for the least attraction of bidders in the Court auction sale of the suit property was that 'the litigious sequel at the judgment-debtor's instance, had 'scare' value in inhibiting intending buyers from coming forward with the best of offers' as aptly put by Krishna Iyer, J., in the case of *M/s.Kayjay Industries v Asnew Drums A.I.R. 1974 S.C. 1331.*

28. Top of all, the alarming factor is that the execution proceedings which commenced its career in the year 1974 never came to a grinding halt till upto this day and the judgment-debtor somehow or other wants to protract the execution proceedings, thus not enabling the decree-holder to realise the fruits of his decree. Therefore, it is clear that the executing Court did not go behind the decree in bringing a property, different from the one, as found described in the decree to sale and as such, there is no force in the contention of the judgment-debtor that there is misdescription of the property brought to sale in the sale proclamation, prejudicially affecting his interest. Further, considering the conduct of the judgment-debtor all along and also the inbuilt and intrinsic circumstances to be culled out from the facts of this case, it goes without saying that the executing Court fully applied its mind, taking into consideration the amount of the decree, that remains to be satisfied and other peculiar facts and circumstances of the case, in bringing the entirety of the suit property to sale and such an act cannot amount to bringing more extent of property for sale than what was necessary for the satisfaction of the decree.

29. Even otherwise, the so-called misdescription of the property as well as bringing more extent of property, than what is required, for purposes of satisfying the decree, to say, offending respectively, Rules 64 and 66 of O.21, C.P.C. cannot at all be construed as vitiating or nullifying circumstances rendering the sale itself invalid and if at all such factors can be termed as irregularities, which would be taken into consideration, in an application filed for setting aside the sale under O.21, Rule 90, C.P.C., on the fact of the decision of the Supreme Court in the case of *Dhirendra Nath v. Sudhir Chandra (1965)2 S.C.J. 219: (1965)6 S.C.R. 1001: A.I.R. 1964 S.C. 1300.*

30. The primordial requisites necessary for setting aside a sale on ground of irregularity or fraud are adumbrated in O.21, Rule 90 C.P.C., which reads as under:

"90. *Application to set aside sale on ground of irregularity or fraud:-* (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation: The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

31. The construction and interpretation of the salient and statutory provisions, as extracted above, came up for consideration in certain decisions of the High Courts as well as the Supreme Court of India. Some of the decisions, may be referred to, for the application of the enunciation of the principles thereof to the facts of the instant case.

32. In *Satyanarayana Soni v. State of Andhra Pradesh, (1987)2 Cur.C.C. 118,* it has been held:

"Unless there is nexus between the inadequacy of price fetched and the irregularity or fraud in conducting the sale, the sale cannot be set aside.....Therefore, if a party, who has an interest in the property sold in execution of the decree is affected by such sale, he has to establish on facts proved to the satisfaction of the

executing court that by reason of irregularity or fraud he sustained substantial injury and that injury has been resulted on grounds of material irregularity or fraud either in publishing the sale proclamation or conducting the sale."

33. In *His Holiness Mahant Chathondosji Varu (Died) His Holiness Dioyadassan Rajendra Ramadasjee Varu v. The Board of Trustees, Tirumalai, A.I.R. 1965 A.P. 335,* it has been held:

"Any material irregularities *per se* will not invalidate a sale. Such irregularities will have the effect of avoiding the sale only if the connection is established between them and the inadequacy of price realised at the sale ......Inadequacy of price *proprio vigore* would not result in avoiding the sales. There must be correlation between the damage suffered by the judgment-debtor and the material irregularity, complained of. If the inadequacy of the price is the result of factors other than the material irregularities complained of the proviso to O.21, Rule 90(1) cannot come into operation."

34. In *Radhey Shyam v. Shyam Bihari Singh, A.I.R. 1971 S.C. 2337,* it has been held:

"Rule 90 of O.21 of the Code, as amended by the Allahabad High Court, *inter alia*, provides that no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realised such a sale, in other words injury, is therefore, not sufficient. What has to be established is that there was not only inadequacy of the price but that that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity."

35. In *M/s. Kayjay Industries v Asnew Drums, A.I.R. 1974 S.C. 1331.* Their Lordships said thus:

"Indeed, under the C.P.C., it is the Court which conducts the sale and its duty to apply its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore, failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity. Mere, substantial inquiry without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a Court mechanically conducts the sale or routinely signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is substantially inadequate, there is the presence of both the elements of irregularity and injury. But it is not as if the Court should go on adjourning the sale till a good price is got, it being a notorious fact that Court sales and market prices are distant neighbours. Otherwise, decree-holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. Maybe, subsequent events not within the ken of the executing court when holding the sale may prove that had the sale been adjourned a better price could have been had. What is expected of the judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors, and, if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale. The Court may consider the fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of Court sales will be introduced."

36. For Rule 90 of O.21, C.P.C., to come into operation, mere existence of material irregularity or fraud in publishing or conducting the sale is not sufficient to set aside the sale; but what is further necessary is that such irregularity or fraud has caused substantial injury to the judgment-debtor. To put it otherwise, there must be nexus between material irregularity or fraud and the substantial injury suffered thereby.

37. I have already found that neither was there any

irregularity much less material irregularity in bringing a larger extent of property than was necessary for sale for satisfying the amount of decree that remains due; nor was there any irregularity of misdescription of the property brought to sale in the sale proclamation, in the sense of there being no violations or refractions of either Rule 64 or Rule 66 of O.21, C.P.C. Further, no material worth the name, had been placed by the judgment-debtor as to his having suffered any injury, much less substantial injury. The resultant position is that there is neither any material irregularity or fraud; nor was there any injury having been caused to the judgment-debtor on account of the impugned sale.

38. Even assuming for argument's sake that there was existence of material irregularity or fraud in the impugned sale, as contended by the judgment-debtor, since the judgment-debtor had not taken any such objection at any point of time during the course of elongated execution-proceedings, which was pending from 1974 onwards, he cannot be allowed to raise such an objection, after the impugned sale, on the face of the express and explicit provisions adumbrated in Sub-rule (3) of Rule 90 of O.21, C.P.C. which is based on the salutary principle that waiver of the necessity for fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the proclamation. Therefore, the objections covered by points 1 and 3 are of no consequence.

39. Now, the second objection may fall for consideration in the arena of discussion. This stem of objection is obviously having its root on Rule 69 of O.21, which prescribes:

> "69. *Adjournment or stoppage of sale:-* (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment.
>
> Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court.
>
> (2) Where a sale is adjourned under Sub-rule (1) for a longer period than thirty days, a fresh proclamation under Rule 67 shall be made, unless the judgment-debtor contends to waive it.
>
> (3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale. "(High Court Amendment: (Madras): For sub-rule (2) of Rule 69 substitute the following sub rule, namely, "(2) Where a sale is adjourned under Sub-rule (1) for a longer period than thirty days, there shall be fresh publication of the proclamation in the manner prescribed by Rule 67, unless the judgment-debtor contends to waive it or the Court otherwise orders." (13.3.1963)."

40. Sub-rule (2), as extracted above, speaks of adjournment of sale for longer period than thirty days. If a sale is adjourned for a period beyond thirty days, then a fresh proclamation is necessary, unless the judgment-debtor contends to waive it. If a plain, nature and contractual meaning is given to the various words and phrases used in the said sub-rule, it goes without saying that the period of thirty days cannot be anything, except one spell and the computation of the period of one spell of thirty days is to be reckoned from the date when the sale was adjourned last and not from the date when the sale was originally notified to take place in the sale proclamation.

41. In the case on hand, the sale was originally notified to take place 17.8.1983. But the sale was actually held on 28.9.1983. In between those two dates, there wa one adjournment of sale on 17.8.1983 at the instance of the judgment-debtor, besides two other adjournments of sale, namely, on 14.9.1983 and 21.9.1983, as a result of the Presiding Officer of the Court availing of leave. Since the continuous spell of the period of thirty days, in between the adjournments of sale on two occasions, as a result of the Presiding Officer availing of leave, immediately preceding the date on which the impugned sale took place did not expire, there was no need to obtain the consent of the judgment-debtor for a fresh proclamation of sale to be put up and in such state of affairs, it goes without saying that there was any violation or refraction of sub-rule (2) of Rule 69 of O.21, C.P.C., inasmuch as the sale originally scheduled to take place as per the proclamation got adjourned at the instance of the judgment-debtor to another date, which was very well within thirty days from the date of sale originally fixed.

42. Assuming the said sub-rule had been violated or refracted, even then such violation cannot at all be construed as a factor vitiating the sale and if at all, the same can be construed as an irregularity, which can be raised as a ground in an application under O.21, Rule 90, C.P.C., if so desired. As already stated by reason of mere irregularity, without substantial injury having been caused to the judgment-debtor, as a result of such an irregularity, a sale cannot be set aside and there being dearth of materials available on record as respects that aspect of the matter, in the instant case, the impugned sale has to be allowed to remain as it is. As such, this bone of contention has also to be rejected as of no merits.

43. In view of what has been stated above, this civil miscellaneous appeal deserved to be dismissed.

44. In the result, this civil miscellaneous appeal is dismissed with costs.

B.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.No.1873 of 1980 *31st October, 1991.*

Bhargavakula Nainargal Sangam, Thiruvannamalai ...*Appellant*

v.

Chakravarthi ...*Respondent.*

Madras City Tenants' Protection Act (III of 1922), Secs.3 and 9 - Tenant of vacant site denying title of landlord - If can claim benefits of Act.

A tenant in respect of a vacant site, who denies the title of the landlord, is not entitled to claim the benefits of the Madras City Tenants' Protection Act. *[Para 12]*

Cases referred to:

Sanjeevi Naidu v. Chittibabu Mudaliar, (1953)1 M.L.J. 260; Mohamed Unni v. Melapurukkal Unni, (1949)1 M.L.J. 452; Dhanapal Chettiar v. Yesodai Ammal, A.I.R. 1979 S.C. 1745: (1979)4 S.C.C. 214: (1980)1 A.P.L.J. (S.C.) 1; Ratan Lal v. Vardesh Chander, (1976)2 S.C.R. 906; Govindamma v. Murugesh Mudaliar, A.I.R. 1991 Kant. 290; Subbarao v. Krishna Rao, A.I.R. 1989 S.C. 2187; Bhargarakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46.

M.N.Padmanabhan, for Appellant.

E.Padmanabhan, for Respondent.

The Court delivered the following

JUDGMENT:- The plaintiff is the appellant. This appeal is against the Judgment and decree of the Subordinate Judge of Tiruvannamalai in A.S.No.8 of 1979, which was in turn against O.S.No.143 of 1978 on the file of the District Munsif, Tiruvannamalai. The suit was tried along with six other suits filed by the same plaintiff against the other tenants occupying its properties. The suits are disposed of by a common judgment by the District Munsif on 29.4.1978. The appeals against the judgments and decrees in all the suits were also disposed of by a common judgment by the Subordinate Judge dated 30.10.1979. Both the courts have held that the respondent herein and the other tenants are entitled to the benefits of the Tamil Nadu City Tenants' Protection Act and the plaintiff is not entitled to the relief of possession. Consequently, the suits were dismissed.

2. The plaintiff filed this second appeal as well as Second Appeal Nos.1461 to 1466 of 1980. Those second appeals were heard by a Division Bench and disposed of by judgment dated 20.10.1989. This second appeal was not posted along with those second appeals and learned counsel states that he could not trace out this appeal and have it posted with the other appeals. Thus, this appeal was left out from the batch.

3. The judgment of the Division Bench is reported in *Bhargarakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46.* The matter was referred to a Bench by Ratnavel Pandian, J. on the question whether a tenant in respect of a vacant site, who denies title of the landlord, is entitled to the benefits of the Madras City Tenants' Protection Act. The Division Bench answered the question in the negative and held that the tenant, who has denied the title of the landlord is not entitled to the benefits of the said Act. The Division Bench ruled that a tenant, who wants to claim the benefits of the Act must fulfil two requirements; firstly, he must be a person liable to pay rent in respect of the said land and secondly, such a liability should be under a tenancy agreement express or implied. The Division

Bench pointed out that will not by any stretch of imagination apply to a case where the tenant denies the very agreement itself and claims title in himself.

4. The facts of the present case, which are similar to the facts of the cases decided by the Division Bench, are shortly as follows: The plaintiff claimed that the defendant was a tenant and filed an eviction petition under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act. That petition was dismissed on the ground that the demised premises was a vacant site and proceedings should be taken in a civil court. Subsequently, a notice determining the tenancy was issued by the plaintiff and the defendant was called upon to deliver possession. The defendant sent a reply denying the allegations made in the notice. Hence the suit was instituted.

5. In the written statement filed by the defendant, it was contended that the plaintiff had no title to the suit property as it stood registered in an individual name and not in the name of Sangam. It was contended that the Sangam, by no stretch of imagination could claim to be the owner of the property. There was no tenancy whatever in favour of the defendant. The tenancy set up in the plaint was specifically denied and the plaintiff was put to strict proof of the averments made in the plaint. It was also contended that the notice issued prior to suit was not valid. Subsequently, an additional written statement was filed in which it was pleaded that if, in any event, the Court found that the plaintiff Sangham was the landlord of the suit site, the defendant was entitled to the protection of the Madras City Tenants' Protection Act.

6. At the time of trial, the plaintiff examined its President as P.W.1. There was no cross-examination challenging his evidence. The defendant did not adduce any evidence on his side. Thus, he gave up the plea with respect to all the issues raised in the suit. Hence the issues were found in favour of the plaintiff.

7. The only question which survived for consideration was, whether the defendant was entitled to the benefits of the Madras City Tenants' Protection Act (hereinafter called 'the Act') on the facts pleaded by the plaintiff. The Courts below have upheld the claim made by the defendant.

8. Inspite of the fact that the Division Bench has disposed of the connected cases and given a ruling holding that the tenant, who denies the title of the landlord is not entitled to the benefits of the Act, learned counsel for the defendant/respondent contends that the Division Bench has failed to take note of an earlier ruling of another Division Bench and the matter requires fresh consideration. He invites my attention to a Judgment in *Sanjeevi Naidu v. Chittibabu Mudaliar, (1953) 1 M.L.J. 260*. In that case, suits were filed for recovery of possession and mesne profits. Decrees were passed and when they were sought to be executed, an objection was raised that notwithstanding the decree, the defendant was not liable to be evicted because of the provisions of Sec.7(1) of the Madras Buildings (Lease and Rent Control) Act of 1949. That contention was upheld by the Master, who dismissed the execution petition and on appeal it was confirmed by a single Judge. On further appeal, the Division Bench confirmed the order of the learned single Judge holding that the decree could not be executed because of the provisions of Sec.7(1) of the Madras Buildings (Lease and Rent Control) Act. The relevant part of the judgment reads as follows:

> "So it may be taken as established that under the general law the tenancy in favour of Chittibabu had been duly terminated. But the definition of "tenant" in the Rent Control Act expressly includes a person continuing in possession after the termination of the tenancy in his favour. Chittibabu would certainly be such a person. In accordance with the findings of the trial court which has since been affirmed by us, Chittibabu did not have title to the property at any time. He must therefore be deemed to have continued all along in possession as a tenant. He would be a tenant-holding over. Under the general law a tenant holding over is deemed to be governed by the same terms as the terms of the tenancy under which he came into occupation. One of such terms would be the payment of monthly rent of Rs.25. We therefore hold that Chittibabu was a tenant within the meaning of Sec.2(4) of the Rent Control Act, as a person by whom rent was payable and as a person continuing in possession after the termination of the tenancy in his favour.
>
> Sec.7(1) expressly provides that a tenant in possession of a building shall not be evicted therefrom, whether before or after the termination of the tenancy, whether in execution of a decree or otherwise, except in accordance

with the provisions of that section. This provision is a complete answer to the execution petition filed by Sanjeevi for eviction. In this view it is not necessary to consider the effect of the proviso because the procedure indicated in the proviso has not been followed in this case. That proviso contemplates first a petition before the Rent Controller himself for eviction and a denial of title in such proceedings. If the controller decides that the denial of title is *bona fide* and records a finding to that effect, then the landlord will be entitled to sue for eviction of the tenant in a civil court. But even here the decree for eviction can only be passed on any of the grounds mentioned in Sec.7. Though the proviso in terms will not have any application to the facts of this case, the principle of the proviso supports the view which we have already taken as regards the status of Chittibabu as a tenant under the Act. The effect of the proviso is that even if a civil court finds that the claim of the tenant is not well founded the tenant can be evicted only on any of the grounds mentioned in sec.7. In other words, even when the tenant has denied the title of the landlord and his denial has been found to be without foundation, he will be entitled to the benefits of Sec.7(1)."

9. The ruling cannot have any bearing in the present case as the provisions of the Madras Buildings (Lease and Rent Control) Act will stand on a different footing. As pointed out by the Division Bench itself there is a specific provision for eviction under the Act on the ground of denial of title. The Rent Control Act has always been held to be a self contained Act and a complete Code with regard to eviction of tenants occupying buildings on lease thereof. Sec.7(1) of the Act, which was then in force, provided that a tenant shall not be evicted whether before or after the termination of the tenancy, whether in execution of a decree or otherwise, except in accordance with the provisions of that section. Hence the Division Bench held that though the tenancy was terminated in accordance with the provisions set out in Sec.111 of the Transfer of Property Act, that would not enable the landlord to recover possession; with the result he could not execute the decree which he had obtained in the suit.

10. It is to be pointed out that this Court has consistently been taking the view that the civil court has not lost its jurisdiction to pass a decree for possession even after the advent of the Madras Buildings (Lease and Rent Control) Act, but such decrees cannot be executed, except in accordance with the provisions of the said Act - *vide: Mohamed Unni v. Melapurukkal Unni, (1949)1 M.L.J. 452*, Sec.7(2)(vi) of the Act of 1949, which corresponds to Sec.10(2)(vii) of the Act of 1960, provided that where a tenant has denied the title to the landlord or claimed a right of permanent tenancy and that such denial or claim was not *bona fide*, the Rent Controller could pass an order evicting the tenant and direct the tenant to put the landlord in possession of the building. On the other hand, if the denial or claim was *bona fide*, Sec.7(1) proviso, corresponding to Sec.10(1) of the 1960 Act was to the effect that the Rent Controller shall record a finding to the effect and the landlord shall be entitled to sue for eviction of the tenant in a civil court and the civil court may pass a decree for eviction on any ground mentioned in the section, notwithstanding the fact that the court found that such denial did not involve forfeiture of the lease. That provision is very significant and express reference is made to that provision by the Division Bench. This provision contained in Sec.7 of the old Act, corresponding to Sec.10 of the present Act, clearly prescribed the procedure by which a landlord could evict his tenant in the case of denial of title. If the denial of title is not *bona fide*, eviction can be obtained before the Rent Controller and if the denial is *bona fide* eviction has to be obtained in a civil court and that too only on the grounds set out in the Act. It is only because of that the Division Bench held that a tenant who had denied title and incurred forfeiture, which led to termination of tenancy under Sec.111 of the Transfer of Property Act, was still a tenant within the meaning of the Madras Buildings (Lease and Rent Control) Act, being entitled to invoke the provisions thereof. The definition of "tenant" in that Act includes a person who continues in occupation after the termination of the tenancy.

11. That ruling will have no relevance to a case arising under the City Tenants' Protection Act. In so far as this Act is concerned, there is no provision similar to the one found in the Buildings Act. This Act does not prescribe the ground for eviction. This Act will come into play only in cases where the tenancies are determined by the lessors

of the property under the provisions of the Transfer of Property Act. When a suit for ejectment is filed it is open to the tenant who is a tenant within the meaning of the Act to claim the benefits of the Act under Sec.3 or Sec.9. The only change which is brought about by this Act is found under Sec.11 of the Act, which provides that notice should be issued in accordance with the provisions contained therein, in the event of the tenant being entitled to the benefits of the Act. If a suit for ejectment is filed without complying with provisions of Sec.11 of the City Tenants' Protection Act, it will have to be dismissed because of the provisions contained therein. Apart from that, there is no other provision in the Act will impinge upon the provisions of the Transfer of Property Act.

12. The Division Bench has in the connected batch discussed the matter in detail at length and come to the conclusion that a person who denies title of his landlord is not entitled to claim the benefits of the City Tenants' Protection Act. Hence, it is not necessary for me to repeat the reasoning or add thereto.

13. It is because the learned counsel wanted to rely on the judgment of the Division Bench in *Sanjeevi Naidu v. Chittibabu Mudaliar, (1953)1 M.L.J. 260,* and contended that the matter requires reconsideration, I had to refer to the above provisions. I hold that the ruling in *Sanjeevi Naidu v. Chittibabu Mudaliar, (1953)1 M.L.J. 260,* has no relevance to a case in which the tenant makes a claim under the City Tenants' Protection Act. Hence, there is no necessity for reconsideration of the matter once again.

14. Learned counsel invites my attention to the judgment of the Supreme Court in *Dhanapal Chettiar v. Yesodai Ammal, A.I.R. 1979 S.C. 1745: (1979)4 S.C.C. 214: (1980)1 A.P.L.J. (S.C.) 1.* In that case the Supreme Court held that no notice is necessary under Sec.106 of the Transfer of Property Act before instituting a proceeding under the provisions of the Rent Control Act. The Court held it was unnecessary and mere surplusage because the landlord cannot get eviction of the tenant even after such notice under Sec.106 of the Transfer of Property Act. While discussing the different arguments put forward by the learned counsel on both sides, the Supreme Court considered the position of a tenant, who had incurred forfeiture of tenancy of denial of title under Sec.111(g) of the Transfer of Property Act, though such a question did not arise on the facts of the case. The relevant passage in the judgment on which reliance is placed by learned counsel is as follows:

"On a careful consideration and approach of the matter in the instant case we think that we cannot approve of the view expressed in the passage extracted above. In *Ratan Lal v. Vardesh Chander, (1976)2 S.C.R. 906,* Krishna Iyer, J. delivered the judgment on behalf of a Bench of this Court consisting of himself, Chandrachud, J. as he then was and Gupta, J. The case related to a building in Delhi. The Court was concerned with clause (g) of Sec.111 of the Transfer of Property Act. Tracing the history of the legislation it was pointed out by the Court at page 918 that the requirement as to written notice provided in Sec.111(g) cannot be said to be based on any general rule of equity and therefore forfeiture of lease brought about in terms of Sec.111(g) of the Transfer of Property Act not by notice but on the application of justice, equity and good conscience was held to be good determination of the lease. Quoting from Manujendra's case it was said at page 911:

"We are inclined to hold that the landlord in the present case cannot secure an order for eviction without first establishing that he has validly determined the lease under the Transfer of Property Act? why this dual requirement? Even if the lease is determined by a forefeiture under the Transfer of Property Act the tenant continues to be a tenant, that is to say, there is no forfeiture in the eye of law. The tenant becomes liable to be evicted under the State Rent Act, not otherwise. In many State statutes different provisions have been made as to the grounds on which a tenant can be evicted and in relation to his incurring the liability to be so evicted. Some provisions overlap those of the Transfer of Property Act. Some are new which are mostly in favour of the tenants but some are in favour of the landlord also. That being so the dictum of this Court in Brij Raj case comes into play and one has to look to the provisions of law contained in the four corners of any State Rent Act to find out whether a tenant can be evicted or not. The theory of double protection or additional

protection, it seems to us, has been stretched too far and without a proper and due consideration of all its ramifications."

15. I have already pointed out that a ruling under the Buildings Act cannot be applicable to a case in which the benefits of the City Tenants' Protection Act are claimed. The case before the Supreme Court arose under Buildings Act and has nothing to do with the claim under the City Tenants' Protection Act.

16. Learned counsel for the respondent contends that the definition of "tenant" in both the Acts is almost the same. In both the cases, a person who continues to be in possession after the termination of tenancy is considered to be a tenant. It may be so. But the two Acts are entirely different in their scope and objects. It is rightly pointed out by learned counsel for the appellant that under the Buildings Act, the landlord need not necessarily be the owner of the building. The landlord" is defined as including a person who is receiving or is entitled to receive the rent of a building, whether on his own account or on behalf of another. But that cannot be the position under the City Tenant's Protection Act. Sec.9 of the Act confers a privilege on the tenant to purchase the land on which he has erected a superstructure if the conditions prescribed in the section are complied with. That can be done only if the proceeding is against the owner of the land. Hence necessarily the landlord under the City Tenants' Protection Act has to be the owner, who is capable of conveying the title in the land to the tenant. That is a fundamental difference between the two Statutes. Apart from that, I have already referred to the circumstances that the Buildings Act is a self-contained Act with regard to eviction of tenants. On the other hand, the City Tenants' Protection Act will come into play only when the tenancies are determined under the provisions of Transfer of Property Act. Therefore, the ruling of the Supreme Court will not help the respondent in the present case.

17. Learned counsel for the respondent places reliance on a judgment of Karnataka High Court in *Govindamma v. Murugesh Mudaliar, A.I.R. 1991 Kant. 290.* That is a case under the Karnataka Rent Control Act. That will have no application to the present case. Even otherwise, there is a judgment of a Division Bench of this Court. Since it is binding on me, there is no point in relying on the judgment of the Karnataka High Court.

18. In the present case, the denial of title was even prior to the institution of the suit in the reply notice issued by the tenant. Even if the denial is made in the course of the proceedings for eviction, it is held by the Supreme Court recently that such a denial would be a ground for eviction. *(vide: Subbarao v. Krishna Rao, A.I.R. 1989 S.C. 2187).*

19. In the result, the judgments of the courts below are erroneous and unsustainable. The second appeal is allowed. The judgments and decrees are set aside. O.S.No.143 of 1989 on the file of the District Munsif, Tiruvannamalai, is decreed as prayed for by the plaintiff, with costs throughout. Learned counsel for the respondent prays for time. Learned counsel for the appellant is agreeable for grant of three months time, If the respondent files an affidavit of undertaking. Hence the respondent is granted time till 31.3.1992 to vacate the premises and hand over possession to the landlord, on condition that he files an affidavit in this Court on or before 15.11.1991 undertaking to vacate the premises on or before 31.3.1992 without driving the appellant to execution proceedings. Learned counsel for the respondent is directed to give a copy of the affidavit of undertaking to learned counsel for the appellant in this Court. If the affidavit is not filed, the respondent will not be entitled to the benefit of grant of time.

V.K. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Raju, J.*

W.P.No.6856 of 1982 *31st October, 1991.*

T.D.Digambar ...*Petitioner*

v.

Central Bank of India represented by Chairman, Bombay-21 and another ...*Respondents.*

(A) Banking Regulations Act (X of 1949), Sec.10(1)(b)(i) - Bi-partite Settlement under Sastry Award, Para 521 - Suspension of payment under

Sec.10(1)(b)(i) - Filing of insolvency petition by bank employee amounts to suspension of payment - Termination of services of such employee on account of loss of confidence because of act of insolvency - Order of termination if vitiated by non-compliance with paragraph 521.

(B) Sastry Award - Bi-partite settlement under Para 522 - Challenge to, as being opposed to public policy and violation of principles of natural justice - If can be sustained.

(C) Constitution of India (1950), Art.226 - Industrial Dispute Act - Challenge to order of termination of a Bank servant on factual grounds or claims - If can be made in writ proceedings.

The petitioner who was appointed a Shroff cum-Collection Clerk in the respondent Bank on 17.11.1968 sought permission of the first respondent for filing an insolvency petition as he had incurred debts to the extent of Rs.20,000 at high rate of interest. He was suspended from service on the basis of that letter. A charge memo was issued to him on 13.1.1981. The petitioner filed an insolvency petition on 8.11.1979. On the charge that the petitioner violated Sec.10(1)(b)(iii) of the Banking Regulations Act an enquiry was conducted on 23.2.1981. In the meanwhile, his insolvency petition was withdrawn and he was not adjudged insolvement. The suspension order was revoked and he was reinstated. But by a memo dated 8.7.1982, his services were terminated with effect from 17.7.1982 and he was awarded retrenchment compensation even though the termination did not amount to retrenchment. The petitioner filed a writ petition challenging the termination order contending (1) that the impugned order being punishment for misconduct was passed without complying with the procedure contemplated under paragraph 521 of the Sastry Award and (2) that the provision contained in paragraph 522 of the Sastry Award was violative of Art.14 of the Constitution of India and (3) that since loss of confidence involves a misconduct, the order amounts to a punitive one in character.

The filing of an insolvency petition in the present case having the same principle and causing the issue of notices and publication made in the Gazette as well as service of notice on some of the respondents to the petition would, in the view of the court, constitute sufficient basis to substantiate the claim of the respondent that the petitioner suspended payment within the meaning of Sec.10(1)(b)(i) of the Act. Consequently, *de hors* any other materials on the very admitted conduct and course of action adopted by the petitioner and having regard to the stipulation contained in the Banking Regulation Act, 1949, referred to supra, the termination in account of loss of confidence cannot be said to be one involving any misconduct and consequently, non-compliance with paragraph 521 of the *Bi-partite* settlement does not vitiate the order of termination. *[Para 9]*

The provisions contained in paras.521 and 522 had different and distinct roles to play and had been held to be binding all along upon the parties and the plea based on Art.14 of the Constitution of India, is wholly misconceived. The clause in question cannot be said to have been either unilaterally thrust on the employee or that the employee was made to agree taking advantage of the dominant role the management had at its command to play in the matter. As referred to already, the *Bi-partite* settlement had its origin in Sastry Award having been rendered by Judicial Tribunal, that the same was given statutory force and has all along been observed to be the charter of rights in respect of the employer and employee relationship of the Bank and its employees and that the said award continued to bind the rights of parties by bilateral settlement entered into under the Industrial Disputes Act, 1947. The challenge to such a provision pressing into service the principles enunciated in the *Central Inland Water Transport Corporation Limited Case, (1986)3 S.C.C. 156: (1986)2 S.C.J. 210: (1986)69 F.J.R. 171: (1986)3 Comp.L.J. 1: (1986)60 Comp.Case 797: 1986 Lab.I.C. 1312: A.I.R. 1986 S.C. 1571,* does not carry any weight or merit. The challenge therefore fails and shall stand rejected. *[Para 10]*

The objection that if the order is to be challenged on merits as to whether the termination was brought about for any misconduct or/and had the effect of casting stigma against the petitioner, an adjudication of such question would require and also depend upon proper and sufficient oral and documentary evidence, and has to be done on a reference to the competent forum merits this court's acceptance. In *Chartered Bank case, A.I.R. 1960 S.C. 919,* the Apex Court was of the view that such questions have to be left to the adjudication of the competent tribunal or court constituted for the purpose. The petitioner if he so desires to challenge the order on such factual grounds or claims should

have recourse only to the adjudicative machinery provided under the Industrial Disputes Act, 1947 and cannot raise such issues in these proceedings under Art.226 of the Constitution of India. [Para 12]

Cases referred to:

Kishore v. Netherlands Training Society, A.I.R. 1930 Cal. 555; Central Inland Water Transport Corporation Limited v. Brojo Nath, (1986)3 S.C.C. 156; (1986)2 S.C.J. 201; (1986)69 F.J.R. 171; (1986)3 Comp.L.J. 1; (1986)60 Comp.Case 797; 1986 Lab.I.C. 1312; A.I.R. 1986 S.C. 1571; Spencer and Company Limited v. B.Vajravelu, (1989)2 L.W. 53; Chartered Bank v. Chartered Bank Employees' Union, A.I.R. 1960 S.C.C. 919; N.B.Shukla v. Bank of Baroda and another, (1979)I L.L.J. 291; Bank of Maharashtra v. O.P.Singla, 1990 Bank.L.J. 198.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 2nd respondent relating to the order dated 8.7.1982 bearing R.O.P.R.S.DAD. 62/116 of the 2nd respondent and quash the same.

A.L.Somayaji for *M/s.Aiyar and Dolia* and *Annamathew*, for Petitioner.

M.R.Narayanaswami, Senior Counsel, for *K.R.Vijayakumar* for Respondent No.2.

The Court made the following

ORDER:- The above writ petition has been filed for a writ of *certiorari* to call for and quash the proceedings of the second respondent in RO:PRS.AD:82/116, dated 8.7.1982, the memo by which the petitioner was informed that his services were terminated with effect from 17.7.1982 that the termination did not amount to retrenchment, and that notwithstanding the same, the petitioner was being given retrenchment compensation which he would have drawn if the termination had amounted to retrenchment and that a pay order for Rs.3,982.17 being the three months pay and allowances was being also attached.

2. The petitioner was appointed as Shroff-cum-Collection Clerk in the services of the respondent-bank on 17.11.1968. On 4.11.1979, the petitioner sought permission from the first respondent for filing an insolvency petition as he had incurred debts of Rs.20,000 at high rate of interest. On 15.4.1980, the petitioner appears to have been suspended on the basis of the above letter while he was working as clerk and he was allowed to draw an amount equal to 1/3 of his salary and all other subsistence allowances as per the orders of the Divisional Manager, Coimbatore Division. Subsequently, on 30.8.1980 having regard to the entitlement of the petitioner, he was ordered to be paid half salary and allowances and subsistence allowances. The petitioner has been issued with a charge memo on 13.1.1981 which included the charge of issuing cheques H.S.S. withdrawals on his account without keeping sufficient funds. By his communication dated 4.11.1979 to the Divisional Manager, the petitioner confessed that he contracted loans approximately of Rs.20,000 and was paying exorbitant interest and seeking permission as referred to above to file an insolvency petition. The petitioner did actually file an insolvency petition on 8.11.1979. The charge memo also contained charge of violation of Sec.10(1)(b)(iii) of the Banking Regulation Act, 1949 and the petitioner was alleged to have committed misconduct involving moral turpitude. I.P.No.54 of 1979 filed by the petitioner, in the court of the Subordinate Judge of Tiruchirapalli was said to have been withdrawn on 28.7.1980 and it is, therefore, claimed that the petitioner, was not adjudged as an insolvent.

3. The management appears to have conducted an enquiry on 23.2.1981 and on the basis of the findings of the Inquiry Officer, a show cause memo dated 26.8.1981 was issued by the Disciplinary Authority (Chief Manager, Coimbatore) holding charges 1 and 2 proved and proposing to impose a consolidated punishment of stoppage of increment for three years permanently. The petitioner appears to have submitted a written submission on 1.9.1981 accepting guilt and also made oral submission on 4.9.1981 and on 4.9.1981 itself. The punishment proposed by the Disciplinary Authority was said to have been imposed. On 8.9.1981, the Chief Manager revoked the suspension order and reinstated the petitioner in service from the date he would report for duty at Pattivatithalai Branch. The petitioner appears to have joined on 11.9.1981 and had been served with the impugned proceedings. Aggrieved, the above writ petition has been filed.

4. Mr.A.L.Somayaji, learned counsel for the petitioner, contended as follows: (a) The impugned order is in substance one of punishment for a misconduct and consequently, the same was passed

without complying with the procedure contemplated under paragraph 521 of the Sastry Award and subsequently made the subject of *Bi-partite* Settlement. (b) The provisions contained in paragraph 522 of the Sastry Award which has before part of the *Bi-partite* Settlement is violative of Art.14 of the Constitution of India and is liable to be struck down and consequently, the order purported to have been passed thereunder also stood vitiated (c) The provisions contained in Para.522 of the *Bi-partite* settlement has no application to the case on hand since the question of loss of confidence involves a misconduct and consequently, the order amounts to a punitive one in character.

5. Mr.M.R.Narayanaswami, learned Senior Counsel appearing for the respondents, contended that having regard to the history of the Sastry Award, the nature and character of the same and the authority under which it has been made and the manner in which it was subsequently made a *Bi-partite* Settlement accords to it a statutory force and they are not unilateral rules devised by the respondent organisation. Consequently, it is contended on behalf of the respondents that the plea of alleged violation of Art.14 of the Constitution of India has no relevance and such a plea cannot be raised against the settlement which had its origin as a judgment of a Tribunal. The learned counsel submitted that the impugned order was not made by way of any punishment for any alleged misconduct and the contention that the order was punitive in character was neither correct nor sustainable. It is also contended that the provisions of Para.522 have been rightly applied to the case of the petitioner and if the submissions of the petitioner are to be accepted, the vital difference between Paras.521 and 522 would be not only wiped out, but paragraph 522 would virtually be rendered otiose. The learned counsel submitted that whether the order of termination should be considered to be one for a misconduct or that the order impugned was punitive in character and if so, whether it is vitiated on that account are matters more appropriate for being considered before the adjudicating authorities under the Industrial Disputes Act by means of appropriate reference and that the same cannot be advanced and sought to be adjudicated in these proceedings under Art.226 of the Constitution of India.

6. On behalf of the petitioner, reliance was placed on the decision in *Chandulal v. The Management of M/s.Pan American World Airways, (1985)2 L.L.J. 181 (S.C.)*, to contend that loss of confidence cast stigma and constitutes misconduct and consequently, the holding of an enquiry is necessary for terminating the services of a worker on that ground. In my view, though the decision of the Apex Court was concerned with the termination of services of the worker in that case, on the ground of loss of confidence, it could be seen having regard to the facts of the said case that the declaration of law in the said decision should be confined to the nature of the case under the consideration of the Supreme Court. That was a case where the worker was considered to have been indulging in certain mal-practices noticed in paragraph 3 of the judgment and it was only in that context when the management terminated on the basis of such malpractices but stating the ground of loss of confidence it was considered to cast stigma on the worker necessitating an enquiry before such termination. In my view, where the basic materials or the relevant facts which were responsible to make the employer to come to a conclusion of loss of confidence *per se* constituted acts of misconduct, the employer cannot avoid the conduct of an enquiry by merely using the pretext of loss of confidence to terminate the services of an employee. The case on hand would not be one such as could be seen from the consideration to follow hereinafter.

7. On behalf of the respondents, the decision of this Court in *Ramiar v. State Bank of India, Madras, (1963)2 L.L.J. 304*, which was confirmed on appeal by a decision of *Ramish v. State Bank of India, Madras (1968)2 L.L.J. 424*, was relied upon to contend that loss of confidence is a matter to be understood in the light of the circumstances of each case and that even in a case where an enquiry has been initiated and conclusions have been arrived at on the basis of the enquiry yet the employer may either choose to punish the employee on a finding of misconduct or it may choose for what may seem to the authority to be valid reasons to terminate the employment under the contract instead, and that the choice of one of the alternatives cannot be denied to the management. On the basis of the said principle, it is contended that loss of confidence and the consequent termination under paragraph 522 cannot be said to be one for any misconduct.

8. The learned Senior Counsel for the respondents while relying upon Sec.10(i)(b) of the Banking Regulations Act, 1949, contended that the termination for loss of confidence was fully supported by the stipulation contained therein, and that Sec.10(i)(b)(i) of the Act provides that no Banking Company shall employ or continue the employment of any person who is, or at any time has been adjudicated insolvent, or has suspended payment or has compounded with his creditors, or who is, or has been convicted by a criminal court of an offence involving moral turpitude. The learned counsel submitted that the action of the petitioner in submitting the application for leave to file an insolvency petition, the admissions contained therein and the actual petition filed and the contents thereof themselves constitute sufficient proof of "has suspended payment" and consequently, no exception could be taken to the termination on account of the loss of confidence for the above reason. On behalf of the petitioner, reliance was placed on the decision in *Chatram Puttappa Sons v. Amarchand, A.I.R. 1960 Mys. 267,* to contend that inability to pay does not amount to suspension of payment. The decision will have no application to the case on hand inasmuch as on the facts of the case, it is not merely inability to pay that was on record. Under Sec.6(1)(f) of the Provincial Insolvency Act, the very fact that one person seeks by filing a petition to be adjudicated as an insolvent under the Act constitutes an act of insolvency. The question as to when a person can be said to have 'suspended payment' has come up for consideration often while considering the scope of Secs.6 and 9 of the Provincial Insolvency Act. In *Kishore v. Netherlands Training Society, A.I.R. 1930 Cal. 555,* a Division Bench of the Calcutta High Court held that where a judgment-debtor brought before the court at the instance of the judgment creditors under Sec.55, C.P.C. intimates to the court that he intends to apply for an adjudication as an insolvent within one month and asks for an order of release, it amounts to giving notice that he is about to suspend, payment of debts, thereby committing an act of insolvency within the meaning of Sec.9 of Presidency Towns Insolvency Act. Suspension of payment of debts generally and not to any particular debt, was said to constitute an act of insolvency within the meaning of Sec.9. The question as to whether the contents of the notice for the action of the debtor constitutes an act of insolvency was always considered to be one of fact to be decided in each case in the light of the fact produced on the mind of the creditors by such notice or action and in a case of an employer *vis-a-vis* an employee it must be considered from the point of view of the effect of action upon the mind of the employer.

9. The filing of an insolvency petition in the present case having the same principle and causing the issue of notice and publication made in the Gazette as well as service of notice on some of the respondents to the petition would, in my view, constitute sufficient basis to substantiate the claim of the respondent that the petitioner 'suspended payment' within the meaning of Sec.10(1)(b)(i) of the Act. Consequently, in my view, *de hors* any other materials on the very admitted conduct and course of action adopted by the petitioner and having regard to the stipulation contained in the Banking Regulation Act, 1949 referred to supra, the termination on account of loss of confidence cannot be said to be one involving any misconduct and consequently, the non-compliance with paragraph 521 of the *Bi-partite* settlement does not vitiate the order of termination.

10. The plea of violation of Art.14 of the Constitution of India and challenge to paragraph 522 of the *Bi-partite* settlement also do not merit my acceptance. On behalf of the petitioner, reliance was placed on the decision in *Central Inland Water Transport Corporation Limited v. Brojo Nath, (1986)3 S.C.C. 156: (1986)2 S.C.J. 210: (1986)69 F.J.R. 171: (1986)3 Comp.L.J. 1: (1986)60 Comp.Case 797: 1986 Lab.I.C. 1312: A.I.R. 1986 S.C. 1571,* and *Spencer and Company Limited v. B.Vajravelu, (1989)2 L.W. 53,* (Summary of Cases) and it was contended that the respondent which is a nationalised bank being "State" within the meaning of Art.12 of the Constitution of India is subject to Art.14 of the Constitution of India and consequently, paragraph 522 which provides for arbitrary termination is liable to be struck down as being opposed to public policy and violation of the principles of natural justice too. In my view, having regard to the origin of the Sastry Award as a judgment of a tribunal and its adoption throughout by means of *Bi-partite* statutory Settlement the principles enunciated in the *Central Inland Water Transport Corporation Limited v. Brojo Nath, (1986)3 S.C.C. 156: (1986)2 S.C.J. 210: (1986)69 F.J.R. 171: (1986)3 Comp.L.J. 1: (1986)60 Comp.Case*

797: 1986 Lab.I.C. 1312: A.I.R. 1986 S.C. 1571, will have no application to the case on hand. *Spencer and Company Ltd. v. B.Vajravelu*, (1989)2 L.W. 53 (Summary of Cases), equally has no application having regard to the specific finding therein that the order ex facie showed adverse imputation against the employees for misconduct which is not and could not be said to be the case herein. For the respondents, the Supreme Court decision in *Employees Welfare Association v. Union of India*, A.I.R. 1990 S.C. 334, was relied upon to contend that when a particular decision has become final and binding between the parties, they would always be bound by the said decision and it cannot be set at naught on the ground that such decision was violative of Art.14 of the Constitution of India. It was also contended that the validity of paragraph 522 of the Sastry Award in question was the subject matter of challenge and the Apex Court repelled the same in the decision in *Chartered Bank v. Chartered Bank Employees' Union*, A.I.R. 1960 S.C. 919. In paragraph 7 of the said judgment while construing the scope of power of the Bank under paragraph 522 of the Sastry Award, it was held as hereunder:

> "Two courses were open to it; it could have taken disciplinary action under paragraph 521 of the Bank Award or it could have acted under paragraph 522(1). The submission on behalf of the Bank is that it did not want to go into the squabble between the Chief Cashier and the respondent and as the Chief Cashier had withdrawn his guarantee with respect to the respondent it acted *bona fide* in proceeding under paragraph 522(1) and thus no question arose of its taking disciplinary action against the respondent."

Consequently, the provisions contained in paras.521 and 522 had different and distinct roles to play and had been held to be binding all along upon the parties and the plea based on Art.14 of the Constitution of India, in my view, is wholly misconceived. The clause in question cannot be said to have been either unilaterally thrust on the employee or that the employee was made to agree taking advantage of the dominant role the management had at its command to play in the matter. As referred to already, the *Bi-partite* settlement had its origin in Sastry Award having been rendered by a Judicial Tribunal, that the same was given statutory force and has all along been observed to be the charter of rights in respect of the employer and employee relationship of the Bank and its employees and that the said award continued to bind the rights of parties by bilateral settlement entered into under the Industrial Disputes Act, 1947. The challenge to such a provision pressing into service the principles enunciated in the *Central Inland Water Transport Corporation Limited v. Brojo Nath*, (1986)3 S.C.C. 156: (1986)2 S.C.J. 210: (1986)69 F.J.R. 171: (1986)3 Com.L.J. 1: (1986)60 Comp.Case 797: 1986 L.C. 1312: A.I.R. 1986 S.C. 1571, does not carry any weight or merit. The challenge, therefore, fails and shall stand rejected.

11. The reliance placed by the learned counsel for the petitioner on the decisions in *N.B.Shukla v. Bank of Baroda and another*, (1979)I L.L.J. 291, of learned single Judge of the Bombay High Court and *Bank of Maharashtra v. O.P.Singla*, 1990 Bank J. 198, of a learned single Judge of the Delhi High Court that notice should be given to the employee followed up by an enquiry, in my view, has no application to the case on hand. Once again those were cases where the termination for loss of confidence was found to factually involve an element of stigma unlike the case on hand as held by me supra. Consequently, the submission of the learned counsel for the petitioner that paragraph 522 has no application to the present case does not also merit my acceptance.

12. That apart, in my view, the objection that if the order is to be challenged on merits as to whether the termination was brought about for any misconduct or and had the effect of casting stigma against the petitioner, an adjudication of such question would require and also depend upon proper and sufficient oral and documentary evidence, and has got to be done on a reference to the competent forum merits my acceptance. In *Chartered Bank v. Chartered Bank Employees' Union*, A.I.R. 1960 S.C. 919, the Apex Court was of the view that such questions have to be left to the adjudication of the competent tribunal or court constituted for the purpose. In my view the petitioner if he so desires to challenge the order on such factual grounds claims should have recourse only to the adjudicative machinery provided under the Industrial Disputes Act, 1947 and cannot raise such issues in these proceedings under Art.226 of the Constitution of India.

13. For all the reasons stated above, the writ petition fails and shall stand dismissed. The

petitioner should be at liberty if he so desires to work out his remedies if any otherwise in accordance with law on those grounds or aspects. No costs.

B.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

A.S.Nos.710 of 1981 and 828 of 1983

4th October, 1991.

M.Lakshmiammal and others ...*Appellants*

v.

K.T.T.Ramalingam Chettiar and another ...*Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.6(20) - 'Temple' - Definition - 'Private' or 'Public' - Temple is presumed to be public - Burden of proving it to be private is on person claiming into to be so.

It may be noted that in South India excepting Malabar, it is well established now by court decisions that the presumption is that a temple is a public one and whoever claims the temple to be a private one he must have to prove it. *[Para 8]*

Cases referred to:

Koman Nair v. Achuthan Nair, A.I.R. 1934 P.C. 230: 67 M.L.J. 788: I.L.R. 58 Mad. 91; Sri Chidambareswara Sivagami Ambigai Temple v. The Commissioner H.R. & C.E., (1966)1 M.L.J. 109: A.I.R. 1966 Mad. 99: I.L.R. (1965)2 Mad. 404; Soundharathammal v. The Thiruchirapalli Mahasuruli Alaya Bakthargal Madya Sangam, (1977)1 M.L.J. 125; E.Subbiah Pillai v. The Commissioner H.R. & C.E. Madras, 77 L.W. 94; Subramania Aiyar v. Pujari Lakshmana Goundan, A.I.R. 1920 Mad. 42: 1919 M.W.N. 899; Thanumalaya Perumal Mudaliar v. The Commissioner H.R. & C.E. Madras, (1975)2 M.L.J. 310; The Executive Officer, Arulmigu Ranganathaswami Davasthanam, Srirangam v. His Holiness Srivan Satagopa Sri Vedantha Desika Yathindra Maha Desigan, (1989)2 M.L.J. 54.

W.C.Thiruvengadam, for Appellants.

P.M.Bhaskaran, Assistant Government Pleader and *T.Srinivasaraghavan*, for Respondent.

The Court delivered the following

JUDGMENT:- These two appeals arise out of one common judgment rendered by the Subordinate Judge of Ramanathapuram in Madurai, in O.S.No.65 of 1969 and O.S.No.124 of 1969. O.S.No.65 of 1969 was decreed, while O.S.No.124 of 1969 was dismissed. As against the decree in O.S.No.65 of 1969 A.S.No.710 of 1981 has been filed and as against the decree passed in O.S.No.124 of 1969 A.S.No.828 of 1983 has been filed. O.S.No.65 of 1969 was filed by one K.T.T.Ramalingam Chettiar against Muthuramalingam Pillai and seven others, the eighth defendant being the Commissioner, Hindu Religious and Charitable Endowments, Madras, while O.S.No.124 of 1969 was filed by the said Muthuramalingam Pillai and six others against the said K.T.T.Ramalingam Chettiar, the plaintiff in O.S.No.65 of 1969 and that suit was filed for recovery of possession and for damages. Both the appeals can be disposed of in one common judgment. In both the suits the case of the respective parties is the same. For convenience sake, as the trial Judge has done, the plaintiff in O.S.No.65 of 1969 will be hereafter referred to as plaintiff and the defendants in that suit as the defendants.

2. Now the case of the plaintiff in brief is that, the suit temple which is known as Pazhikkanjia Vinayagar temple at Sivakasi is a public temple. It was founded by Ayira Vysya Kasukara Chettiars community. It was managed and administered by the plaintiff and their predecessors. The defendants and their predecessors were only Poosaries in the temple and they had nothing to do with the ownership of the temple. The defendants filed an application before the Deputy Commissioner, Hindu Religious and Charitable Endowment Department for declaration that the suit temple is a private temple and that was ordered. The appeal preferred before the Commissioner was dismissed. The plaintiff filed statutory suit under Sec.70 of the Hindu Religious and Charitable Endowments Act for setting aside that order and to declare the suit temple as a public temple.

3. The defendants contended that it is a private temple belonging to the family of the defendants. They also contended that the suit temple was constructed by their ancestors-Muthulinga Othuvar in his own land and the idol was consecrated as a family deity. The defendants and their ancestors

have been in possession and management of the temple throughout and they are not mere Othuvars.

4. On consideration of the evidence adduced in the case the trial court held by its judgment dated 30.11.1971 that the suit temple is a private temple. Accordingly it decreed the suit O.S.No.124 of 1969 filed by the defendants and dismissed the suit O.S.No.65 of 1969 filed by the plaintiff.

5. The matter was taken on appeal to this Court and in that appeal, observing that the trial court has not considered properly some of the relevant evidence in the case set aside the said judgment of the trial court and remitted it back to the trial court for fresh disposal.

6. The trial court by its judgment dated 29.11.1980 in reversal of its earlier judgment, held that the suit temple is a public temple as pleaded by the plaintiff and not a private temple as contended by the defendants. Accordingly it decreed the suit O.S.No.65 of 1969 and dismissed the suit O.S.No.124 of 1969. As against this, now the defendants have filed these two appeals.

7. Mr. W.C.Thiruvengadam, learned counsel appearing for the appellants-defendants would contend that the finding of the trial court is quite contrary to the evidence in the case. He would lay much stress on Ex.82 filed by the defendants. This is a photo of a Silasasanam of the year 1669. As per the said Silasasanam the temple has been built by Muthusamy Othuvar, the ancestor of the appellants.

8. It is not in dispute that there is such a Silasasanam in the temple. But however it is argued for the plaintiffs that even if this Silasasanam is a genuine one that alone will not prove that the temple is a private one. No doubt this Silasasanam would show that the temple has been built by Muthusamy Othuvar, but the question is whether he intended it to be a private temple or public temple. In this connection it may be noted that in South India excepting Malabar, it is well established now by court decisions that the presumption is that a temple is a public one and whoever claims the temple to be a private one he must have to prove it. It has been so held by the Privy Council in *Koman Nair v. Achuthan Nair, A.I.R. 1934 P.C. 230: 67 M.L.J. 788: I.L.R. 58 Mad. 91,* and by a Division Bench of this Court in *Sri Chidambareswara Sivagami Ambigai Temple v. The Commissioner H.R. & C.E., Madras, (1966)1 M.L.J. 109: A.I.R. 1966 Mad. 99: I.L.R. (1965)2 Mad. 404.*

9. As against this the learned counsel for the defendants cited a decision of this Court in *Soundharathammal v. The Thiruchirapalli Mahasuruli Alaya Bakthargal Madya Sangam, (1977)1 M.L.J. 125,* wherein, while considering whether a Samathi is a public place of worship or private place of worship it is stated that before a temple or shrine or other holy place can be accepted and recognised as a place of public religious worship there must be evidence of dedication of the same for the benefit of the Hindu Community or a section thereof. This being single Judge decision and the controversy is with regard to a Samathi and not a temple this decision will not help the plaintiff.

10. One important thing that has to be borne in mind is that admittedly the temple has been built in a poramboke land. If the builder of the temple wanted it to be a private one it is unlikely that he would have built it in a poramboke land. Therefore the fact that the building is in a poramboke land gives an indication that quite possibly the builder wanted to dedicate the temple to the public.

11. Mr.Thiruvengadam would however rely on a decision in *E.Subbiah Pillai and another v. The Commissioner H.R. & C.E. (Admn.) Dept., Madras, 77 L.W. 94,* wherein it has been held that only because the temple is situated on a Natham it cannot be called a public temple. There is vast difference between Natham and a poramboke land. In that case the temple was built not only adjacent to the plaintiffs' house but the plaintiffs had access and entrance to the temple directly from their house. Further in our case too just for the reason the temple is built on a poramboke land we do not hold that it is a public temple, but, as stated above, this is a strong circumstance probabilising that it could be the intention of the builder that the temple was to be a public temple.

12. Then even if at the time of building of the temple the builder had no intention that the public should worship there, it could be that in the course of time the temple had become a public one by uninterrupted user by the Public. In a Full Bench decision in *Subramania Aiyar and others v. Pujari Lakshmana Goundan and another, A.I.R. 1920 Mad.42: 1919 M.W.N. 899,* a temple built on a private land and exclusively managed by the founder and his family, was by inference from the acts of the founder and his family members, held that the temple had been dedicated to the public.

13. The next document the appellants would rely on is Ex.832 which is called Cadjan leaves written by one Muthusamy Udayar on 11.1.1965. Therein it is written that,

"……..நம்மள் முன்னோர்களால் நேமித்த சிவ்காசி கன்னி மூலை விநாயகர் மூர்த்தியை நான் நான்தோறும் பூசித்து பணிவிடை செய்து வந்த நாளில் எனக்கு பூர்வ கருமத்தால் குருமவைத்து வலியால் நெடுநாள் வருத்தமாயிருந்தேன்."

From this it is argued that as per Ex.832 the suit temple has been established by the abovesaid Muthusamy Othuvar. That may be so, but this document does not show that the temple was a private temple. It reads that the writer had been doing pooja and service to the deity.

14. The next evidence for the appellants is the oral testimony of first defendant as D.W.1, and D.Ws.2 and 3. The evidence of first defendant (D.W.1) is an interested one. Therefore the only evidence that can be said to be independent is of D.Ws.2 and 3 who would say that the public do not worship in the temple.

15. As against this on the side of the plaintiff, Mr.T.R.Srinivasaraghavan, learned counsel for the respondent-plaintiff would submit that the defendants' family had been the poosaries of the temple, and they were not the owners. In support of their case the plaintiff would first rely on a grant of maniam Ex.A-14, dated 9.10.1929 by the Government of Rs.5 and annas 4 only for the purpose of pooja. This grant is in favour of the temple and not in favour of any individual, not to speak of any of the defendants' ancestors. From this it is submitted by the plaintiff that the Government believed the temple to be or treated it as a public temple.

16. However it is argued on the side of the defendants that only because the Government has granted maniam it cannot be said to be a public temple since there is nothing preventing the Government granting maniam to a private temple also. In this connection the learned counsel would rely on a Division Bench ruling of this Court in *Thanumalaya Perumal Mudaliar and others v. The Commissioner H.R. & C.E. (Admn.) Department, Madras and others, (1975) 2 M.L.J. 310,* wherein it is stated that,

"The fact that at one particular point of time a small extent of two acres and odd was additionally granted to the deity by some strangers cannot alter the nature of the initial grant or the character of the institution from a private one to a public one."

But in the instant case there is no question of any strangers granting anything to the deity but it is the Government that has granted the manibam. Therefore the said decision would not help the defendants. I agree with the trial court that the grant of maniam by the Government is one of the strong circumstances that would go to show that the suit temple could be a public one.

17. Sivakasi Municipality also has treated the suit temple as a public temple inasmuch as it is not in dispute that it has exempted the suit temple from payment of tax. As per Ex.A-20 the municipality has levied tax on the properties of the temple and the owner of the property has been described as Pazhikkanjia Vinayagar temple, and Ex.B-21 is a receipt for payment of tax for the properties of the temple and there too the owner has been described as Pazhikkanjia Vinayagar temple.

18. Exs.A-1 to A-9 are statements recorded by the Revenue Inspector in connection with the said temple, given by the residents of Sivakasi and some of them are of 1896 and the others are of 1897. A reading of these documents would show that the residents have complained about the poosari in the temple *i.e.* Muthusamy Othuvar stating that he was not properly doing poojas and was misusing the funds of the temple properties. Therein the residents have stated clearly that the temple had been built by the people of Chettiar community and now Muthusamy Othuvar was doing pooja in the temple but he was not doing pooja properly. The genuineness of these documents is not in dispute and these being ancient documents they have great evidentiary value.

19. Ex.B-14 is an order dated 31.8.1890 issued by the Tahsildar upon a complaint made by one Arunachalam Chettiar against Muthusamy Othuvar in connection with the temple properties, and in that order the Tahsildar has stated that it appeared that Muthusamy Othuvar had not appropriated to himself any of the temple properties and therefore the complaint need not be pursued further. This is an indication that it did not appear then that Muthusamy Othuvar claimed the suit temple as his family temple.

20. Ex.A-26 is a registration copy of a mortgage deed executed by one Vellayan Asari and others in

favour of one Vadivel Nadar on 20.2.1874. Therein the boundary of the property mortgaged has been stated as "..........செட்டியார் பிள்ளையார் கோவில் நந்தவன நிலத்திற்கும் மேற்கு"

It is not in dispute that this temple mentioned as the boundary is the suit temple. Therefore as per the mortgage deed Ex.A-26 which is also as early as of the year 1874 the suit temple has been stated to be belonging to the Chettiars.

21. Ex.B-8, dated 28.7.1917 is a partition deed among the then members of the defendants family. Therein they have referred to the private properties and poosari right in the suit temple. No mention of the temple or temple properties has been made as their private property. This only shows that according to the members of the defendants' family then the temple was not a private property belonging to their family.

22. Ex.A-11 is a registered copy of sale deed dated 6.1.1919 executed by Mariappa Pillai in favour of one Anaiappa Pillai for Rs.600. It is a sale deed by one of the ancestors of the defendants. Therein he has been described as "சுவாமியார் பிள்ளை குமாரர்.......... கோவில் பணிவிடை"

So the defendants' ancestor has been described as one who did service in the temple. To this effect is Ex.A-12 also which is a cancellation deed cancelling Ex.A-11. If really the said defendant's ancestor was the owner of the temple he would not have been described as a 'panividaidhar'. This description 'panividaidhar' is incompatible with the temple being a private one belonging to the defendants' family.

23. Ex.A-15 is a copy of the petition given by the first defendant to the Sivakasi Municipal Commissioner on 22.7.1937. Therein, as pointed out by the trial court, the first defendant has called himself as 'Huqdar' of the suit temple. Huqdar means manager, and the suit temple has not been referred to as the private temple of the defendants' family. This Ex.A-15 is a copy of petition sent by the first defendant complaining against his uncle (paternal) Shanmugham Pillai in respect of the temple properties. Therein he has clearly mentioned that the temple properties are endowed properties (தர்மசொத்து), and that himself or Shanmugham Pillai has no right whatsoever in it. In one place in it he calls himself as the Inamdar of the temple. These recitals conclusively, by way of admission, prove that the suit temple and its properties belong to the public and not to the family of the defendants. In my view, in the face of this document Ex.A-15, it is not at all open to the defendants to raise a plea that the suit temple is a private temple and not a public temple.

24. The first defendant himself as D.W.1 has categorically admitted that people of all communities go to the temple. He would also say that he used to do pooja daily two times and there will be poojas on festival days, and there will be pooja on the Vinayaga Chadhurthi day. In the face of this evidence of the first defendant himself, the evidence of D.Ws.2 and 3 that the public does not go to the suit temple to worship has to be rejected as untrue.

25. The plaintiff besides himself as P.W.1, has examined P.Ws.2 to 9. All of them have uniformly deposed that the suit temple is a public temple and the public go there and worship without any interruption, and no permission to worship in the temple is needed for anybody. This evidence of P.Ws. has not been seriously challenged in the cross examination.

26. Considering the circumstances discussed above, I am clearly of the view that the suit temple is a public temple and not a private temple as decided by the trial court.

27. It is next argued by the learned counsel for the appellants-defendants that in the plaintiff's suit *i.e.*, O.S.No.65 of 1969 eighth defendant is the Commissioner, Hindu Religious and Charitable Endowments, Madras and to him no notice under Sec.80, C.P.C. has been given and for this reason the suit is incompetent and is liable to be dismissed. In this connection the learned counsel cited a Division Bench decision of this Court in *The Executive Officer, Arulmigu Ranganathaswami Devasthanam, Srirangam v. His Holiness Srivan Satagopa Sri Vedantha Desika Yathindra Maha Desigan, (1989) 2 M.L.J. 54*. But in the very same judgment in paragraph 13 it has been clearly held that the point regarding notice under Sec.80, C.P.C. can be raised by the Government or Public Officer against whom the suit is filed and not by a third party. Therefore this contention of the learned counsel has no merit.

28. The result is, both the appeals are liable to be dismissed. I order accordingly. In both the appeals the appellants shall pay costs to the respondents.

B.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

W.P.Nos.7725 and 7726 of 1991 W.M.P.No.17947 of 1991 *9th October, 1991.*

Dr.Alexander Educational Foundation, Tambaram *...Petitioner*

v.

University of Pondicherry, represented by Registrar, Pondicherry and another *...Respondents.*

(A) Pondicherry University First Ordinance, Chapter VIII, Rule 5(4) - Provisional affiliation given by university to a private educational institution to start B.Pharm. Course, B.Sc. Nutrition Course and B.Sc. M.L.T. Course - University seeking to withdraw the provisional affiliation on basis of inspection report of a committee - Copy of Inspection report, if to be furnished to the institution before passing orders.

Rule 5(4) of Chapter VII of the First Ordinance relates to inspection done pursuant to an application by the institute for permanent affiliation to a course, which might be granted after provisional affiliation was granted for three academic years. In that context only the said rule 5(4) says that the report of the Inspection Committee shall not be communicated to the institution, but shall be regarded as a confidential document until it has first been considered by the University. But, the present case is an inspection to see whether the conditions of provisional affiliation were complied with by the petitioner. Institution and whether the provisional affiliation could be renewed or the institute should be de-affiliated, as the case may be. The said Rule 5(4) would not apply to this case. So, the copy of the report should have generally been given to the petitioner along with the show cause notices. *[Para 15]*

(B) Constitution of India (1950), Art.226 - Petition under - Disputed questions of fact if can be gone into.

The factual averments in the petitioner's affidavits having been disputed in the counter affidavits of the 1st respondent, the court cannot go into those questions of facts in the present jurisdiction under Art.226 of the Constitution of India. *[Para 16]*

(C) Pondicherry University Act (LIII of 1985), Sec.13(3) - Expression - 'Any matter' - Scope of - Whether includes non-renewal of affiliation or de-affiliation.

The term "any matter" used in Sec.13(3) is wide enough to include non-renewal of affiliation or de-affiliation. In such a case, the Vice-Chancellor can exercise the authority of the Executive Council provided under Statute 32(5). The second proviso of Sec.13(3) cannot limit the scope or ambit of the wide expression 'any matter' used in the main part of Sec.13(3). *[Para 18]*

Case referred to:

The University of Mysore and another v. C.D.Govinda Rao and another, A.I.R. 1965 S.C. 491.

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith, the High Court will be pleased to issue writs of *certiorarified mandamus*, calling for the records of the 1st respondent in its order dated 10.5.1991 bearing PU/ACQ-3/P7T/90/3936 and quash the same and direct the respondents to continue affiliation for B.Sc. (Medical Lab Technology) and B.Sc. (Nutrition) (in W.P.No.7726 of 1991) (Prayer amended as per order of court dated 12.8.1991 in W.M.P.No.13173 of 1991), and order dated 19.8.1991 bearing No.PU/ACQ/3/PIT/91 and quash the same and direct the respondents to continue the affiliation as already ordered in W.A.No.1110 of 1988 for B.Pharm. course to the petitioner's institution (In W.P.No.7725 of 1991 (prayer amended as per order of court dated 9.10.1991 and made in W.M.P.No.17947 of 1991. etc.

Kapil Sibal, Senior counsel for *P.S.Raman, P.R.Raman* and *K.S.Viswanathan* for Petitioner.

P.D.Dinakar, for Respondent No.1.

K.S.Ahamed, Government Pleader (Pondicherry), for Respondent No.2.

The Order of the Court was made by

Abdul Hadi, J.:- These two writ petitions are by Dr.Alexander Educational Foundation, Tambaram, against the Pondicherry University and the Government of Pondicherry.

2. The abovesaid foundation runs an educational institution by name "Pant Institute of Technology" from the year 1987. The 1st respondent-university granted to the said institution provisional affiliation to start B.Pharm. course, B.Sc. Nutrition course and B.Sc. (M.L.T.) course in 1987. On 9.4.1991, the 1st respondent-university

sent two impugned show cause notices under Statute 32(5) of the Pondicherry University Act, 1985, one in respect of B.Pharm course and the other in respect of the two B.Sc. courses. With reference to B.Pharm course, the notice stated that the petitioner was given an opportunity to defend itself as to why the said B.Pharm course should not be de-affiliated from the academic year 1991-92 onwards. With reference to the other two B.Sc. course also, the notice stated that the petitioner was given an opportunity to defend itself as to why the provisional affiliation granted should not be withdrawn from the academic year 1991-92 onwards. W.P.No.7725 of 1991 has been filed for the issuance of *certiorarified mandamus* to quash the above said show cause notice relating to B.Pharm course and direct the 1st respondent not to interfere with the affiliation already granted for six years with regard to B.Pharm course. This provisional affiliation for 6 years was granted on 21.11.1988 by the 1st respondent-university pursuant to the order of this Court dated 27.10.1988 in W.A.No.1110 of 1988, about which further details are given in paragraph 5 below. W.P.No.7726 of 1991 has been filed praying for issuance of a writ of *certiorarified mandamus* to quash the said show cause notice relating to the said B.Sc. course and direct the 1st respondent to continue the affiliation for the said courses without any further interference.

3. In the stay petitions filed in the above writ petitions, on 14.5.1991, this Court ordered that "further proceedings may go on in the matter, but final orders passed should not be given effect to until further orders of this Court". While so, two final orders have been passed by the Vice-Chancellor of the 1st respondent-university under Statute 13(3) of the Pondicherry University Act, 1985, pursuant to the above referred to two show cause notices. One order is dated 10.5.1991 relating to the above said B.Sc. courses, stating that the Vice Chancellor decides not to renew the provisional affiliation in respect of the above said B.Sc. courses in the Pant Institute of Technology from the academic year 1991-92 onwards. The other order is dated 19.8.1991 and it states that the Vice Chancellor decides to de-affiliate the abovesaid B.Pharm course in the Pant Institute of Technology from the academic year 1991-92 onwards.

4. Since the said final orders have been passed, the writ petitioner has filed W.M.P.No.13173 of 1991 in W.P.No.7726 of 1991 and W.M.P.No.17947 of 1991 in W.P.No.7725 of 1991. W.M.P.No.13173 of 1991 seeks to substitute the prayer in the writ petition for quashing the abovesaid final order dated 10.5.1991 and directing the 1st respondent to continue the affiliation for the abovesaid B.Sc. courses. This writ miscellaneous petition was ordered as prayed for, on 12.8.1991. W.M.P.No. 17947 of 1991 is for quashing the abovesaid final order dated 19.8.1991 and directing the 1st respondent to continue the affiliation as already ordered in W.A.No.1110 of 1988 for the B.Pharm course to the petitioner's institution. Though this petition has not already been disposed of, it is obvious that this writ miscellaneous petition has also to be ordered, just as the abovesaid W.M.P.No. 13173 of 1991. Accordingly, W.M.P.No.17947 of 1991 is also hereby ordered as prayed for.

5 The above referred to W.A.No.1110 of 1988 is the writ appeal filed by the petitioner herein against the order dated 8.8.1988 in W.M.P.No.11323 of 1988 in W.P.No.7798 of 1988 on the file of this Court. The said W.P.No.7798 of 1988 was also filed by the petitioner herein praying for a direction to the 1st respondent-university to continue the affiliation for the abovesaid B.Pharm and B.Sc. courses. The abovesaid W.P.No.7798 of 1988 was filed in the following circumstances:- Originally. the provisional affiliation referred to in para 2 above was granted only for one year. The said grant was communicated to the petitioner by letter dated 30.7.1987 in respect of B.Pharm and B.Sc. Nutrition courses and by letter dated 27.10.1987 in respect of B.Sc. (M.L.T.) course. The said grant was also subject to the condition that the petitioner agreed to fulfil all the conditions laid down by the Inspection Commission, based on whose report, the said grant was made. But, on the ground the said conditions were not complied with, after show cause notice and personal hearing, the 1st respondent-university, by its letter dated 25.2.1988, informed the petitioner that the provisional affiliation for B.Sc. Nutrition and M.L.T. courses, automatically ceased since it was granted only for one year. A similar letter dated 2.7.1988 was also sent to the petitioner with reference to B.Pharm course also. So, the petitioner filed the above W.P.No.7798 of 1988 and it is said to be pending.

6. In the abovesaid writ petition, the abovesaid W.M.P.No.11323 of 1988 prayed for an interim

direction, directing the 1st respondent to permit the petitioner to admit students for the abovesaid B.Pharm and B.Sc. courses pending disposal of the abovesaid W.P.No.7798 of 1988. The said writ miscellaneous petition was dismissed and against the dismissal, the above said writ appeal was filed. In the said writ appeal, by order dated 27.10.1988, the 1st respondent was directed to accord provisional affiliation for a period of six years in respect of B.Pharm course alone, commencing from the academic year 1988-89, subject to the condition that the petitioner should create an endowment to the tune of Rs.15,00,000 within a period of five years in five specified yearly instalments. Admittedly, the said condition of creating the endowment is being fulfilled in terms of the abovesaid order. The abovesaid affiliation for six years also had been granted as stated above on 21.11.1988. It may also be stated here that by order dated 12.8.1991 in W.M.P.No.9235 of 1991 in W.A.No.1110 of 1988, it has also been clarified that the abovesaid order dated 27.10.1988 does not bar the 1st respondent-university to take appropriate action against the petitioner in accordance with law. It may also be stated that the 1st respondent has also granted to the petitioner affiliation to the above said B.Sc. course also once again for 1989-90, after another inspection commission and recommended such affiliation.

7. However, since the abovesaid show cause notices dated 9.4.1991 have been issued, these two writ petitions W.P.Nos.7725 and 7726 of 1991 have been filed by the petitioner and since subsequently the abovesaid final orders dated 10.5.1991 and 19.8.1991 have been passed, the above referred to substitution of prayer in the respective two writ petitions, have been sought for and have also been granted as stated above.

8. Now, apart from the original common affidavit filed in support of both the present writ petitions and the separate counter affidavits filed by the 1st respondent in the respective two writ petitions, the 1st respondent has also filed two additional counter affidavits dated 21.8.1991, one in W.P.No. 7725 of 1991 and another in W.P.No.7726 of 1991, and on behalf of the petitioner, an affidavit dated 25.8.1991 styled as "Common counter affidavit" was also filed. Further, subsequently on behalf of the petitioner, a common supplementary affidavit dated 4.9.1991 has been filed. Thereafter a common counter affidavit dated 8.9.1991 was also filed on behalf of the 1st respondent.

9. Though the averments and counter averments are so voluminous, we think, the following brief statement of some further material facts, as borne out by the abovesaid affidavits and relevant documents, which are germane to the arguments made by both the counsel, and to the discussion that follows, is sufficient. The abovesaid show cause, notices of 9.4.1991 were preceded by an inspection commission appointed by the 1st respondent-university on 25.3.1991. To this inspection, the 1st respondent gave notice to the petitioner by its letter dated 12.3.1991, to which, the petitioner replied by its letter dated 16.3.1991. In the said reply, though the petitioner expresses that the staff and students are busy preparing for the final examination to be held a week thereafter and that it failed to understand the necessary purpose of the inspection, it however states finally "We would welcome the Inspection Committee and show them of our facilities but it is only our expression of an apprehension that this Inspection Committee should not be a weapon of harassment." However, on 23.3.1991, the petitioner sent a telegram stating "regarding sudden inspection of Pant Institute of Technology *as usual goondas* appeared at the institution and broken the cafeteria and threatened to burn the institution by local vandals..... Institution closed temporarily till law and order improves.......Inspection may be taken up later". *(underline is ours)*. This telegram has reached the 1st respondent only at 10.30 a.m. on 25.3.1991, the date of inspection. But, however, since the Inspection Commission had already arrived at the petitioner-institution on 25.3.1991, it went on with the inspection, though no responsible person on behalf of the petitioner was present there to give them the necessary information, etc. The inspection report submitted by the Commission strongly recommends that the provisional affiliation for B.Sc. courses be not renewed from 1991-92, and that with reference to B.Pharm course, there may be de-affiliation from the said year. Based on the said report, the abovesaid show cause notices were issued, though a copy of the said report was not furnished to the petitioner. In the abovesaid show cause notice with reference to B.Sc. courses, *inter alia*, it is stated as follows:

> "The Commission have given a formal recommendation that the provisional affiliation for B.Sc.(M.L.T.) and B.Sc. (Nutrition) courses

be not renewed on the ground of th deficiencies and violations as briefly mentioned below:-

(i) Except two class rooms, the rest are all housed only in temporary sheds;

(ii) The laboratories are inadequate for the sanctioned strength of different courses, and while there should be at least 6 well equipped labs, the number of labs available in the Institute is totally inadequate. Further the same labs, are being utilised for the students enrolled in Community Polytechnic housed in the same building for Diploma in Pharmacy and certificate course in Radiology and thereby making it almost impossible to conduct the practical courses as per time-table. Further, the labs do not have space to conduct practicals for the sanctioned strength at any given time.

(iii) No hostel facilities. Students are accommodated in rented buildings far away from the College campus and have to walk a long distance for all their meals in the Institute Canteen.

(iv) The Institute Canteen is in a dilapidated condition;

(v) No play ground;

(vi) With regard to the teaching staff available in the Institute, the list of books available in the Library and particulars of equipments, the Commission was not in a position to report as necessary information was not made available by the Institute. However, the commission noted that students present on the spot complained that there was no permanent Principal and sufficiently qualified teachers in different major subjects, that they have paid heavy capitation fees, and that all the financial transactions are maintained in Tambaram which is outside the jurisdiction of this University causing great inconvenience to the students and parents.

4. In view of the above grave inadequate and gross lack of teaching, physical and laboratory facilities the inspection Commission has "strongly recommended" that provisional affiliation for B.Sc. (M.L.T.) and B.Sc. (Nutrition) courses be not renewed from the academic year 1991-92.

5. As provided in the Statute 32(5) of the Pondicherry University Act, you are given an opportunity to defend yourself as to why the provisional affiliation of B.Sc. (M.L.T.) and B.Sc. (Nutrition) courses not be withdrawn from the academic year 1991-92 onwards. Your explanation will be placed before the Executive Council of this University".

Likewise, in the other show cause notice relating to B.Pharm course, almost the abovesaid same allegations are mentioned with one additional deficiency or violation as follows:

> "While the Pharmacy College must possess at least 10 acres of land, (as per the affiliation condition) the land available for the use of the Institute appears to be less than 5 acres and even this is not in the name of the Institute or Society but in the name of private individuals which is highly objectionable."

10. To these two show cause notices, the petitioner replied by two letters both dated 21.4.1991, though the one relating to B.Sc. courses was addressed to the Vice Chancellor of the University, the other relating to the B.Pharm course was addressed to the Deputy Registrar of the University. In the former reply, without specifically adverting to any of the abovesaid deficiencies and violations pointed out in the relevant show cause notices, the petitioner, aftermentioning about the previous, Inspection Committee's report, only stated generally thus:

> "The institution is being run with good standard by competent teachers without any complaint from any quarters and is sending periodical reports to the University regarding its staff position and the academic matters......The management is willing to comply with any additional infrastructural facilities as may be pointed out by the University."

Then, in the other reply, in relation to B.Pharm course, it is stated that in view of the abovesaid order dated 27.10.1988 in W.A.No.1110 of 1988, "the University of Pondicherry has no jurisdiction to send another inspection committee to inspect the Pant Institute of Technology......In terms of the judgment you are entitled to verify only as to whether the management has remitted the endowment amounts as stipulated by the High Court and without getting any permission for sending another inspection committee, from the Honourable High Court, Madras, the University has no jurisdiction to do the same and consequently no reply need be sent by the management for your notice issued under reference cited above.

The issuance of the above notice is an act of Contempt of Court". In this reply, there is no denial at all regarding the specific allegations made against show cause notice Further, in neither of the said replies, there is any complaint that copy of the inspection report was not given to the petitioner and by reason of that, they could not make their full representations.

11. However, as already stated, on 10.5.1991, the 1st respondent passed the above said impugned order dated 10.5.1991, in relation to B.Sc. courses, which, *inter alia* runs as follows:

> "Whereas a number of petitions have been received from members of the public, parents and students alleging irregularities in the functioning of the Pant Institute of Technology and the conduct of B.Sc. (M.L.T.) and B.Sc. (Nutrition) courses.......whereas the explanation offered by the Institute was placed before the academic council as envisaged under the Statute 32(5) of Pondicherry University Act and the matter was discussed and deliberated through Agenda Item No.91.15.58 in its meeting held on 6.5.1991; And whereas the Academic Council has resolved to recommend de-affiliation, dis-continuance, withdrawal and non-renewal of the provisional affiliation in respect of B.Sc. (M.L.T.) and B.Sc. (Nutrition) courses from the academic year 1991-92 onwards; Now, therefore, in the interest of good standards of education, the students and parents, immediate action should be taken, the Vice Chancellor in exercise of powers vested in him by virtue of Statute 13(3) of the Pondicherry University Act, hereby decides not to renew the provisional affiliation in respect of B.Sc. (M.L.T.) and B.Sc. (Nutrition) courses in the Pant Institute of Technology from the academic year 1991-92 onwards........"

12. Likewise, in respect of B.Pharm course also, the impugned order dated 19.8.1991 was passed by the 1st respondent, containing almost similar expressions, as found in the other impugned order.

13. Now, the main submissions of Mr.Kapil Sibal, learned Senior Counsel for the petitioner are as follows: The 1st respondent has violated the principles of natural justice in passing the impugned orders in not having furnished a copy to the petitioner, of the abovesaid inspection report, based on which the abovesaid show cause notices were issued and the subsequent impugned orders were passed. In the circumstances (as narrated earlier) in para 9 above) the inspection on 25.3.1991 should not have taken place, but it should have been postponed. As per Statute 32(5) under the above said Act, affiliation can be withdrawn only if conditions, on the fulfilment of which, the institute was affiliation, are not satisfied. The allegation that the petitioner's institution has not fulfilled the said conditions, is not correct. As per Statute 32(5), only the Executive Council can withdraw the affiliation. But, in the present case, the Vice Chancellor has done it. The Vice Chancellor has no such power under Sec.13(3) of the Pondicherry University Act. The said Sec.13(3) no doubt says "The Vice Chancellor may, if he is of opinion that immediate action is necessary on any matter exercise any power conferred on any authority of the University by or under this Act and shall report to such authority the action taken by him on such matter". But, in view of the second proviso therein, "any matter" spoken to in Sec.13(3) would relate only to service matters and not withdrawal of affiliation. The Court cannot validate the impugned orders on reasons not disclosed therein even though they are disclosed in other records of the 1st respondent.

14. Mr.P.D.Dinakar, learned counsel for the 1st respondent University refuted these submissions and contended briefly as follows: There is no violation of principles of natural justice. The copy of the abovesaid inspection report need not be given to the petitioner in view of the First Ordinance of the University, *viz.*, Rule 5(r) in Chapter VII therein. Even in the abovesaid replies to the show cause notices no such complaint was made that the said copy was not furnished to the petitioner. Further, in the said replies, the specific allegations for withdrawal of the affiliation, made in the show cause notices, have not been specifically controverted at all. The above said telegram to postpone the inspection, reached only at 10.30 a.m. on 25.3.1991, the date of inspection and by then, the Inspection Commission had already reached the institute for making the inspection. The petitioner has certainly violated the conditions of affiliation. The Vice Chancellor is well within his rights in having invoked Sec.13(3) of the Act, in view of the necessity for taking immediate action, since otherwise, the petitioner would admit new students for the current academic year and

place them in difficulties. The expression "any matter" in that sub-section, cannot be restricted to only service matters, No doubt, as per the second proviso therein, the appellate power is provided to the Executive Council. But that will not apply to the present case.

15. We have considered the rival submissions. Regarding the contention that copy of the inspection report was not furnished to the petitioner, we cannot accept the contention of the learned counsel for the 1st respondent that in view of Rule 5(4) of Chapter VII of the First Ordinance, the said copy need not be communicated to the institute. The said Rule 5(4) relates to inspection done pursuant to an application by the institute for permanent affiliation to a course, which might be granted after provisional affiliation was granted for three academic years. In that context only the said Rule 5(4) says that the report of the Inspection Committee shall not be communicated to the institution, but shall be regarded as a confidential documents until it has first been considered by the University. But, the present case is an inspection to see whether the conditions of provisional affiliation were complied with by the petitioner-Institution and whether the provisional affiliation could be renewed or the institute should be de-affiliated, as the case may be. The said Rule 5(4) would not apply to this case. So, the copy of the report should have generally been given to the petitioner along with the show cause notices. No doubt, the original of the said report has been produced before us and a copy thereof has also been now given to the petitioner.

16. But, the question is, whether the non-furnishing or the copy along with the show cause notice or atleast prior to the passing of the impugned orders, and not providing an opportunity to rebut that is contained in the said report, would vitiate the impugned orders in the present case. On the further facts of the present case, we think this question has to be answered in the negative since the abovesaid contention of the petitioner in this regard cannot be raised by the petitioner for the following reasons: We have already mentioned the specific deficiencies or violations of the petitioner's institute, contained in the two show cause notices. We have also already indicated that there was no denial in the abovesaid replies of the petitioner, of those specific allegations in the show cause notices. One such allegation is that the laboratories are inadequate for the sanctioned strength of different courses and while there should be at least 6 well equipped labs, the number of labs available in the Institute is totally inadequate and the same labs are being utilised for the students enrolled in community Polytechnic housed in the same building and thereby making it almost impossible to conduct the practical courses as per time-table. Another deficiency, the commission noted is that the students present on the spot complained that there was no permanent Principal and sufficiently qualified teachers in different major subjects. Further, with reference to pharmacy course, the additional allegation is that the Pharmacy College must possess at least 10 acres of land as per the affiliation condition and the land available for the use of the institute appears to be less than 5 acres. To these and other specific allegations, there is no specific denial at all in the replies sent on 21.4.1991, as already stated. Further, in those replies of 21.4.1991, there was no complaint about the non-furnishing of the copy of the report, nor there is an allegation that any prejudice has been caused to the petitioner on account of the non-furnishing of the said copy. Further, most of the findings of the report are engrafted in the show cause notices themselves. No doubt, the petitioner seeks to controvert some of those specific allegations found in the show cause notices, in the affidavits filed by it in support of the writ petition. But, those factual averments in the petitioner's affidavits having been disputed in the counter affidavits of the 1st respondent, we cannot go into those questions of fact in our present jurisdiction under Art.226 of the Constitution of India, particularly when the petitioner has not chosen to deny earlier specifically the various abovesaid allegations made in the show cause notices and not chosen to say earlier that any prejudice was caused to it on account of the non-furnishing of the copy of the said report.

17. Then, regarding the other submission also, that the abovesaid inspection on 25.3.1991 should not have taken place, but should have been postponed, we have come to the conclusion that in this regard also, there is no violation of principles of natural justice. As we have pointed out earlier, in its reply dated 16.3.1991, the petitioner, though expressed some apprehensions, welcomed the Inspection Committee and promised to show the Committee the facilities available in the

petitioner's institute. No doubt, on 23.3.1991. it sent the abovesaid telegram for postponement of the inspection scheduled to take place on 25.3.1991. But, as already stated, the said telegram reached only at 10.30 a.m. on the very date of inspection, viz., 25.3.1991 and by then, the Inspection Commission itself was at the premises of the petitioner itself for inspection. So the 1st respondent-University cannot be blamed in this regard. If really, on 23.3.1991, the petitioner genuinely wanted a postponement of the inspection, it could have phoned up to the University and also sent a special messenger with a written request for postponement.

18. That apart, the conduct of the petitioner does not also warrant the relief being given in its favour, under Art.226 of the Constitution of India. Even when the Inspection Commission, which was composed of very eminent personalities, came on the spot on 25.3.1991, there was not even a single responsible person to receive the Commission. Thus, the petitioner did not even show the ordinary courtesy to receive the commission when it arrived at its institute. If really, the petitioner's intentions are *bona fide*, it could have atleast received the Commission and told them about the abovesaid telegram sent for postponement and also explained to them its alleged difficulties in allowing the inspection on that day. Further, the petitioner's conduct in one other aspect also may be noted in this regard. In the abovesaid telegram itself it is mentioned that "as usual goondas appeared at the institution". This also shows, even according to the petitioner's own telegram, that the goondas has appeared at the institution on many other earlier occasions also. This certainly does not speak well of the petitioner's institute and the way in which it is functioning. That apart, even in one of the abovesaid replies dated 21.4.1991 no doubt relating to B.Pharm course, (with reference to which the abovesaid order dated 27.10.1988 was passed by this Court) the petitioner even went to the extent of saying that the University had not jurisdiction to send another inspection committee and that in terms of the abovesaid order dated 27.10.1988, the University was entitled to verify only as to whether the management had remitted the endowment amounts as stipulated by the High court and no reply need be sent by the petitioner for the show cause notice. Such an attitude also does not speak well of the petitioner.

19. Then, in view of the non-denial in the abovesaid replies dated 21.4.1991, of the abovesaid specific charges in the show cause notices, it cannot be said that the conditions of affiliations have not been violated. Then, the other submission of the learned counsel for the petitioner that the impugned orders could not have been passed by the Vice Chancellor under Sec.13(3) of the said Act, is also not correct. The term "any matter" used in Sec.13(3) is wide enough to include non renewal affiliation or de-affiliation, as in the present case. In such a case, the Vice Chancellor can exercise the authority of the Executive Council provided under Statute 32(5). The second proviso of Sec.13(3) cannot limit the scope or ambit of the wide expression "any matter" used in the main part of Sec.13(3). As rightly contended by the learned counsel for the 1st respondent, there was necessity for taking immediate action since otherwise, the 1st petitioner would admit new students for the current academic year itself and might place those students in difficulties.

20. With reference to the other submission of the learned counsel for the petitioner that the court cannot validate the impugned orders on reasons not disclosed therein, we think there is no necessity for going into this submission, since we are upholding the impugned orders, not on any ground, or grounds urged by the learned counsel for the 1st respondent, which were not disclosed in the abovesaid show cause notices which have been specifically referred to in the impugned orders and which resulted in the above said impugned orders.

21. In the view we have taken on facts, there is no necessity to deal with the applicability of the decisions cited by the learned counsel for the 1st respondent excepting to quote the following passage in *The University of Mysore and another v. C.D.Govinda Rao and another, A.I.R. 1965 S.C. 491:*

> "Boards of Appointments are nominated by the Universities and when recommendations made by them and the appointments following on them, are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about *mala fides* against the experts who constituted the present Board; and so, we think, it would normally be wise and safe for the courts to leave the decisions of

academic matters to experts who are more familiar with the problems they face than the courts generally can be."

Here also, there is no allegation about the *mala fides* against the above said Inspection Commission.

22. No doubt, the impugned orders also direct the petitioner to ensure that the students already admitted in the above said courses, may be allowed to continue to complete their respective courses in the petitioner's institute. In this context, in case, the petitioner-institute is not able to continue to teach the said courses to those students, the University is directed to make other alternative arrangements for those students. In this regard, the learned counsel for the 1st respondent has also assured us that the University would do so.

23. In the result, these writ petitions are dismissed. However, in the circumstances of the case, no costs.

B.S. -- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.No.434 of 1982 *28th January, 1992.*

Sendamarai Kannan and others ...*Appellants*

v.

Vinayakam ...*Respondent.*

(A) Adverse possession - Vendors selling property but claiming to be in possession subsequently adverse to the purchaser for over requisite period - Vendors or their successors-in-interest whether precluded from setting up title by prescription.

Just because 'B' and 'M' had sold the property to Veerasamy, they will not be precluded from setting up title by prescription, if they had continued to be in possession subsequently adverse to the purchaser for over the requisite period. Consequently, their successors-in-interest also are not precluded. *[Para 4]*

(B) Adverse possession - Parties closely related - Defendants not proved to have exercised any adverse act - Defendants not making any attempt to get patta transferred to their names - Not exercising any act of ownership by dealing with the property - Not declaring at any time that they were the owners - Held in the circumstances, long possession will not tantamount to adverse possession.

The lower court has held that mere possession for long period be it hundred years or more, will not make it adverse possession and such possession should be continuous, uninterrupted, peaceful, public and as an owner to prescribe title by adverse possession to the property. The learned Judge has referred to a pertinent circumstance that the parties are closely related and possession of the defendants will not by itself be adverse. The learned Judge has also pointed out that at no time before the filing of the suit, the defendants exercised any adverse act to indicate as they were claiming title to the property to the exclusion of the plaintiff's predecessor-in-title. There was no attempt by the defendants to get the patta of Kanakavalli Ammal transferred to their names. They never exercised any act of ownership by dealing with the property. Nor was there any declaration by them at any time that they were the owners of the properties. In those circumstances, the courts below are perfectly justified in holding that the long possession of the defendants will not tantamount to adverse possession and there is no question of prescription of title by the defendants. *[Para 5]*

Case referred to:

S.M.Karim v. Mst.Bihi Sakina, A.I.R. 1964 S.C. 1254: (1964)2 S.C.J. 221.

T.Dhanyakumar, for Appellants.

T.P.Manoharan, for Respondent.

The Court delivered the following

JUDGMENT:- This second appeal is filed by the defendants. The facts which are not in dispute are as follows:

The property belonged to one Mannadha Pillai, whose sons were Balakrishnan and Muthukrishnan. After the death of Mannadha Pillai, they sold it to Veeraswami on 12.5.1892, who is turn sold it to his daughter Kanakavalli, who happened to be the wife of Mannadha Pillai, on 15.10.1901. After Kanakavalli's death, her legal heirs were her daughters Thayammal, Ponnukannu and Swarnathammal. The last daughter died issueless. The property thus belonged to Thayammal and

Ponnukannu. Thayammal's grand daughters are Alamelu and Narayani, while Ponnukannu's daughters are Kuppammal and Janaki Ammal. Janaki Ammal sold her 1/4th share to Nachammal *alias* Andal on 5.2.1968. There was a suit for partition in O.S.No.125 of 1969 filed by Alamelu Ammal and Narayani Ammal against Kuppammal and Janaki Ammal. It was decreed and the eastern half was allotted to Kuppammal and Janaki Ammal. Kuppammal's daughter Thulasi Ammal sold her 1/4th share to the plaintiff under Ex.A-4, dated 8.11.1975 and Andal Ammal sold her 1/4th share to the plaintiff under Ex.A-3, dated 12.2.1975. Thus, the plaintiff, claiming the eastern half share which was allotted to Kuppammal and Janaki Ammal in the partition suit, filed the present suit for declaration of his title and for delivery of possession. The first defendant is the son of Balakrishnan, son of Mannadha Pillai, already referred to. The second defendant is the son of the first defendant. They resisted the suit contending that they are entitled to the properties absolutely, on two counts. First, they claimed that the sale deed executed by Balakrishnan and Muthukrishnan in favour of Veerasamy was sham and nominal and it was never given effect to. According to them, possession continued with the vendors always. Secondly, it is contended that the defendants have perfected title to the property by adverse possession as the property was with them for more than hundred years.

2. The courts below have negatived both the contentions and granted a decree in favour of the plaintiff.

3. In this appeal it is argued that the judgments of the courts below are erroneous. It is argued that there is ample evidence to prove that Balakrishnan and Muthukrishnan never parted with possession after the sale in favour of Veerasamy and the transaction was sham and nominal. That is a pure question of fact and the courts below have, on the evidence available on record, come to a conclusion against the appellants. There is no possibility to interfere with the same in a second appeal.

4. The other argument advanced by learned counsel for the appellants is that in any event, possession of the property having been with the appellants for over hundred years, they have perfected title to the property by adverse possession. The lower appellate court has given two reasons for rejecting the contention. One reason is that the property having been sold by Balakrishnan and Muthukrishnan to Veerasamy, who in turn sold to Kanakavalli under whom the present plaintiff claims by virtue of subsequent purchases, it is not open to the appellants, who claim under Balakrishnan and Muthukrishnan to put forward a case of adverse possession. That reasoning is obviously erroneous. I do not accept the same. Just because Balakrishnan and Muthukrishnan had sold the property to Veerasamy, they will not be precluded from setting up title by prescription, if they had continued to be in possession subsequently, adverse to the purchaser for over the requisite period. Consequently, their successor-in-interest also are not precluded.

5. However, the other reason given by the learned Judge is unassailable. The learned Judge has held that mere possession for long period, be it hundred years or more, will not make it adverse possession and such possession should be continuous, uninterrupted, peaceful, public and as an owner to prescribe title by adverse possession to the property. The learned Judge has referred to a pertinent circumstance that the parties are closely related and possession of the defendants will not by itself be adverse. The learned Judge has also pointed out that at no time before the filing of the suit, the defendants exercised any adverse act to indicate as they were claiming title to the property to the exclusion of the plaintiff's predecessor-in-title. There was no attempt by the defendants to get the patta of Kanakavalli Ammal transferred to their names. They never exercised any act of ownership by dealing with the property. Nor was there any declaration by them at any time that they were the owners of the properties. In those circumstances, the courts below are perfectly justified in holding that the long possession of the defendants will not tantamount to adverse possession and there is no question of prescription of title by the defendants. The Supreme Court has in *S.M.Karim v. Mst.Bihi Sakina, A.I.R. 1964 S.C. 1254: (1964)2 S.C.J. 221,* laid down that long possession for several twelve years is not necessarily adverse possession. There should be an animus of adversity with the party who is in possession. In the present case, there is absolutely no evidence to prove the same.

6. Hence, the view taken by the Courts below is right and the Second Appeal has to be dismissed and accordingly it is dismissed. There will be no order as to costs.

7. It is agreed that the appellants will have six months time, provided they file an affidavit in this court undertaking to vacate the premises on the expiry of six months. The appellants are, therefore, directed to file an affidavit in this Court on or before 11.2.1992 undertaking to vacate the premises on or before 31.7.1992. Without driving the plaintiff to execution proceedings. If the affidavit of undertaking is filed, the plaintiff shall not execute the decree till 31.7.1992. If the affidavit is not filed, it is open to the plaintiff to execute the decree immediately.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Lakshmanan, J.*

App.Nos.4108 and 4109 of 1991 in O.M.S.No.21 of 1988 *10th January, 1992.*

Winfred Dhanraj Samuel ...*Petitioner*
v.
Betsy Ratnakumari ...*Respondent.*

(A) Divorce Act (IV of 1869), Secs.36 and 37 - Petition for divorce dismissed - Court if can pass order directing husband to take back the wife - And to pay maintenance till she is taken back.
(B) Divorce Act (IV of 1869), Sec.37 and Hindu Marriage Act (XXV of 1955), Sec.25 - Relevant scope.
(C) Civil Procedure Code (V of 1908), Sec.151 - High Court passing an order - The provisions of Divorce Act not complied with - Whether Court can recall or modify order or decree in exercise of inherent jurisdiction.

The plaintiff in O.M.S.No.21 of 1988 filed the petition for a decree declaring her marriage with the respondent as null and void on the ground that his consent for the marriage was obtained by suppressing the idiocy of the respondent. The court while dismissing the petition passed an order directing the plaintiff to take back the wife and the child and pay a sum of Rs.800 per month to the wife towards the maintenance of herself and her child from the date of the filing of the petition till he took back the wife and the child. He filed two applications - one to review the order and the other to stay that portion of the order directing him to take back the wife and pay maintenance to her.

Held:- The condition precedent to satisfy the requirements of Sec.37 of the Divorce Act are two fold: (1) there must be a decree absolute declaring the marriage to be dissolved and (ii) a decree of judicial separation obtained by the wife. In that event court can grant permanent alimony. In the instant case, the suit filed by the husband has been dismissed and hence the grant of maintenance ordered is irregular. Sec.36 of the Indian Divorce Act provides that the wife may present a petition for alimony pending the suit. The court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just. Sec.15 of the Indian Divorce Act also provides that in any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such suit instituted by a husband of the adultery, and cruelty, the court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion. Thus, it is seen that the court has a power to grant maintenance pending suit under Sec.36 of the Indian Divorce Act and had power to order maintenance under Sec.37 of the Indian Divorce Act only when a decree is made absolute declaring the marriage to be dissolved, or on any decree of judicial separation obtained by the wife. Permanent alimony and maintenance can only be granted in case divorce is granted and if the marriage between the parties subsists. If the petition by the husband as in the instant case fails, then no decree is passed *i.e.*, the decree is denied to the husband. Alimony cannot, therefore, be granted in a case where decree for divorce is refused. Ultimately alimony on a permanent basis maintenance given to an ex-spouse and if a petition fails, then the marriage still subsists unaltered by the intervention of any decree and the normal rights of the parties to be found in the legal system under which they are married has to prevail. There is no

question of granting alimony in such cases, because the matrimonial rights of the parties are to be found in the legal system which operates, requiring one of the parties to support the other and if there is failure to do so, then the other partner can seek maintenance by recourse to the civil or criminal court. There is no question of granting alimony in such cases. The word 'decree' is used in matrimonial cases in a special sense different from that in which it is sued in C.P.C.

[Paras 9, 10 and 13]

Sec.25 of the Indian Marriage Act, in the view of the court, is not identical to Sec.27 of the Indian Divorce Act. It is clear from Sec.27 of the Indian Divorce Act that only in a case where the court passes a decree absolute declaring a marriage to be dissolved or any decree of judicial separation obtained by the wife and in confirmation made an order on the husband for payment to the wife of a monthly or weekly maintenance. But that is not the case in so far as Sec.25 of the Hindu Marriage Act is concerned. Sec.25 of the Hindu Marriage Act only contemplates passing of any decree and does not further proceed to say a decree for either dissolution, nullity of marriage, restitution of conjugal rights, or judicial separation. This is the distinction the court is able to see between Sec.25 of the Hindu Marriage Act and Sec.37 of the Indian Divorce Act. *[Para 15]*

This Court has its inherent jurisdiction and has power to recall or modify an order or decree if it was passed irregularly without complying with the requirements of Sec.37 of the Indian Divorce Act.

[Para 18]

Cases referred to:

Devasahayam v. Devamony, (1923)17 L.W.90; Ranganatham v. Shyamala, (1989)1 L.W. 342; Smt.Sushama v. Satishchandra, A.I.R. 1984 Del. 1; Vinod Chandrasharma v. Rajesh Pathak, A.I.R. 1988 All. 150.

V.Sridevan, Senior Counsel for *Mrs.Prabha Sridevan,* for Petitioner.

V.M.Lenin for *M/s.Calvin Jacob,* for Respondent.

The Court made the following

ORDER:- Winfred Dhanraj Samuel, plaintiff in O.M.S.No.21 of 1988 is the petitioner in Application Nos.4108 and 4109 of 1991. Application No.4108 of 1991 has been filed by him to review my order dated 7.5.1991 in the main O.M.S.

2. His case is that the respondent's mental condition is idiocy within the meaning of Medical Jurisprudence. Her mental faculties, her behaviour as a child, poor memory and absence of will power emotions, or initiative of any kind, etc., would go to show that she had always been an idiot both before and during the time of marriage and continued to be so thereafter. His consent for the marriage was obtained by the suppression of this material fact. He is therefore entitled to a decree declaring his marriage with respondent as null and void.

3. This Court, while dismissing the petition passed an order on 7.5.1991 as under:

> "In the result, the suit is dismissed. I direct the plaintiff to pay a sum of Rs.800 (Rupees eight hundred only) per month to the defendant towards the maintenance of the defendant and her child from the date of filing of this petition till he takes the respondent and the child. It is further directed that in view of the dismissal of this suit, the plaintiff should take back the defendant and her child immediately. But, however, there will be no order as to costs."

4. To review the said order, Application No.4108 of 1991 has been filed. Application No.4109 of 1991 has been filed to stay the portion of the order giving direction to the petitioner to take back the respondent and to pay maintenance to her. Stay was granted.

5. Mr.V.Sridevan, learned Senior Advocate, appearing for the petitioner/husband has contended that the only question that arose for consideration was whether the petitioner was entitled to divorce as prayed for. There was no issue as to whether the petitioner should take back the respondent. There was no suit for restitution of conjugal rights. He has further submitted that this Court has erred in granting maintenance to the wife, which according to the learned senior counsel is beyond the scope of Secs.36 and 37 of the Indian Divorce Act. Mr.Sridevan further contented that while under Sec.36 the court has power to grant maintenance pending suit, under Sec.37 it has power to order maintenance only when a decree is made absolute declaring a marriage to be dissolved or a decree of judicial separation obtained by the wife.

6. Thus, according to Mr.Sridevan, the direction to the husband to take back the wife and to pay maintenance till she is taken back after dismissing the suit for divorce is beyond the scope of the suit.

In any event the order of this Court directing the petitioner to take back the respondent is not sustainable. Hence, the case has got to be reviewed.

7. Mr.Lenin, learned Senior counsel appearing for the wife resisted the application. He said that the jurisdiction of this Court exercising the matrimonial jurisdiction is very wide and that this Court is justified in passing the order that has been made. He has further urged that when the wife has expressed her desire to join her husband, he was not willing to take her back, and has unjustly deserted her and refused to maintain her. He is bound to maintain her and in fact she has claimed maintenance in her written statement filed in this suit.

8. I see much force in the contention of Mr.V.Sridevan. Secs.36 and 37 which are the relevant Sections are reproduced hereunder:

> Sec.36. *Alimony* pendente lite: In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.
>
> Such petition shall be served on the husband; and the court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just;
>
> Provided that alimony pending the suit shall in no case exceed one fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.
>
> Sec.37. *Power to order permanent alimony:-* The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,
>
> Order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties."

9. The condition precedent to satisfy the requirements of Sec.37 of the Indian Divorce Act are two fold:

> (i) there must be a decree absolute declaring the marriage to be dissolved and
>
> (ii) a decree of judicial separation obtained by the wife;

10. In that event court can grant permanent alimony. In the instant case, the suit filed by the husband has been dismissed by me and hence in my view, the grant of maintenance ordered by me is irregular. Sec.36 of the Indian Divorce Act provides that the wife may present a petition for alimony pending the suit. The court on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just. Sec.15 of the Indian Divorce Act also provides that in any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the ground, in case of such suit instituted by a husband, of his adultery, cruelty, or desertion without reasonable excuse, or in case of such suit instituted by a wife, on the ground of her adultery and cruelty, the court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented a petition seeking such relief, and the respondent shall be competent to give evidence of or relating to such cruelty or desertion. Thus, it is seen that the court has power to grant maintenance pending suit under Sec.36 of the Indian Divorce Act and has power to order maintenance under Sec.37 of the Indian Divorce Act only when a decree is made absolute declaring the marriage to be dissolved, or on any decree of judicial separation obtained by the wife.

11. The points on the issue is covered by two decisions of our High Court, one by a Division Bench consisting of Krishnan and Ramesam, JJ. reported in *Devasahayam v. Devamony, (1923)17 L.W. 90* and another by K.M.Natarajan, J. reported in *Ranganatham v. Shyamala, (1989)1 L.W. 342. Devasahayam v. Devamony, (1923)17 L.W. 90,* was a case filed by the husband against his

wife against the decree of the District Judge, Madurai in a suit brought by him for dissolution of his marriage with his wife on the ground of her adultery with the second defendant as the co-respondent. The District Judge, who tried the case after hearing the evidence came to the conclusion that the plaintiff had failed to prove the adultery alleged and dismissed the suit. Further he passed an order granting permanent maintenance to the wife at the rate of Rs.10 a month. The husband filed an appeal before this Court stating that permanent alimony can be granted under the Indian Divorce Act only under Sec.37 of the Act and that the circumstances justifying such a grant have not arisen in that case, the suit for dissolution of marriage having been dismissed. The counsel for the respondent wife however argued that under Sec.15 of the Act, it was open to the court to grant maintenance on finding that the wife had been treated cruelly and had been driven out of the house. The Division Bench of this Court in their judgment, dated 16th October, 1922 held as under:

> "It is perfectly clear that this refers to a petition which could have been filed under the Indian Divorce Act. Thus she might, in answer to her husband's suit, claim if there are circumstances, which justify such a relief, a decree, for judicial separation or for dissolution of marriage. In case such a decree is passed at her instance, the court would be in a position to act under Sec.37. It is not contended that a bare application for maintenance can be put in by the wife against the husband under the Indian Divorce Act. If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Crl.P.C. The order therefore granting maintenance to the wife is *ultra vires.* It must therefore be set aside. In the result, we vary the decree of the lower court by striking out the order for maintenance and otherwise dismiss the appeal with costs."

The Division Bench therefore held that granting maintenance to the wife by the lower court is *ultra vires* and the decree of the lower court was varied by striking out the order for maintenance.

12. *Ranganatham v. Shyamala; (1989)1 L.W. 342,* is one arising under Sec.25 of the Hindu Marriage Act filed by the husband against the wife. Learned single Judge after considering the various decisions relied on by the learned counsel for the husband arising under similar circumstances held as under:

> "On going through the ratio laid down in the above decisions which is supported by convincing reasons, I am of the view that the word 'passing of any decree' has been properly interpreted. I am also in respectful agreement with the decisions rendered by the various High Courts that 'the passing of a decree under Sec.25 of the Act means the passing of the decree of divorce, restitution of conjugal rights or judicial separation and not the passing of a decree through which the petition itself is dismissed and therefore, it is clear that alimony cannot be granted in a case where a decree for divorce is refused."

13. In my opinion, permanent alimony and maintenance can only be granted in case of divorce is granted and if the marriage between parties subsists. If the petition by the husband as in the instant case fails, then no decree is passed *i.e.,* the decree is denied to the husband. Alimony cannot, therefore in my view, be granted in a case where a decree for divorce is refused. Ultimately alimony on a permanent basis is maintenance given to an ex-spouse and if a petition fails, then the marriage still subsists unaltered by the intervention of any decree and the normal rights of the parties to be found in the legal system under which they are married has to prevail. There is no question of granting alimony in such cases, because the matrimonial rights of the parties are to be found in the legal system which operates, requiring one of the parties to support the other and if there is failure to do so, then the other partner can seek maintenance by recourse to the civil or criminal court. There is no question of granting alimony in such cases. The word 'decree' is used in matrimonial cases in a special sense different from that in which it is used in C.P.C.

14. The Delhi High Court is also of the view that the power to grant alimony contained in Sec.25 of the Hindu Marriage Act can only be exercised when the court is faced with the problem of setting the mutual rights of the parties after the matrimonial ties have been determined or varied by the passing of the kind of decree mentioned in Secs.9, 10, 11 and 13 of the Act and not in other cases. The Delhi High Court has taken this view in the decision reported in *Smt.Sushma v. Satishchandra,*

A.I.R. 1984 Del. 1.

15. In this context, it is worthwhile to quote Sec.25 of the Hindu Marriage Act, which reads as follows:

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant, as having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under Sub-sec.(1) it may at the instance of either party vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or if such party is the husband that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just."

The said section in my view is not identical to Sec.37 of the Indian Divorce Act. It is clear from Sec.37 of the Indian Divorce Act that only in a case where the court passes a decree absolute declaring a marriage to be dissolved, or any decree of judicial separation obtained by the wife and on its confirmation make an order on the husband for payment to the wife of a monthly or weekly maintenance. But that is not the case in so far as Sec.25 of Hindu Marriage Act is concerned. Sec.25 of the Hindu Marriage Act only contemplates passing of any decree and it does not further proceed to say a decree for either dissolution, nullity of marriage, restitution of conjugal rights, or judicial separation. This is the distinction, I am able to see between Sec.25 of the Hindu Marriage Act and Sec.37 of the Indian Divorce Act.

16. It is therefore clear from the above two provisions that what is contemplated under Sec.37 of the Indian Divorce Act is materially different from the language used in Sec.25 of the Hindu Marriage Act. In the decision reported in *Vinod Chandrasharma v. Rajesh Pathak, A.I.R. 1988 All. 150,* it was held as follows:

"Where an application for divorce, is dismissed there is no decree passed. Obviously, alimony cannot, therefore, be granted in a case where a decree for divorce is refused because in such a case the marriage will subsist. The power to grant alimony contained in Sec.25 has to be exercised when the court is called upon to settle the mutual rights of the parties after the marital ties have snapped by determination or variation by the passing of the decree of a type mentioned in Secs.19, 11 and 13 of the Act, read with Secs.23, 26 and 27 of the Act, a decree can be assumed to have been passed when an application for divorce or similar other relief is granted but merely not when the application is dismissed."

The Allahabad High Court has also relied on the decision reported in *Smt.Sushama v. Satishchandra, A.I.R. 1984 Del.1,* referred to by me supra.

17. Mr.V.M.Lenin, learned senior counsel appearing for the respondent at the time of hearing the review Applicant sought permission of this Court to represent the petition filed by the wife claiming maintenance during the pendency of the main suit. It appears that the said application filed during the pendency of the suit was returned by the Office for certain compliance and that the same has not been represented at all. Hence, this Court had no occasion to consider whether any alimony can be granted to the wife during the pendency of the proceedings. It was also not brought to the notice of this Court, when the main suit was taken up for trial. It is now too late on the part of the wife to make a request to permit her to represent the same. Such a request, in my view, cannot at all be granted. Hence, the said request is rejected.

18. In the result, Application Nos.4108 and 4109 of 1991 are ordered as prayed for. My earlier order granting maintenance to the wife and the further direction to the husband to take back the wife, being beyond the scope of the suit, I have no

hesitation in setting aside that part of the order. In all other respects the Order will hold good.

> "In my view, this Court has its inherent jurisdiction and has power to recall or modify an order or decree, if it was passed irregularly without complying with the requirements of Sec.37 of the Indian Divorce Act. Hence, I feel justified in setting aside that portion of the Order, granting maintenance to the wife and directing the husband to take back the wife."

However, the wife is given liberty to take appropriate proceedings before the proper forum claiming maintenance and for other relief, if any in accordance with law. No costs.

B.S. ---- *Applications allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.367 of 1991 *6th March, 1991.*

K.A.Syed Ali ...*Petitioner*
v.
Saradambal ...*Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), Secs.19 and 23 - Application for fixation of fair rent - Preliminary objection as to maintainability of application on ground that application was barred by res judicata - Rent Controller refusing to decide question - Order, if appealable.

If the Rent Controller had come to certain conclusions on the questions of *res judicata* and jurisdiction, then it might have given rise to an appeal. The Rent Controller said that the question raised by the petitioner could not be gone into as a preliminary issue and it could be decided in the proceedings only after trial and the recording of evidence is closed. The order not having decided any rights of the parties was not appealable.

[Paras 2 and 4]

Cases referred to:

T.N.Habib Khan, Proprietor, Hotel Impal and Impala Sweets v. Arogya Mary Shanthi Lucien, (1981)2 M.L.J. 298; Central Bank of India v. Shri Gokal Chand, A.I.R. 1967 S.C. 799: (1967)2 S.C.J. 828: (1967)3 S.C.R. 310; Bank Singh Gill v. Shanti Devi and others, A.I.R. 1967 S.C. 1360; Kumaraswamy Goundan, In re., (1951)1 M.L.J. 422; Santhanam Iyer v. S.Somasundara Vanniyar, (1958)1 M.L.J. 400.

Petition under Sec.25 of the Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) as amended by Act (23 of 1973), praying the High Court to revise the Order of the Court of the Additional Subordinate Judge's Court, Vellore, dated 8.1.1991 and made in R.C.A.No 54 of 1990 (in I.A.No.89 of 1990 in R.C.O.P.No.54 of 1989 on the file of the Rent Controller, Vellore, dated 24.7.1990.

M.S.Kandasamy, for Petitioner.
T.R.Rajaraman for Respondent.

The Court made the following

ORDER:- There is no merit in this civil revision petition. It arises out of the application filed by the petitioner herein to try the maintainability of the main application as a preliminary point. The main application R.C.O.P.No.54 of 1989 filed by the respondent is for fixation of fair rent at Rs.27,000 per month. That is being contested by the petitioner herein. The petitioner filed I.A.No.89 of 1990 for deciding the question of maintainability as a preliminary point. The Rent Controller dismissed the application holding that the question of maintainability could be gone into only in the trial after the evidence is recorded. Against that order, the petitioner filed an appeal. The appellate authority held that the appeal was not maintainable and also held that the question raised by the petitioner could not be decided as a preliminary issue without evidence being recorded. Against the said order, the petitioner has come up in revision in this Court.

2. At the outset, it should be said that the appeal before the Appellate Authority was not maintainable. The order of the Rent Controller dismissing I.A.No.89 of 1990 did not decide the rights of either parties. It merely said that the question raised by the petitioner could not be gone into as a preliminary issue and it could be decided in the proceedings only after trial and the recording of evidence is closed. The order not having decided any rights of parties was not appealable. Learned counsel for the petitioner places reliance on the judgment of this Court in *T.N.Habib Khan,*

Proprietor, Hotel Impal and Impala Sweets v. Arogya Mary Shanthi Lucien, (1981)2 M.L.J. 298. The principles set out in that judgment are clearly against the petitioner. Ratnavel Pandian, J. (as he then was) who decided that case has extracted the observations made by the Supreme Court in *Central Bank of India v. Shri Gokal Chand, A.I.R. 1967 S.C. 799: (1967)2 S.C.J. 828: (1967)3 S.C.R. 310.* After extracting the said observation, the learned Judge pointed out that the impugned order in the case before the Supreme Court was merely a procedural one not affecting any right or liability of the appellant therein. The learned Judge observed thus:

> "....The principle laid down by the Supreme Court in the above decision was reiterated and affirmed by the Supreme Court in *Bank Singh Gill v. Shanti Devi and others, A.I.R. 1967 S.C. 1360.* Following the above decision of the Supreme Court and the Judicial Pronouncements made by this Court, in particular by a Division Bench of this Court consisting of Rajamannar, C.J., and Panchapagesa Iyer, J. in *Kumaraswamy Goundan, In re., (1951)1 M.L.J. 422* and *Santhanam Iyer v. S.Somasundara Vanniyar, (1958)1 M.L.J. 400,* and certain other decisions, I have held in *Chinnaraju Naidu v. Bavani Bai, C.R.P.No.646 of 1981 order dated 24th March, 1981,* that all interlocutory orders passed during the proceeding under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, cannot be said to be orders coming within the meaning of Sec.23(1)(b) of the Act, but only the orders which affect the rights and liabilities of the parties, in the sense that they have become final orders though passed in an interlocutory application, are appealable...."

3. If the test laid down in the decisions referred to above is applied to the present case, it is clear that the rights of the parties not having been decided by the Rent Controller in I.A.No.89 of 1990, the appeal against the said order before the Appellate Authority was not maintainable.

4. Learned counsel for the petitioner contends that the question raised by him is two-fold. According to him, the main R.C.O.P.No.54 of 1989 is barred by the principles of *res judicata* and consequently, the Rent Controller has no jurisdiction to entertain the petition for fixation of fair rent. According to learned counsel, when the question of *res judicata* and the question of jurisdiction are raised, the Court is bound to decide the same and an order refusing to decide those questions is certainly appealable. I do not agree. If the Rent Controller had come to certain conclusions on those questions one way or the other, then it might have given rise to an appeal. The Rent Controller has refused to decide that question and directed the parties to go on with the trial. That will not affect the rights of either parties. Hence that order is not appealable.

5. Turning to the merits of the contention that the Rent Controller ought to have decided the preliminary point, I do not agree with learned counsel. Learned counsel invited my attention to the orders passed in the earlier proceedings in R.C.O.P.No.111 of 1979 and R.C.A.No.29 of 1989. R.C.O.P.No.111 of 1979 was for fixation of fair rent filed by the respondent herein with respect to the same building. The petitioner herein contended that the application was not sustainable on the ground that the respondent was not the owner of the building as the building was entirely constructed by him. But in the counter statement filed by the petitioner herein in those proceedings, a contention was raised that the respondent, who would become the owner of the building on 20.5.1989 could not maintain the application for fixation of fair rent before the said date. The Court ultimately held that during that period the respondent herein was not the owner of the building and, therefore, the application at her instance for fixation of fair rent was not sustainable and that order was affirmed by the Appellate Authority.

6. In the present proceedings, the application for fixation of fair rent was filed on 1.8.1989, which is admittedly after the expiry of the period of lease. Hence it is the contention of the respondent that she has become the owner of the building from 21.5.1989 and the petitioner contends otherwise. This is a question which could be decided only in the main proceedings after evidence is recorded. This point cannot be decided as a preliminary one.

7. The question whether the respondent has become the owner of the building on 21.5.1989 and, entitled to maintain the application for fixation of fair rent was not the subject of consideration in the earlier proceedings in R.C.O.P.No.111 of 1979 and R.C.A.No.29 of 1989. When those proceedings were disposed of, the court decided that the respondent had not become the owner of the building, and, therefore, she was not entitled

to maintain that application. The issue to be considered in the present proceedings may be different. Hence the question cannot be decided preliminarily. The question for consideration in the present proceedings will depend upon the question whether the respondent has become the owner of the building on 21.5.1989. That has necessarily to be decided only after the evidence is recorded.

8. In the circumstances, the conclusion arrived at by the courts below is correct and the civil revision petition is dismissed with costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Somasundaram, J.*

C.R.P.No.4259 of 1984 *20th February, 1991.*

Ramother & Co., represented by its Partner, Ramother, S/o Kabulchand *...Petitioner*

v.

Rameshchandra Sureschandra & Co., by Proprietor, Rameshchandra B. Takzania *...Respondent.*

Contract Act (IX of 1872), Sec.2 - Offer and acceptance - Acceptance of offer made over telephone - When complete - Contract, where concluded.

On the basis of the averments made in the plaint it is clear that the acceptance in this case was complete and the contract was concluded between the parties for the sale of Bombay quality tapioca starch only when the words of acceptance spoken by the plaintiff over phone at Salem was actually communicated to the defendant's agent at Bombay. In view of the decision of the Supreme Court in *B.G.Kedia v. Girdharilal, A.I.R. 1966 S.C. 543: (1966)1 S.C.R. 656,* it has to be held that the acceptance spoken to by the plaintiff over the phone from Salem was complete and a contract was concluded only when the acceptance was communicated to the defendant's agent at Bombay and that the contract between the parties was concluded only at Bombay where the acceptance was communicated to the defendant's agent at Bombay and not at Salem where the acceptance was spoken over the phone. *[Paras 5 and 7]*

Case referred to:

B.G.Kedia v. Girdharilal, A.I.R. 1966 S.C. 543: (1966)1 S.C.R. 656.

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the II Additional District Court, Salem, dated 30.3.1984 and made in C.M.A.No.105 of 1983 (O.S.No.610 of 1978 dated 25.2.1983, on the file of the Court of the II Additional Subordinate Judge, Salem).

T.Chengalvarayan, Senior Counsel, for *Surana & Surana, G.V.S.Iyer* and *B.Bhaskaran,* for Petitioner.

B.T.Seshadri for *R.Vedantham,* for Respondent.

The Court made the following

ORDER:- The plaintiff in O.S.No.610 of 1978 on the file of the Sub Court, Salem is the petitioner in this civil revision petition. The defendant in the said suit is the respondent in this civil revision petition. For the sake of convenience the parties are referred to in this order as per the nomenclature given to them in the suit.

2. The plaintiff filed the suit O.S.No.610 of 1978 on the file of the Sub Court, Salem against the defendant for recovery of a sum of Rs.8040 as damages for the breach of contract. The case of the plaintiff is as follows:

The plaintiff-firm is doing business in sago, starch and allied products at Salem. The defendant is a proprietary concern doing business in sizing and chemicals at Sivaganj, Indore. On or about 20.2.1978 M/s.Dalal Jayanthilal Gopalji and Company, Bombay offered to purchase on behalf of the defendant six wagon loads of Bombay quality tapioca starch at Rs.59 per 50 Kg. of F.O.R. at Angadipuram or Palghat. The plaintiff received a letter on or about 24.2.1978 sent by the said M/s.Dalal Jayanthilal Gopalji and Company, Bombay, dated 21.2.1978, stating that he had sold on behalf of the plaintiff six wagon loads of tapioca starch snow white full paste. The plaintiff wrote a letter to M/s.Dalal Jayanthilal Gopalji and Company, Bombay, that he never offered to supply goods of the variety mentioned in his letter dated 21.2.1978 but he offered only to supply Bombay quality tapioca starch at Rs.59 per 50 Kg. After receiving the letter M/s.Dalal Jayanthilal Gopalji and Company, Bombay called the plaintiff over the phone and requested him to send six wagon loads of Bombay quality tapioca starch to the defendant to Indore. The plaintiff accepted the offer of M/s.Dalal Jayanthilal Gopalji and Company, Bombay on behalf of the defendant and agreed to supply Bombay

quality stretch to the defendant at Rs.59 per 50 kg. On the plaintiff accepting at Salem the offer of M/s.Dalal Jayanthilal Gopalji and Company, Bombay on behalf of the defendant for the supply of goods to the defendant the contract was completed at Salem on 27.2.1978 the plaintiff caused between 11.3.1978 to 13.3.78 four wagon loads of Bombay quality tapioca starch to be despatched from Palghat to Indore and he caused the invoice for 111 bags of loads to be sent by the Chemical Starch Factory and for 220 bags by P.V.Brothers Starch Industrials and for two more wagons by Leenith Starch Factory. The defendant, after waiting for several days sent a telegram on 1.4.1978 stating that the wagons had been unloaded and the quality of goods despatched were inferior in quality than the one contracted for. The plaintiff sent his representative Chainraj to Indore to look into the matter and on 6.4.1978 the said Chainraj inspected the goods at Indore, found the allegations of the defendant that the goods are of inferior quality are false and thereafter he sold the goods at the risk of the defendant and realised a sum of Rs.64,125 and the plaintiff on account of the breach of contract committed by the defendant suffered a loss of Rs.8040 which he claimed as damages in the suit.

3. The defendant resisted the suit contending *inter alia* that the defendant-firm carry on business at Indore in Madhya Pradesh and the proprietor of the defendant-firm voluntarily works and resides at Indore and that the offer and acceptance for the supply of the Bombay quality tapioca starch was negotiated by M/s.Dalal Jayanthilal Gopalji and Company, Bombay on telephone and the contract was concluded only at Indore and as no part of cause of action for the suit arose within the jurisdiction of the Sub Court, Salem, the said Court has no jurisdiction to entertain the suit.

4. The trial court framed the following issue on the question of jurisdiction:

> "Whether the Court has no jurisdiction to entertain the suit for the reasons set forth in the written statement of the defendant?"

The trial court tried the above issue with regard to the jurisdiction as preliminary issue and found that the Sub Court, Salem has no jurisdiction to entertain the suit as no part of cause of action for the suit arose within the jurisdiction of the Sub Court, Salem. Consequently the trial court returned the plaint to the plaintiff for representing the same to the proper court. The plaintiff filed an appeal C.M.A.No.105 of 1983 before the District Court, Salem. The appellate Court confirmed the finding of the trial court that no part of cause of action arose at Salem and dismissed the appeal. Aggrieved by the judgment of the lower appellate court the plaintiff has filed the present civil revision petition.

5. The only point argued by Sri T.Chengalvorayan learned counsel for the plaintiff is, that the contract for the supply of Bombay quality tapioca starch was concluded by offer and acceptance made over the phone; by the letter, Ex.A-2, the plaintiff offered to sell Bombay quality tapioca starch to the defendant's agent M/s.Dalal Jayanthilal Gopalji and Company, Bombay; the defendant's agent M/s.Dalal Jayanthilal Gopalji and Company, Bombay called the plaintiff over the phone from Bombay and accepted the offer of the plaintiff made in Ex.A-2 to supply Bombay quality tapioca starch; the acceptance was made over the telephone at Bombay by M/s.Dalal Jayanthilal Gopalji and Company on behalf of the defendant and the same was communicated to the plaintiff at Salem and, therefore, the contract for the supply of goods was concluded at Salem. Learned counsel further contended that as the contract was concluded at Salem, a part of the cause of action for the suit arose at Salem, and, therefore, the sub-court, Salem has got jurisdiction to entertain the suit. The contention of the learned counsel for the plaintiff cannot be accepted because factually the contention of the learned counsel for the plaintiff runs counter to the averments made in the plaint. In para 5 of the plaint the plaintiff has specifically stated as follows:

> "After receiving the letter M/s.Dalal Jayanthilal Gopalji and Company, Bombay called the plaintiff over the phone and requested him to send 6 wagon loads of Bombay quality topioca starch to defendant to Indore instead the tapioca mentioned by him in his letter dated 21.2.1978. The plaintiff accepted this offer of M/s.Dalal Jayanthilal Gopalji and Company, of Bombay on behalf of defendant and agreed to supply Bombay quality tapioca starch to the defendant at Rs.59 per 50 Kgs. For Angadipuram or Palghat. On the plaintiff accepting this at Salem the offer of M/s.Dalal Jayanthilal Gopalji and Company, of Bombay on behalf of defendant for the supply of the goods to defendant, the contract was completed at Salem on

27.2.1978."

Further in para 17 of the plaint the plaintiff has also stated that the cause of action for the suit arose on 27.2.1978 when the plaintiff was at Salem through phone to send 6 wagons of quality tapioca starch to Indore. In para 18 of the plaint the plaintiff has further stated that even though the defendant is residing beyond the jurisdiction of the lower court as the contract to supply the goods was completed at Salem, a part of cause of action has arisen within the jurisdiction of the lower court and, therefore, the lower court has got jurisdiction to entertain the suit. A perusal of the averments in para 5, 17 and 18 of the plaint go to show that the offer was spoken by the defendant's agent M/s.Dalal Jayanthilal Gopalji and Company at Bombay over the telephone and the acceptance was spoken by the plaintiff over the telephone at Salem and the acceptance in this case was complete only when it was actually communicated to the defendant's agent M/s.Dalal Jayanthilal Gopalji and Company, at Bombay. On the basis of the averments made in the plaint it is clear that the acceptance in this case was complete and the contract was concluded between the parties for the sale of Bombay quality tapioca starch only when the words of acceptance spoken by the plaintiff over phone at Salem was actually communicated to the defendant's agent at Bombay. This is the only conclusion that can be reached on the basis of the specific averments made by the plaintiff paras 5, 17 and 18 of the plaint.

6. The Supreme Court in *B.G.Kedia v. Girdharilal, A.I.R. 1966 S.C. 543: (1966)1 S.C.R. 656,* dealing with the question where the acceptance of an offer is made over telephone, when acceptance is complete and where the contract is concluded, whether it is complete at the place where acceptance is spoken or at the place where the acceptance is heard, held that when an offer of acceptance is made over telephone, the acceptance is complete only when it is communicated to the other party and the acceptance is complete and a contract is concluded at the place where the acceptance is heard by the person to whom the acceptance is made. The Supreme Court in the above decision has observed as follows:

> "Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regards a contract as completed only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is inapplicable.
>
> The trial court was therefore right in the view which it has taken that a part of the cause of action arose within the jurisdiction of the City Civil Court, Ahmedabad, where acceptance was communicated by telephone to the plaintiffs."

7. In view of the above settled position of law, it has to be held that the acceptance spoken by the plaintiff over the phone from Salem was complete and a contract was concluded only when the acceptance was communicated to the defendant's agent at Bombay and that the contract between the parties was concluded only at Bombay where the acceptance was communicated to the defendant's agent and not at Salem where the acceptance was spoken over the phone. As the contract in this case was not concluded at Salem and no part of cause of action for the suit arose at Salem, the Sub Court, Salem has no jurisdiction to entertain the suit. In these circumstances, the court below rightly held that no part of the cause of action for the suit arose within the jurisdiction of the Sub Court, Salem and the trial court has no jurisdiction to entertain the suit. There are no merits in the civil revision petition and the same is liable to be dismissed. Accordingly, the civil revision petition is dismissed. No costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami and Abdul Hadi, JJ.*

A.No.1198 of 1979 *24th March, 1992.*

Dhanasekaran ...*Appellant*

v.

Manoranjithammal and others ...*Respondents.*

(A) Hindu Succession Act (XXX of 1956), Sec.8 - Notional partition preceding death of father - Son getting 1/2 share in joint family property by survivorship - Share whether separate property of son - Share obtained by son by way of inheritance from father - If separate property of son.

(B) Hindu Law - Hindu joint family and Hindu Co-parcenary - Distinction between - Joint family property and co-parcenary property whether distinct.

(C) Hindu Minority and Guardianship Act (XXXII of 1956), Sec.12 - Expression 'adult male, member' whether will include adult female member - Word 'Management' whether includes management otherwise than by kartha.

(D) Hindu Minority and Guardianship Act (XXXII of 1956), Secs.8, 11 and 12 - Minor being sole surviving co-parcener - Guardian, if can be appointed - Undivided interest of minor in the property - If covered by Sec.8 - Sec.11 if will apply to minor's interest in joint family property.

(E) Hindu Minority and Guardianship Act (XXXII of 1956), Sec.11 - Sale of minor's interest in joint family property by de facto guardian - If void or voidable.

The plaintiff D (appellant) was the son of R who died in 1960. D as the minor son and his mother M the first respondent survived him. The plaint 'B' Schedule properties belonged to the joint family consisting of R and D. On the date of death of R, D became entitled to 3/4th share and the first defendant to 1/4 share. The second defendant in the suit before the lower Court who died after filing a written statement got a sale deed dated 2.8.1961 from M representing herself and as guardian for her minor son 'D' D filed a suit in O.S.No.296 of 1975 in the Court of the Subordinate Judge, Cuddalore for setting aside the sale deed and for partition and separate possession of his 3/4th share, M remained *ex parte*. The second defendant died after filing written statement its legal representatives defendants 3 to 10 were impleaded as parties. The suit was dismissed, on appeal, it was contended that inasmuch as the Court's permission was not obtained for alienating the minor's share by the mother the sale was void.

Held:- In view of the notional partition immediately preceding the death of the plaintiff's father, the 1/2 share that was got by the plaintiff's father on such partition was his separate property. (In that alone, the plaintiff inherited half that is the 1/4th share in entirety). It is settled law that property obtained as his share on partition by a co-parcener who has no male issue is his separate property. (*Vide:* Sec.230(b) of Mulla's Hindu Law). In the present case the only male issue of the plaintiff's father being the plaintiff and the notional partition having taken place between him and his father, the property obtained by the plaintiff's father on such partition would only be his separate property. So long as Sec.8 of the Hindu Succession Act, 1956 operates, the result should be the same in view of the observation of the Supreme Court in *State of Maharashtra v. Narayan Rao, A.I.R. 1985 S.C. 716.* Therefore the abovesaid 1/4th share got by the plaintiff from the father's abovesaid 1/2 share by way of inheritance under Sec.8 of the abovesaid Act is only his separate property. Regarding the character of the other 1/2 share which the plaintiff got from the father on the above said notional partition, in the present case, admittedly the plaintiff is sole surviving co-parcener on the death of his father and the other member of the joint family is his mother the 1st defendant. The above said 1/2 share in the hands of the sole surviving co-parcener, the plaintiff, is to be treated as if it were his separate property. *[Paras 37, 38 and 39]*

The terms 'Hindu joint family' is certainly wider in connotation that the term 'Hindu Co-parcenary' since the former includes female members of the family *viz.*, Widows and unmarried daughters and even male members who are beyond 3 degrees from the common ancestor while the latter is restricted only to those male members who got right by birth in the property of the family. But there is no difference between the 'joint family property and co-parcenary property. *[Para 41]*

In Sec.12 of the Hindu Minority and Guardianship Act, adult member would include both male and female. The management spoken to in Sec.12 need not necessarily be management as kartha but

would include even the management otherwise.

[Para 45]

Sec.12 of the Hindu Minority and Guardianship Act statutorily recognises the principle which was laid down consistently by several High Courts that under the Guardians and Wards Act, 1890, no guardian can be appointed of minor's undivided interest in the joint family properties where the property is under the management of an adult. Yet it has been held even under the Guardians and Wards Act, a guardian can be appointed in cases where the minor is the sole surviving co-parceners. Therefore, the case of the interest of the sole surviving co-parcener in the joint family property is treated as if it were a separate property. Therefore, Sec.8 of the Hindu Minority and Guardianship Act would also cover the case of such an interest. In view of what is stated in Sec.8, there is an implied exclusion of minor's interest in the joint family property from it. In other words, the very content of Sec.8 suggest, through not expressly, that the said section does not operate in the case of minor's undivided interest in the joint family property. But while reading Sec.11 the Court does not get the impression that it cannot operate with reference to minor's interest in the joint family property. Further Sec.6 mentions who are all natural guardians for the minor's property other than his interest in the joint family. While so, when the succeeding Sec.8 deals with powers of a natural guardian, it is but natural to imply when there is nothing to indicate contra in that section that the said powers are that of a natural guardian of minor's property other than his interest in the joint family property. So, Sec.11 will apply to all properties of a minor including the minor's interest in the joint family property. But all the abovesaid discussion proceed on the assumption that the abovesaid 3/4th share of the plaintiff was joint family property simpliciter. On the other hand, the court has held that out of the abovesaid 3/4th share, the abovesaid 1/4th share is the plaintiff's separate property and his other 1/2 share is to be treated as his separate property on the facts of this case. Therefore, in respect of both the abovesaid 1/4th and 1/2 share belonging to the minor, the said Sec.8 of the Hindu Minority and Guardianship Act would operate and the permission contemplated therein having not been obtained, the said sale under Ex.B-4 in so far as the plaintiff's above said 1/2, 1/4, 3/4th share is concerned has to be necessarily set aside since no prior permission from the Court was obtained under Sec.8 of the Hindu Minority and Guardianship Act.

[Paras 46, 49 and 51]

The Court is in agreement with the view expressed by the Division Bench in *Subbulakshmi v. Sengolatha Koundan and others, C.R.P.No.831 of 1969.* Therefore, the Court does not think that the abovesaid Sec.11 does render the sale by a *de facto* guardian of his minor's interest in the joint family void. But the said section renders the said sale voidable only. *[Para 50]*

Cases referred to:

Gowli Buddanna v. Commissioner of Income Tax, Mysore, (1966)1 S.C.J. 586: (1966)1 I.T.J. 576: A.I.R. 1966 S.C. 1523; Sunamani Dei v. Babaji Das and others, A.I.R. 1974 Orissa 184; Commissioner of Wealth Tax Kanpur, etc. v. Chander Sen Etc., A.I.R. 1986 S.C. 1753: (1986)3 S.C.C. 567: (1986)161 I.T.R. 370: 1986 Tax. L.R. 1328; Yudhishter v. Ashok Kumar, A.I.R. 1987 S.C. 858; The Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar Karur, A.I.R. 1979 Mad. 1: I.L.R. (1978)3 Mad. 305: 1979 Tax.L.R. 14: (1978)2 I.T.J. 542; Subramaniam v. Krishnaswami Goundar and others, A.I.R. 1972 Mad. 377; In re Krishnakant Managammal, A.I.R. 1961 Guj. 68; V.M.N.Radha Ammal Kancheepuram v. The Commissioner of Income Tax, Madras, (1950)2 M.L.J. 399; Commissioner of Income Tax, Madhya Pradesh, Nagpur v. Sethi Govindram Sugar Mills Ltd., A.I.R. 1966 S.C. 24: (1965)3 S.C.R. 488; Pattayi Padayachi v. Subramania Padayachi and others, (1980)2 M.L.J. 296; Sugga Bai v. Hira Lal, A.I.R. 1969 M.P. 32; Gangoji Rao and another v. H.R.Channappa and others, A.I.R. 1983 Kant. 222; Sandeep (Minor) and another v. Sarojini Mossiar and others, A.I.R. 1990 NOC 138 Ker; Subramaniam v. K. Gounder, A.I.R. 1972 Mad. 377; Commissioner of Income Tax, Gujarat-I v. Dr.Babubhai Mansukhbai, (1977)108 I.T.R. 417; Commissioner of Wealth Tax, A.P. II v. Mukundgirji, 1983 Tax.L.R. 1370 (A.P.); Shri Vallabhdas Modami v. Commissioner of Income Tax, 1983 Tax.L.R. 559; Padmaja v. Jaisoorya, (1959) A.L.T. 67; Kalianji Ranchhod v. Bezonji Naraswamji, I.L.R. 32 Bom. 512; State of Maharashtra v. Narayan Rao, A.I.R. 1985 S.C. 716; D.S.Agalawe v. P.M.Agalawe, A.I.R. 1988 S.C. 845; Sitabai v. Ramchandra, A.I.R. 1970 S.C. 343; Girdhar Singh v. Anand Singh, A.I.R. 1982 Raj. 229; Venkata Krishna Reddy v. Amarababu, (1971)2

M.L.J. 466; Rakhnabai v. Sita Bai, I.L.R. 1952 Bom. 455; Ranganatha Gounder v. Kuppuswami Naidu, (1976)2 M.L.J. 128; P.Govinda Reddy and others v. Golla Obulamma, A.I.R. 1971 A.P. 363 (F.B.); Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar, A.I.R. 1979 Mad. 1 (F.B.).

Appeal against the decree of the Court of the Subordinate Judge, Cuddalore, South Arcot District, dated 7.11.1977 in O.S.No.296 of 1975.

M.N.Padmanabhan, for Appellant.

V.R.Gopalan, for Respondent Nos.2 to 9.

The Order of reference was made by

Bellie, J. (on 17-6-1991): The question that arises for consideration in this matter is whether the sale by the plaintiff's mother of his property during his minority is valid. The suit filed by the plaintiff for setting aside the sale was dismissed. Hence this appeal by him.

2. The plaintiff's father was one Rajamanickam Padyachi. He died in 1960. The plaintiff as a minor son and his mother-first defendant survived him. The plaint 'B' Schedule properties belonged to the joint family consisting of the said Rajamanickam and the plaintiff. On the death of Rajamanickam the plaintiff became entitled to 3/4th share and the first defendant to 1/4th share. The second defendant who was residing in a portion of the property, taking advantage of the young age of the first defendant, got a false and fictitious sale deed dated 2.8.1961 from her as representing herself and as guardian for her minor son the plaintiff as if it is supported by consideration of Rs.1,300. There was no legal necessity or justifiable reason for the sale. On these grounds the plaintiff filed the suit for setting aside the sale deed dated 2.8.1961 and for partition and separate possession of the plaintiff's 3/4th share.

3. First defendant remained *ex parte*, and the second defendant filed a written statement contesting the suit. After filing the written statement the second defendant died on his legal representatives have been impleaded as defendants 3 to 10 and they adopted the written statement filed by the second defendant. They raised various contentions but many of them are not necessary for the purpose of this appeal. They desired that the sale was a fictitious one, and they contended that the sale was supported by consideration, and it was executed for the benefit of the minor for legal necessity.

4. It appears during the arguments before the trial Court it was argued for the plaintiff that the first defendant-mother should have obtained previous permission from the Court for selling the minor's property, and there being no such permission the sale deed is invalid.

5. The learned trial Judge rejected the plaintiff's case on all points raised by him and particularly holding that the sale was for legal necessity and the first defendant had right to sell the property of the minor, he dismissed the suit.

6. Now in the appeal by the plaintiff the only argument advanced is that admittedly the first defendant-mother did not get the previous permission of the Court as required under Sec.8 of the Hindu Minority and Guardianship Act to sell the minor's interest of 3/4th share and therefore the sale in favour of the second defendant is invalid and hence it is liable to set aside and the suit is to be decreed.

7. It is not in dispute that the suit property originally belonged to the joint family consisting of Rajamanickam and his son-the plaintiff. Rajamanickam and his son-the plaintiff were each entitled to 1/2 share of the suit property as joint family members. While so Rajamanickam died in 1960. He left behind him his minor son-the plaintiff and his wife-the first defendant. Under the Hindu Succession Act the plaintiff and his mother will be entitled to each 1/2 share in the share of Rajamanickam. Thus the plaintiff would be entitled to 3/4th share in the suit property and the first defendant would be entitled to 1/4th share.

8. Now the plaintiff-son and the first defendant-mother constitute a joint family and this is also not in dispute, for a male member and a female member can always constitute a joint family (See: *Gowli Buddanna v. Commissioner of Income Tax, Mysore, (1966)1 S.C.J. 586: (1966)1 I.T.J. 576: A.I.R. 1966 S.C. 1523* and *Sunamani Dei v. Babaji Das and others, A.I.R. 1974 Orissa 184.* This family owned the entire property *i.e.*, the property that belonged to Rajamanickam and his son-the plaintiff, in which the plaintiff will be entitled to 3/4th share and the first defendant to 1/4th share.

9. It is argued as far as the 1/4th share that devolved on the plaintiff out of the half share that belonged to Rajamanickam on his death that this cannot be a joint family property but it is separate property of the plaintiff. In this connection Mr.M.N.Padmanabhan, learned counsel for the

appellant-plaintiff relies on *Commissioner of Wealth Tax Kanpur, etc., v. Chander Sen etc., A.I.R. 1986 S.C. 1753: (1986)3 S.C.C. 567: (1986)161, I.T.R. 370: 1986 Tax.L.R. 1328,* and *Yudhishter v. Ashok Kumar, A.I.R. 1987 S.C. 858.* In these two cases, in respect of a separate property devolved on the father under Sec.8 of the Hindu Succession Act, it was held that the property cannot be the property of a Hindu joint family of the father *vis-a-vis* his sons. Similarly in the Full Bench decision of this Court in *The Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar, Karur, A.I.R. 1979 Mad. 1: I.L.R. (1978)3 Mad. 305: 1979 Tax.L.R. 14: (1978)2 I.T.J. 542,* which has been referred to in the above Supreme Court decision in *Commissioner of Wealth Tax, Kanpur, etc., v. Chander Sen etc., A.I.R. 1986 S.C. 1753: (1986)3 S.C.C. 567: (1986)161 I.T.R. 370: 1986 Tax.L.R. 1328,* it was decided that the property inherited by the father under Sec.8 of the Hindu Succession Act cannot be the property of the joint family of himself and his sons and other members of the family. But in the instant case no separate property was inherited by one, but in the joint family property of the plaintiff and his father, on the plaintiff's father's death, the plaintiff along with his half share in the joint family property, also inherited 1/4th share out of his father's half share, the other 1/4th share going to the mother-first defendant. On the plaintiff's father's death the joint family property owned by the father and son was not partitioned, and the joint family did not disrupt, but the joint family status continued as joint family of the plaintiff and his mother, and the plaintiff's share in the property became 3/4th share while the mother got 1/4th share.

10. A Full Bench of Andhra Pradesh High Court in *Govinda Reddy and others v. Golla Obulamma, A.I.R. 1971 A.P. 363 (F.B.),* dealing with devolution of the interest in co-parcenary property under Sec.6 of the Hindu Succession Act observed:

> "Sec.6 is concerned with the devolution of a deceased co-parcener's interest alone. It has nothing to do with the disruption of joint family status. The co-parcenary will continue notwithstanding the death of a co-parcener until partition is effected."

I am in respectfully agreement with this view.

11. Now the question is whether in this situation the mother could alienate the plaintiff's undivided 3/4th share in the joint family property as his guardian. As per Sec.6 of the Hindu Minority and Guardianship Act, in respect of minor's property, *excluding his undivided interest in the Hindu joint family property,* in the absence of the father, the mother will be the natural guardian. Sec.8 of the Hindu Minority and Guardianship Act prescribes that for the sale of a minor's immovable property the natural guardian shall take the permission of the court. We have held above that the suit property of the plaintiff-minor's 3/4th share, which includes the 1/4th share inherits from his father, cannot be held to be a separate property of the minor but it is his 3/4th undivided interest in the joint family property of himself and his mother.

12. Incidentally a point may arise whether an undivided interest in the joint family property of a minor is excluded in Sec.8 also as in Sec.6. While Sec.6 says as to who are the natural guardians of a Hindu minor in respect of his property it has excluded the minor's undivided interest in the joint family property. Sec.8 deals with the power of the natural guardian in respect of the minor's immovable property. From a conjoint reading of both the Secs.6 and 8 it is clear and beyond any doubt that the minor's immovable property referred to in Sec.8 is that property excluding his undivided interest in the joint family property.

13. This view is supported by a decision of Palaniswami, J. in *Subramaniam v. Krishnaswami Goundar and others, A.I.R. 1972 Mad. 377.* Therefore as per Sec.8 of Hindu Minority and Guardianship Act permission of the Court shall be obtained in respect of minor's separate property and not his undivided interest in the joint family property. But the sale of the undivided interest shall be justified under the Hindu Law, *i.e.*, it must be for legal necessary. This appears to be the consistent view of various High Courts commencing from *In re. Krishnakant Managanmal, A.I.R. 1961 Guj. 68,* followed by *Sunamani Dei v. Baboji Das and others, A.I.R. 1974 Orissa 184* and *Subramaniam v. Krishnaswami Goundar and others, A.I.R. 1972 Mad. 377.*

14. Now we come to the question whether the sale by the mother of the plaintiff's share in the property is valid. It is argued that even in the suit property is the minor's interest in the joint family property, his mother cannot be a kartha or manager of the joint family property and therefore the sale by her is incompetent. In this connection a Division Bench ruling in *V.M.N.Radha Ammal,*

Kancheepuram v. The Commissioner of Income Tax, Madras, (1950)2 M.L.J. 399, was relied on. Therein Satyanarayana Rao, J. observed:

"The right to become a manager depends upon the fundamental fact that the person on whom the right devolved was a co-parcener of the joint family.....Further, the right is confined to the male members of the family as the female members were not treated as co-parceners though they may be members of the joint family."

Viswanatha Sastri, J. said:

"The managership of a joint Hindu family is a creature of law and in certain circumstances, could be created by an agreement among the co-parceners of the joint family. Co-parcenership is a necessary qualification for managership of a joint Hindu family."

These observations of the learned Judges were quoted with approval by the Supreme Court in *Commissioner of Income Tax, Madhya Pradesh, Nagpur v. Seth Govindram Sugar Mills Ltd., A.I.R. 1966 S.C. 24: (1965)3 S.C.R. 488,* and it was said that a widow, not being a co-parcener has no legal qualification to become the manager of a joint Hindu family.

15. In Mulla's Hindu Law, Fifteenth Edition, at page 625, in Sec.519, there is the following passage, which appears to be with special reference to minor's interest in the joint family property:

"If the minor is a member of a joint family governed by the Mitakshara Law, the father as kartha (manager) is entitled to the management of the whole co-parcenary property including the minor's interest. After the father's death, the management of the property, including the minor's interest therein passes to the eldest son as karta. The mother is not entitled to the custody of the undivided interest of the undivided interest of her son in the joint property, because such property is not separate property, though she is entitled to the custody of his person and of his separate property, if any."

The next sentence below this passage is also worth noting,

"If all the sons are minors, the Court may appoint a guardian of the whole of the joint property until one of them attains majority, specially when the widows of the father were quarrelling among themselves."

These passages in Mulla's Hindu Law makes it more clear that in respect of minor's undivided interest in Hindu joint family property the mother cannot be a kartha (manager). It therefore follows that the plaintiff's mother, in our case the first defendant, in respect of the plaintiff's 3/4th share in the joint family property could never be the karta (manager).

16. Without being a kartha (manager), in what capacity she has sold the minor's interest is the point. Ratnam, J. in *Pattayi Padayachi v. Subramania Padayachi, (1980)2 M.L.J. 296,* has held that a sale by the mother as guardian of an undivided interest of two minors in the joint family property is void because the mother had no right to sell.

17. Mr.V.R.Gopalan, learned counsel for the respondents-defendants would however contend that may be the mother has no right in respect of minor's share in the co-parcenary property, but not in the case of minor's undivided interest in a joint family property. The learned counsel would submit that 'joint family' is much wider a term than a co-parcenary. But from the above discussion of the decisions *viz., V.M.N.Radha Ammal, Kancheepuram v. The Commissioner of Income Tax, Madras, (1950)2 M.L.J. 399,* and *Commissioner of Income Tax, Madhya Pradesh, Nagpur v. Seth Govindram Sugar Mills Ltd., A.I.R. 1966 S.C. 24: (1965)3 S.C.R. 488,* and the passages in Mulla's Hindu Law, I find no merit in this submission. The Supreme Court has clearly stated that a widow has no legal qualifications to become a manager of a joint Hindu family. It is similarly stated in the said Mulla's passages (supra) also.

18. In this connection Mr.Gopalan would cite the decision of Orissa High Court in *Sunamani Dei v. Babaji Das and others, A.I.R. 1974 Orissa 184,* wherein it has been held that,

"When the minor and his mother constitute a Hindu joint family, each with a moiety of undivided interest in any immovable property belonging of the family, in the absence of the father, the mother as natural guardian, can alienate even the minor's half share in the immovable property under the personal law. Sec.8 of the Hindu Minority and Guardianship Act will not apply to such alienation."

This decision is rendered by following a judgment of Madhya Pradesh High Court in *Sugga Bai v. Hira Lal, A.I.R. 1969 M.P. 32.* And this Orissa ruling has been followed by the Karnataka High Court in *Gangoji Rao and another v. H.R.Channappa*

and others, A.I.R. 1983 Karn. 222. The same view has been held by the Kerala High Court in *Sandeep (Minor) and another v. Sarojini Mossiar and others, A.I.R. 1990 Ker. 138 (NOC).*

19. From the passage quoted above from the decision of the Orissa High Court, it appears, according to that High Court, because the mother is a natural guardian she will have the right to alienate minor's undivided interest in the joint family property. But as per the passage of Mulla's Hindu Law quoted above the mother is not entitled to the custody of the undivided interest of her son in the joint family property. It is only in respect of a person and separate property the mother can be a natural guardian and that is what Sec.6 of the Hindu Minority and Guardianship Act also states. It appears to me that the reasoning given by the Orissa High Court is not quite correct.

20. However, the question arises whether the mother, by virtue of being a natural guardian of the person and the private property of the minor, as a *de facto* guardian, can alienate the minor's share in the joint family property for the legal necessity or for the benefit of the estate. The concept of *de facto* guardian is well recognised in Hindu Law. For this Mulla's Hindu Law, fifteenth Edition, Sec.538 at page 636 can be referred to. It is stated therein that a *de facto* guardian has the same power of alienating the property of his ward as a natural guardian.

21. Mother alone in the instant case can manage the joint family property including the share of the minor son. Certainly she is not a karta or the manager as known to Hindu Law in respect of the joint family property. This means she has no legal right to claim as Karta or manager, but that does not mean she cannot manage the property. In this way she becomes the *de facto* guardian of the minor's undivided interest in the joint family property. In that capacity, as per the general Hindu Law she will have the right to sell the minor's undivided interest, subject to of course, the sale being for legal necessity or for the benefit of the estate of the minor.

22. Then it is contended that Sec.11 of the Hindu Minority and Guardianship Act abrogates the right of *de facto* guardian to sell the minor's undivided interest in the joint family property. The section reads as follows:

> "After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor."

Now the question is whether this Sec.11 abrogates the right of a *de facto* guardian in respect of the undivided interest of a minor in the joint family property also.

23. In the section there is no reference to "undivided interest" of a Hindu minor in "the Hindu joint family property", but what is referred to is "the property of a Hindu minor". We have to construe whether the words "property of a Hindu minor" includes the undivided interest of the minor in the Hindu joint family property.

24. Sec.6 prescribes who will be the natural guardian in respect of minor's person as well as in respect of minor's property. This is the first section (in the Act) wherein minor's property is referred to. When it is so referred to 'minor's undivided interest in the joint family property" is excluded. Therefore as per Sec.6 minor's property means his private property *i.e.*, his property other than the undivided interest in the joint family property. Sec.8 deals with the powers of natural guardian in respect of minor's immovable property. In this section there is no mention of undivided interest in the joint family property. As already discussed above with reference to these two sections, when they are conjointly read, minor's immovable property referred to in Sec.6 only means his private property, and his undivided interest in the Hindu joint family is not included.

25. Sec.9 relates to testamentary guardians and their powers and thus it deals with a different aspect. This section while giving power to the father of a minor and a mother after the father, who is entitled to act as a natural guardian, to appoint by will a testamentary guardian to the minor's property, excludes the undivided interest referred to in Sec.12. The property referred to in Sec.12 is undivided interest in the joint family property which property is under the management of an adult member of the family. To such a property, as per Sec..9, no testamentary guardian shall be appointed by the father who is entitled to act as natural guardian of the minor. Thus construed, Sec.9 enables a Hindu father entitled to act as natural guardian of his minor son to appoint a guardian by will to the minor's property which can be both private property as well as the undivided interest in the joint family property but which is not under the management of an adult member.

26. Sec.12 as just aforesaid relates to minor's undivided interest in the joint family property which is under the management of an adult member of the family and the section says that no guardian shall be appointed for the minor in respect of such undivided interest. Thus Sec.12 specifically deals with the minor's property of an undivided interest in the joint family property which is under the management of an adult member of the family. While so Sec.11 deals with the defacto guardian's power in the minor's property. While Sec.8 deals with the natural guardian's power in respect of the minor's property. We have already held that the minor's property referred to in Sec.8 does not include his undivided interest in the joint family property and therefore, likewise, it must be held that minor's property referred to in Sec.11 also does not include his undivided interest in the joint family property.

27. According to Ratnam, J. in his decision in *Pattayi Padayachi v. Subramania Padayachi and others, (1980)2 M.L.J. 296,* while in Secs.6, 9 and 12 the minor's undivided interest in the joint family property has been specifically excluded there is no such exclusion in Sec.11 and therefore it can be said that Sec.11 also exclude minor's undivided interest in the joint family property. But for the reasons stated above by me, with great respect, I am unable to agree with this reasoning of the learned Judge. When in Sec.6 wherein for the first time 'Minor's property' occurs the minor's undivided interest in the joint family property is excluded, in the subsequent section whenever "minor's property" occurs it must be taken to exclude the undivided interest in the joint family property unless it is expressly stated that minor's property includes or does not exclude the undivided interest in the joint family property. In Secs.8 and 11 there is no such exclusion, whereas in Sec.9 there is specific exclusion. Therefore it is clear that minor's property referred to in Sec.11 excludes his undivided interest in the joint family property. It therefore follows that this section does not abrogate the right of the *de facto* guardian in respect of the minor's undivided interest in the joint family property.

28. Perhaps keeping in mind the possibility of a mother being in management of joint family property, in Sec.12 it is stated "an adult member of the family" and not "a male adult member of the family". Considering thus it can be safely taken that the sale by the first defendant mother is under the power as *de facto* guardian of minor's undivided interest in the joint family property.

29. Considering the entire circumstances of the case which involves complicated legal points and also my inability to agree with the view taken by Ratnam, J., I think it would be quite appropriate to place the matter before a Division Bench or Full Bench for an authoritative decision.

30. The office is directed to place the matter before my Lord the Chief Justice for necessary direction.

Pursuant to the Order of reference the judgment of the Bench was delivered by

Abdul Hadi, J.:- This appeal has been posted before us on being referred to by Bellie, J., since the view he is taking on the question involved in the appeal is in conflict with the view taken by Ratnam, J., in the decision reported in *Pattayi Padayachi v. Subramania Padayachi and others, (1980)2 M.L.J. 296.*

32. This appeal is by the plaintiff against the dismissal of his suit O.S.No.296 of 1975 on the file of Sub Court, Cuddalore, praying for setting aside the sale under Ex.B-4, dated 2.8.1961, effected by his mother when he was a minor in so far as his 3/4th the share therein is concerned and for partition and separate possession of the said share. The question to be answered is whether the said sale is hit by Sec.8 of the Hindu Minority and Guardianship Act, 1956 since admittedly the plaintiff's mother did not obtain the previous permission from the Court as contemplated in the said Section, and consequently whether the plaintiff could avoid the said sale with reference to his above-said 3/4th share. the contention of the learned counsel for the plaintiff Mr.M.N.Padmanabhan is that Sec.8 operates and the plaintiff could avoid the sale. On the other hand, the contention of the learned counsel for the defendants 3 to 10 (respondents 2 to 9 herein) who are the legal representative of the deceased 2nd defendant, the vendee under the above said sale deed, Mr.V.R.Gopalan, is that the said property being the joint family property, the said Section is not attracted that consequently, the above said permission from the Court is not called for and that the said sale having been effected for legal necessity of the family, should be up-held as valid as the Court below has done.

33. The 1st defendant (1st respondent herein) is the plaintiff's mother and under the said, she sold

not only the above said 3/4th share belonging to the plaintiff on his behalf, she also sold her own 1/4th share therein. She remained *ex parte* both in the Court below and in this Court.

34. Admittedly, the abovesaid property was a joint family property of the family of one Rajamanickam Padayachi; his son, the plaintiff and his wife, the 1st defendant, till his death in 1960, after the coming into force of the Hindu Succession Act of 1956, leaving behind his said widow the 1st defendant and his son, the plaintiff. There is also no dispute that pursuant to Sec.6, proviso and Explanation 1 therein, read with Sec.8 of the said Act, a notional partition between Rajamanickam Padayachi and his son, the plaintiff had taken place immediately before the death of Rajamanickam Padayachi, that the plaintiff thereby got half share in the suit property by survivorship and in the remaining half share of Rajamanickam Padayachi, his two heirs, *viz.*, the 1st defendant and plaintiff got 1/4th share each by inheritance and that, in all, the plaintiff got 3/4th share and the 1st defendant got the remaining 1/4th share. Bellie, J., in his referring judgment, has came to the conclusion that the above-said undivided 3/4th share was the joint family property of the family of the plaintiff and his mother, after the death of the plaintiff's father, that consequently Sec.8 of the Hindu Minority and Guardianship Act, is not attracted and that though she is not a co-parcener and consequently not the karta of the family, she can alienate the said 3/4th share as *de facto* guardian of her minor son for the legal necessity of the minor or for the benefit of the estate of the minor, since she is, in the absence of the father, the natural guardian of the person and the private property of the minor. For coming to this conclusion Bellie, J. has held that Sec.11 of the Hindu Minority and Guardianship Act, (which says that after the commencement of the said Act, no person shall be entitled to dispose of the property of a Hindu minor merely on the ground of his being the *de facto* guardian of the minor), is not applicable to an undivided interest of a minor in the joint family property. But, in this regard, as also pointed out by Bellie, J., Ratnam, J., has held that the above said Sec.11 will apply even to such minor's interest in the joint family property. Therefore, according to Ratnam, J., *de facto* guardianship is totally abolished, whatever be the nature of the property, whether separate property or joint family property of the minor and when the minor's mother sells such interest of the minor in the joint family property, the said sale is void, *ab initio* because the mother has no competency at all to sell such interest of the minor, she being total trespasser. Further Ratnam, J., while interpreting Sec.12 of the Hindu Minority and Guardianship Act, (which says that where a minor has undivided interest in the joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest) has held that the expression 'adult member' used in Sec.12 would refer only to an adult male member and not an adult female member. Bellie, J., does not also share this view of Ratnam, J., and holds that the expression "adult member" would refer to both male and female and the term "management" referred to therein does not mean management as karta, but management in general.

35. In view of these differing views, on reference by Bellie, J., the matter has been placed before us. Before going into the question whether Sec.8 of the Hindu Minority and Guardianship Act would apply to the sale of the abovesaid 3/4th share which belonged to the plaintiff, we have to see what is the character of the said 3/4th share in the hands of the plaintiff, in the light of the facts narrated above. If it is joint family property, the uniform opinion as laid down in *Subramaniam v. K. Gounder, A.I.R. 1972 Mad. 377*, and other decisions is that Sec.8 will not operate since it is only with reference to separate property of minors it will. So, it has be seen whether the above said 3/4th share of the plaintiff is the joint family property or the separate property of the plaintiff when the abovesaid sale was effected. As already stated, the abovesaid 3/4th share is composed of 1/2 share which came to the plaintiff on the above-said notional partition between himself and his father immediately prior to the death of the father, by survivorship. The other 1/4th share was inherited by him from his father on his death out of the abovesaid remaining 1/2 share, which was got by his father pursuant to the abovesaid notional partition.

36. So far as this 1/4th share is concerned, the learned counsel for the plaintiff Mr.M.N.Padmanabhan cited before us, as he did before Bellie, J., also two Supreme Court decisions,

viz., *Commissioner of Wealth-tax, Kanpur, etc., v. Chander Sen Etc., A.I.R. 1986 S.C. 1753: (1986)3 S.C.C. 567: (1986)161 I.T.R. 370: 1986 Tax.L.R. 1328* and *Yudhishter v. Ashok Kumar, A.I.R. 1987 S.C. 858*, in support of his contention that it came to the plaintiff as his separate property. In the above referred to *Commissioner of Wealth-tax Kanpur, etc. v. Chander Sen Etc., A.I.R. 1986 S.C. 1753: (1986)3 S.C.C. 567: (1986)161 I.T.R. 370: 1986 Tax.L.R. 1328*, there was a partition of joint family business between the father and his only son. Thereafter they continued the business in the name of a partnership firm. The son formed a joint family with his own sons. The father died and amounts standing to the credit of the deceased father in the account of the firm devolved on his son. The Wealth Tax Authorities, while assessing the wealth tax in respect of the assessee, *viz.*, the joint family (which is called Hindu undivided family under the Wealth-tax Act) of the son and his own sons, included the amount in computing the net wealth under the said Act. In that context, the Supreme Court held that the said son inherited the above said amount standing to the credit of his deceased father in the accounts of the firm, as an individual and not as karta of his joint family with his own sons and that hence it could not be included in computing the said assessee's net wealth under the abovesaid Act. In this context, the Supreme Court observed that though under the old Hindu Law the said son would inherit the above said amount standing to the credit of the deceased father as Karta of his own family with his own sons, the Hindu Succession Act, 1956, has modified the rule of succession by virtue of Sec.8 thereof read with the preamble and Sec.4 of the said Act. Therefore, it observed as follows:

> "It would be difficult to hold today that the property which devolved on a Hindu under Sec.8 of the Hindu Succession Act would be *HUF* in his hand *vis-a-vis* his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and *vis-a-vis* son and female heirs with respect to whom no such concept could be applied or contemplated."

In the above referred to *Yudhishter v. Ashok Kumar, A.I.R. 1987 S.C. 858*, the same principles was enunciated thus:

> "Normally therefore whenever the father gets a property from whatever source from the grand father or from any other source, be it separate property or not, his sons should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. This Court observed that this position has been affected by Sec.8 of the Hindu Succession Act, 1956 and, therefore, after the Act, when the son inherited the property in the situation contemplated by Sec.8, he does not take it as karta of his own undivided family but takes it in his individual capacity......."
>
> "This Court observed in the aforesaid decision that the views expressed by the Allahabad High Court, the Madras High Court, the Madhya Pradesh High Court and the Andhra Pradesh High Court appeared to be correct and was unable to accept the views of the Gujarat High Court. To the similar effect is the observation of learned author of Mayne's Hindu Law, 12 Edn. page 919".

The above referred to overruled decision of Gujarat High Court in *Commissioner of Income Tax, Gujarat-I v. Dr.Babubhai Mansukhbhai, (1977)108 I.T.R. 417*. The above referred to decisions which were approved are *Commissioner of Wealth-tax, A.P.II v. Mukundgirji, 1983 Tax.L.R. 1370 (A.P.), The Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar Karur, A.I.R. 1979 Mad. 1: I.L.R. (1978)3 Mad. 305: 1979 Tax.L.R. 14: (1978)2 I.T.J. 542 (F.B.)* and *Shri Vallabhdas Modami v. Commissioner of Income Tax, 1983 Tax.L.R. 559 (M.P.)*.

37. But, Bellie, J. in his referring judgment, distinguished these two Supreme Court judgments and also the above referred to *The Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar Karur, A.I.R. 1979 Mad. 1: I.L.R. (1978)3 Mad. 305: 1979 Tax L.R. 14: (1978)2 I.T.J. 542 (F.B.)*, by saying that in those cases "in respect of a separate property devolved on the father under Sec.8 of the Hindu Succession Act it was held that the property cannot be the property of a Hindu joint family of the father *vis-a-vis* the son.... but, in the instant case, no separate property was inherited ...." No doubt in the above-said Supreme Court and Madras decision, separate property was inherited. But we do not see any difference in the present case also. With respect we hold that Bellie, J., is not correct in this regard. In view of the

abovesaid notional partition immediately preceding the death of the plaintiff's father, the abovesaid 1/2 share that was got by the plaintiff's father on such partition was also his separate property. (In that alone, the plaintiff inherited half that is the abovesaid 1/4th share in the entirety). It is settled law that property obtained as his share on partition by a coparcener who has no male issue, is his separate property. (Vide Sec.230(b) of Mulla's Hindu Law). In the present case the only male issue of the plaintiff's father being the plaintiff and the notional partition having taken place between him and his father, the property obtained by the plaintiff's father on such partition would only be his separate property. In Mayne's Hindu Law, 12th Edition at page 541 also it has been observed relying on *Padmaja v. Jaisoorya, (1959) A.L.T. 67,* following *Kalianji Ranchhod v. Bezonji Naraswanji, I.L.R. 32 Bom. 512,* that where a father divided that family property between his and his sons, the share obtained by him was self-acquired property, which he could bequeath to his wife. In the above referred to *The Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar Karur, A.I.R. 1979 Mad. 1: I.L.R. (1978)3 Mad. 305: 1979 Tax L.R. 14: (1978)2 I.T.J. 542 (F.B.),* also, the property in question was the property inherited from his devised father and it was held that the son 'K' who so inherited, got the property as his separate property and not that of the joint family consisting of himself, his wife, sons and daughters. The only difference is in the above referred to *The Additional Commissioner of Income-tax, Madras v. P.L.Karuppan Chettiar Karur, A.I.R. 1979 Mad. 1: I.L.R. (1978)3 Mad. 305: 1979 Tax L.R. 14: (1978)2 I.T.J. 542 (F.B.),* there was a natural partition or division, but in the present case, the partition or division, is a notional one. But that will not make any difference. No doubt, the learned counsel for respondent argued that the legal fiction employed in Explanation 1 to Sec.6 of the Hindu Succession Act, 1956 is only to fix the quantum of the share of the deceased co-parcener and not to fix the character of the property in the hands of his heirs who inherit from the quantum so fixed. In this connection he cited *State of Maharashtra v. Narayan Rao, A.I.R. 1985 S.C. 716.* But, the said decision only says; "A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted, but it cannot be carried beyond that." In the said Supreme Court decision, on facts it was held that the abovesaid legal fiction could not be carried to the extent of holding that the female heir under Sec.7 of the Hindu Succession Act read with Sec.6 of the said Act, could be treated as having ceased to be a member of the family. It was so held because otherwise it would amount to carrying the legal fiction beyond the permissible limit. But, the present case is different. The legal fiction being the abovesaid notional partition, what is deducible as a consequence from it, is that the property got on such a notional partition by the plaintiff's father or the plaintiff as the case may be, is only his separate property, in view of the fact that if the partition was a natural one, the same result would follow.

38. So, in the final analysis, so long as Sec.8 of the Hindu Succession Act, 1956 operates, the result should be the same in view of the abovesaid observations of the Supreme Court. Therefore, the abovesaid 1/4th share got by the plaintiff from the father's abovesaid 1/2 share, by way of inheritance under Sec.8 of the abovesaid Act is only his separate property.

39. Now, regarding the character of the other 1/2 share, which the plaintiff got from his father on the abovesaid notional partition, the learned Counsel for the appellant also cited *D.S.Agalawe v. P.M.Agalawe, A.I.R. 1988 S.C. 845,* where it has been held as follows:

> "The joint family property does not cease to be joint family property when it passes to the hands of a *sole surviving co-parcener.* If a son is born to the sole surviving co-parcener, the said properties become the joint family properties in his hands and in the hands of his son. The only difference between the right of a manager of a joint Hindu family over the joint family properties where there are two or more co-parceners and the right of a sole surviving co-parcener in respect of the joint family properties is that while the former can alienate the joint family properties only for legal necessity or for family benefit, the latter is entitled to dispose of the co-parcenary property *as if it were his separate property* as long as he remains a sole surviving co-parcener and *he may sell or mortgage the co-parcenary property even though there is no legal necessity or family benefit* or may even make a gift of the co-parcenary property. If a son is subsequently born to or adopted by the sole surviving co-parcener or a new

co-parcener is inducted into the family on an adoption made by a widow of a deceased co-parcener, an alienation made by the sold surviving co-parcener before the birth of a new co-parcener or the induction of a co-parcener by adoption into the family whether by way of sale, mortgage or gift would however stand, for the co-parcener who is born or adopted after the alienation cannot object to alienations made before he was begotten or adopted." (*Emphasis supplied by us*).

In the present case, admittedly the plaintiff is the sole surviving *co-parcener* on the death of his father, and the other *member* of the joint family is his mother the 1st defendant. The contention of the learned counsel for the appellant is that, since the abovesaid 1/2 share, in the hands of the sole surviving co-parcener, the plaintiff, is to be treated *as if it were* his separate property according to the Supreme Court decision, here also Sec.8 of the Hindu Minority and Guardianship Act would operate and the abovesaid sale effected by the 1st defendant-mother on behalf of the minor plaintiff could be avoided by the minor plaintiff on the mere ground that the prior permission from the Court was not obtained. We also hold so, since the abovesaid 1/2 share has to be treated as if it were the plaintiff's separate property. In this regard also we differ from Bellie, J.

40. No doubt the learned counsel for the respondents sought to contend that the said half share, though not "co-parcenary property", is the "joint family property" in the hands of the plaintiff. We are unable to understand this contention. He no doubt began to explain the above said contention by saying that the term "Hindu joint family" is wider in concept than the term "Hindu co-parcenary" and cited *Buddanna v. I.T. Commissioner, Mysore, A.I.R. 1966 S.C. 1523* and *Sitabai v. Ramchandra, A.I.R. 1970 S.C. 343.*

41. On the proposition of law, no doubt, there can be no two opinion. In other words, the terms 'Hindu joint family' is certainly wider in connotation than the term 'Hindu Co-parcenary'. since the former includes female members of the family *viz.*, Widows and unmarried daughters and even male members who are beyond 3 degrees from the common ancestor, while the latter is restricted only to those male members who got right by birth in the property of the family. But there is no difference between the 'Joint family property and 'co-parcenary property'. In fact, Mulla's Hindu Law, 15th Edition, Sec.220 at page 287 says that the term "joint family property", is synonymous with "co-parcenary property". In the said section the learned author divides the properties under law, only into two classes, *viz.*, 1. Joint family property and 2. separate property, and finally also states that the term 'joint family property' is synonymous with "co-parcenary property". So, we are unable to accept the abovesaid contention of the learned counsel for the respondents.

42. The learned counsel for the respondent also relied on *Gangoji Rao and another v. H.R.Channappa and others, A.I.R. 1983 Kant. 222, Girdhar Singh v. Anand Singh, A.I.R. 1982 Raj. 229, Sunamani Devi v. Babaji Das and others, A.I.R. 1974 Orissa 184* and *In re. Krishnakant Managammal, A.I.R. 1961 Guj. 68.* These decisions are cited on the footing that the abovesaid 3/4th share of the plaintiff was joint family property in his hands. But, in the view we have taken, *viz.*, that the abovesaid 1/4th share of the plaintiff is his separate property and his obiter 1/2 share is to be treated as his separate property, these decisions may have no application to the case in hand. Nevertheless, since arguments were advanced on the footing of these decisions, we shall tough upon them also (assuming that the abovesaid 3/4th share in the hands of the plaintiff was joint family property simpliciter).

43. In the above referred to *Gangoji Rao and another v. H.R.Channappa and others, A.I.R. 1983 Kant. 222,* it has been held that when the mother manages the family property of the minor son, Sec.11 of the Hindu Minority and Guardianship Act, 1956 is not attracted and that, therefore, she can validly alienate it for family necessary or benefit, without obtaining permission of the Court under Sec.8 of the said Act. The said decision further observes that the fact that the mother can also manage the family property is event from Sec.12 referring to the family property being in the management of 'an adult member of the family' and not "adult male member of the family". But according to us, this decision does not lay down the correct law. Sec.12 no doubt runs as follows:

"12. Guardian not to be appointed for minor's undivided interest in joint family property- where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the

minor in respect of such undivided interest:

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest."

44. A Bench of this Court held in *Venkata Krishna Reddy v. Amarbabu, (1971)2 M.L.J. 466*, as follows:

"Neither the father nor the mother can, as the minor's natural guardian, alienate such an undivided interest of the minor.........it has been consistently held that in respect of such undivided interest of a co-parcener neither the natural guardian nor the guardian appointed under the Guardians and Wards Act had any power to sell that interest even for necessity or for benefit. The distinction that obtained under the general Hindu Law between the separate property of a minor and his undivided co-parcenary interest is kept up also under the provisions of the Hindu Minority and Guardianship Act, 1956. Sec.6 of that Act which defines a natural guardian excludes minor's undivided interest in a joint family property from the operation of that section and Sec.12 imposes a prohibition against the appointments of a guardian by a Court other than the High Court in respect of an undivided interest of a minor in a joint family property when such joint family property is in the management of an adult member of the family. Therefore, *It is not possible to hold that the fourth defendent as the natural guardian of the minor sons is authorised to sell the undivided interest of the minors as such in the joint family properties either under the General Hindu Law or under the provisions of this Act.*" (*emphasis is ours*).

The learned Judges in the said decisions also observed as follows:

"On this aspect some light is thrown by the wording in Sec.12 of the Hindu Minority and Guardianship Act. That Section says that where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest. *The adult member of the family may be either male or female.* If there is no adult member of the family in management then the prohibition contained in Sec.12 will not apply. But if there is an adult member in management of the joint family property, then the Court is prohibition from appointing a guardian for the minor's undivided interest in the joint family property. The section does not say that the adult member could only be a male member. If in case where there is no adult male member and all the members of the family are minors, a guardian can be appointed by the Court with reference to the entire joint family property." (*emphasis is ours*).

45. So, in Sec.12, adult member would include both male and female and in this respect, with due respect, we observe that the decision of Ratnam, J. in the above referred to *Pattayi Padayachi v. Subramania Padayachi and others, (1980)2 M.L.J. 296*, holding that the term 'adult member' in Sec.12 contemplates only the case of the male member of a family, is not correct. Further, the abovesaid *Krishna Reddy v. Amarababu, (1971)2 M.L.J. 466*, also pointed out thus:

"Cases have also held that the management of the joint family and its affairs can be taken up not only by an adult male member of the family but also by a female member of the family like the mother. When this adult mother is in actual management of the joint family properties, including the undivided interest of its minor members, Sec.12 prohibits a guardian being appointed in such a case as there is an adult member in management of the property. It is true a mother cannot be a co-parcener in a joint family but it cannot be denied that she is a member of the joint family."

Therefore, the management spoken no in Sec.12 need nor necessarily be management as Kartha but would include even the management otherwise.

46. We may also point out one other aspect. Sec.12 of the Hindu Minority and Guardianship Act, as Mayne's Hindu Law, (12th Edition, Page 507 says, statutorily recognises the principle which was laid down consistently by several High Courts that under the Guardians and Wards Act, 1890, no guardian can be appointed of minor's undivided interest in the joint family properties where the property is under the management of an adult. Yet, it has been held even under the Guardians and Wards Act, a guardian can be appointed in cases where the minor is the sole surviving co-parceners (*vide: Rakhnabai v. Sita Bai, I.L.R.*

1952 Bom. 455. In Mayne's Hindu Law, 12th edition at page 508 it is stated thus:

"It is also well recognised by the Courts that a guardian can be appointed in cases where the minor is the sole surviving co-parcener."

Therefore, the case of the interest of the sole surviving co-parcener in the joint family property is treated as if it were a separate property. Therefore, we think that Sec.8 of the Hindu Minority and Guardianship Act would also cover the case of such an interest.

47. Further, we hold with due respect that both the learned Judge who has decided the above referred to *Gangoji Rao and another v. H.R.Channappa and others, A.I.R. 1983 Kant. 222* and Bellie, J. in his referring judgment are not correct when they hold that Sec.11 of the Hindu Minority and Guardianship Act is not attracted in the case of minor's interest in the joint family property. We think Ratnam, J. is correct in this regard. This aspect is dealt with below in more detail.

48. The above referred to *Gangoji Rao and another v. H.R.Channappa and others, A.I.R. 1983 Karn. 222,* follows the view taken in the abovesaid *Girdhar Singh v. Anand Singh, A.I.R. 1982 Raj. 229, Sunamani Devi v. Babaji Das and others, A.I.R. 1974 Orissa 184* and *In re. Krishnakant Mangammal, A.I.R. 1961 Guj. 69.* But, in the view we have taken, we hold that those decisions do not lay down the correct law.

49. We may now further elucidate the differing views taken by Ratnam, J. and Bellie, J. on their respective interpretation of Sec.11 of the Hindu Minority and Guardianship Act. Sec.11 runs as follows:

"11. *De facto guardian not to deal with minor's property*:- After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being there facto guardian of the minor."

According to Ratnam, J. the property of a Hindu minor referred to in Sec.11 will include all his properties including his undivided interest in the joint family property and consequently he held that the sale by the *defacto* guardian of the minor's interest in the joint family property was void *ab initio.* In coming to the said conclusion The learned Judge reasoned out as follows:

"While Secs.6, 9 and 12 take care to exclude the undivided interest of a minor in the family properties from the scope of the property guardianship of a natural guardian, *viz.*, the father or the mother, Sec.11 does not contain any such restriction with reference to the property of a Hindu minor. In the absence of any distinction between the separate property of a Hindu minor and the undivided interest of a Hindu minor in the joint family property, the provision in Sec.11 must be held to apply equally to both the categories of properties. Otherwise, the object behind Sec.11 of preventing the de facto guardians from dealing with the property of a Hindu minor would be totally frustrated inasmuch as a *de facto* guardian, while being prevented from dealing with the separate property of a Hind minor under Sec.11, would be at liberty to deal freely with the undivided interest of a Hindu minor in the family property. Having regard to the object with which Sec.11 has been enacted, it is difficult to place any such restriction on the word "property" used in that section. In addition, such a construction is fortified by the decision in *Ranganatha Gounder v. Kuppuswami Naidu, (1976)2 M.L.J. 128.*

But, Bellie, J.'s view in the referring judgment is that the minor's property referred to in Sec.11 excludes his undivided interest in the joint family property, and, therefore, Sec.11 does not abrogate the right of the *de facto* guardian in respect of the minor's undivided interest in the joint family property. For reaching the conclusion, the reasoning of Bellie, J. is expressed as follows:

"When in Sec.6 wherein for the first time "minor's property" occurs the minor's undivided interest in the joint family property is excluded, in the subsequent sections whenever "minor's property" occurs it must be taken to exclude the undivided interest in the joint family property unless it is expressly stated that minor's property includes or does not exclude the undivided interest in the joint family property. In Secs.8 and 11 there is no such exclusion, whereas in Sec.9 there is specific exclusion."

But, the reasoning of Bellie, J., for holding that minor's property referred to in Sec.11 excludes his undivided interest in the joint family property, does not appeal to us. We think that in view of what is stated in Sec.8, there is an implied exclusion of minor's interest in the joint family

property from it. In other words, the very contents of Sec.8 suggest, though not expressly, that the said section does not operate in the case of minor's undivided interest in the joint family property. We are also in agreement with the view expressed in the above referred to *Subramaniam v. Krishnaswami Goundar and others, A.I.R. 1972 Mad. 377,* thus:

> "When Sec.8 deals with the minor's estate or the immovable property of the minor, it could not have been intention of the Legislature that those expressions were intended the apply to the undivided interest of the minor in the joint family property, for it is not possible to postulate or predicate what share the minor has and what item of property is the minor's property. On the other hand, the expressions "minor's estate" occurring in Sec.8 can apply only to definite properties of the minor and not to a fluctuating interest of the minor in the undivided Hindu family'......Thus, there is intrinsic evidence in Section itself to justify the conclusion that the minor's undivided interest in the joint family property is not contemplated in Sec.8."

But, while reading Sec.11 the Court does not get the impression that it cannot operate with reference to minor's interest in the joint family property. Further Sec.6 mentions who are all natural guardians for the minor's property other than his interest in the joint family. While so, when the succeeding Sec.8 deals with powers of a natural guardian, it is but natural to imply when there is nothing to indicate contra in that section that the said powers are that of a natural guardian of minor's property other than his interest in the joint family property. So, we hold that Sec.11 will apply to all properties of a minor, including the minor's interest in the joint family property.

50. But, this view of ours by itself cannot settle the other question whether the sale by a *de facto* guardian of minor's property in the joint family property is *void ab initio* or voidable. In this connection, we also find in unreported decision in *Subbalakshmi v. Sengolatha Koundar and others, C.R.P. 831 of 1969 dated 13.2.1973* of the Division Bench of this Court, wherein we find the following observations:

> "Sec.11 of the Hindu Minority and Guardianship Act is relied on for the petitioner to contend that a *de facto* guardian would not be entitled to dispose of or deal with the property of a Hindu minor. But that is not a complete statement of the law. That section itself proceeds to say that she is not so entitled merely on the ground of her being a *de facto* guardian of the minor. If the intention of the section is that in no case the transaction of a *de facto* guardian is to be valid, it could have easily said so. Having regard to the language employed in Sec.11, we are of the view that the entitlement of the *de facto* guardian to deal with or dispose of a property of a Hindu minor will not spring merely from the fact of a person being a *de facto* guardian. That is to say, there may be circumstances, as for instance, that there is no other person left alive to look after the minor, or the interest of the legal guardian is adverse to that of the minor. In such cases, the *de facto* guardian is not acting as such merely by reason of that fact, but due to the existence of other circumstances which make it necessary make it necessary for her to set as a *de facto* guardian. We are of the view, therefore, that Sec.11 does not render the sale void."

We are in agreement with the view expressed by the abovesaid Division Bench. Therefore, we do not think that the abovesaid Sec.11 does render the sale by a *de facto* guardian, of his minor's interest in the joint family, void. But the said section renders the said sale voidable only. Therefore, we also observe, with due respect, that the above said decisions of Ratnam, J., in this regard, is not correct.

51. But, as already stated, all the abovesaid discussion right from paragraph 13 above proceed on the assumption that the abovesaid 3/4th share of the plaintiff was joint family property simpliciter. On the other hand, we have already held that out of the abovesaid 3/4th share, the abovesaid 1/4th share is plaintiff's separate property and his other 1/2 share is to be treated as his separate property on the facts of this case. Therefore, in respect of both the abovesaid 1/4th and 1/2 share belonging to the minor, the said Sec.8 of the Hindu Minority and Guardianship Act would operate and the permission contemplated therein having not been obtained, the said sale under Ex.B-4 in so far as the plaintiff's abovesaid 1/2 + 1/4 = 3/4th share is concerned, has to be necessarily set aside since no prior permission from the Court was obtained under Sec.8 of the Hindu Minority and Guardianship Act.

52. In the result, the appeal is allowed, the judgment and decree of the Court below are set aside and the suit is decreed as prayed for. However, in the circumstances of the case, no costs throughout.

Per Venkataswami, J.:- This matter was posted at the instance of the appellant/plaintiff, regarding, payment of court-fee.

54. The court-fee payable both in the appeal as well as in the suit, will be paid by the appellant/ plaintiff.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Lakshmanan, J.*

C.A.No.602 of 1992 in C.P.No.126 of 1989

12th May, 1992.

S.Varadarajan ...*Applicant*

v.

M/s.Venkateswara Solvent Extraction Private Limited and others ...*Respondents.*

(A) Companies Act (1 of 1956), Sec.169 - One member holding the requisite number of shares or voting rights, if can requisition an Extraordinary General Meeting - Such shareholder, if can be restrained by injunction from calling the meeting - Such member if bound to disclose reasons for resolutions proposed at the meeting - Reasons, if justifiable.

A shareholder of a company possessing the numerical strength as required by the Act has the right to requisition an Extraordinary General Meeting. Such a shareholder cannot be restrained by injunction from calling the meeting and he is not bound to disclose the reasons for the resolutions proposed at the meeting. Nor are the reasons for the resolutions subject to judicial review. Though Sec.169 uses the expression 'such number of members of the company' in the plural, yet the requirements of the provisions would be satisfied even if one member holding the requisite number of shares or voting rights makes the requisition. It is also well settled that words in the plural include the singular. *[Para 12]*

(B) Companies Act (I of 1956), Sec.173(2) - Notice of meeting - Explanatory statement to - Obligation to annexe - Requisitionist calling for a meeting under Sec.169 - If obliged to annexe explanatory statement to notice.

The obligation to annexe explanatory statement to the notice of the meeting is only on the company when it calls for a meeting to transact special business. When requisitionists call for an Extraordinary General Meeting under Sec.169, there is no obligation on the requisitionists to annexe an explanatory statement to the notice of the meeting. *[Para 15]*

(C) Companies Act (1 of 1956), Sec.284 - Scope and applicability.

Sec.284 of the Act deals with the removal of Directors. This Section does not deal with the power of the Board of Directors to revoke the appointment of Managing Director. The Board of Directors in the meeting of the Board appoint a Managing Director. When the authority given to the Managing Director is sought to be revoked by the Directors the provisions of Sec.284 would not come into play. *[Para 17]*

(D) Companies Act (I of 1956), Secs.397 and 398 - Applicant holding required share strength on the date of filing petition - But holding less number of shares on date of hearing - Whether is barred from maintaining petition for winding up.

The contention that the present applicant cannot maintain the application because the main petition itself is not maintainable and has to be rejected became the present applicant holds less than the required share strength as on date even though as on the date of filing the main company petition there was satisfaction of the required strength by the present applicant and four others cannot be accepted. *[Para 19]*

Cases referred to:

L.I.C. of India v. Escorts Ltd., (1986)56 C.C. 548; Major General Shanta Shamshur v. Kamani Brothers, (1959)29 C.C. 501; L.RM.K. Narayanan v. Puthuthottam Estates Ltd., (1992)74 C.C. 30.

A.K.Mylsamy, for Applicant.

A.C.Muthanna, for *S.Sandurkar,* for Respondent Nos.2, 3, 6 and 7.

N.S.Nandakumar for Respondent No.1.

R.L.Narayanan and *M.Subramaniam,* for other Respondents.

The Court made the following

ORDER:- The first petitioner S.Varadarajan in the main Company Petition is the applicant in

Company Application No.602 of 1992. He filed the above Application for an order of interim injunction restraining the second respondent M.Sekaran from holding the Extraordinary General Meeting on 23.4.1992 or any other adjourned date pending disposal of the main company petition.

2. This Application was opposed by all the respondents. Elaborate arguments were heard by me on 21.4.1992. Since the meeting was to be held on 23.4.1992 at 4.00 p.m. and having regard to the urgency of the matter, I passed an interim order on 22.4.1992 which is reproduced as under:

> "Elaborate and lengthy arguments were advanced by the counsel for the applicant as well as the counsel for respective respondents and very many decisions have been referred to in respect of the respective contentions.
>
> Since the meeting is to be held on 23.4.1992 at 4.00 p.m. it will not be possible for this Court *for want of time* to pronounce final orders in the above application.
>
> Hence, having regard to the urgency of the matter and bearing in mind the interest of all parties the following interim order is passed subject to the ultimate final orders in the above matter.
>
> The Extraordinary General Body Meeting to be held on 23.4.1992 pursuant to the notice dated 28.3.1992 will go on and resolutions if any passed in the said meeting will not be implemented and given effect to.
>
> This above order is subject to final orders in the above application."

3. The applicant herein and four others have filed the main company petition under Secs.397 and 398 of the Indian Companies Act, 1956, against the second respondent and his associates for mismanagement and oppression of the affairs of the first respondent company. While the main company petition was pending before this Court, petitioners 2 to 5 in Company Petition No.126 of 1989 have sold their shares to the second respondent. The applicant's counsel has also received a communication from petitioners 2 to 5 stating that they are not interested in prosecuting the main company petition. Hence the applicant alone has now taken out the present application. The second respondent Sekaran was appointed as the Managing Director of the first respondent company for a period of three years and his office as Managing Director came to an end with effect from 1.9.1990. Thereafter the board of directors of the first respondent has duly appointed at a meeting of the board held on 20.12.1991 the third respondent as the Managing Director of the Company (*viz.* M.Durai Raj). According to the applicant, the company is being run by the third and fifth respondents as Managing Director and wholetime Directors of the Company respectively. While so, the second respondent have lodged a requisition on 8.2.1992 under Sec.169 of the Companies Act calling upon the company to convene an extraordinary General Meeting. Another notice dated 28.3.1992 received by the applicant from the second respondent mentions that he is convening the Extraordinary General Meeting since the company did not comply with his demand as per letter dated 8.2.1992. The convening of the said meeting is challenged by the applicant herein. The following are the grounds of challenge:

(a) The meeting convened by the second respondent on 23.4.1992 is not in order and the same is in violation of the mandatory provisions of the Sec.169 of the Act.

(b) As per Sec.169 of the Act, the requisitionist must lodge the necessary resolution with the company. The Board must convene the meeting within 21 days and if the Board of Directors of the company fail to convene the Extraordinary General Meeting within 21 days from the date of the lodgment of the said requisition, then the requisitionists themselves within 45 days can convene the Extraordinary General Meeting.

(c) The notice sent by the second respondent convening the Extraordinary General Meeting on 23.4.1992 is not valid since the notice itself relies on the earlier requisition dated 8.2.1992 which does not contain any agenda.

(d) The second respondent cannot convene the meeting of his own without complying with the mandatory provisions of Sec.169 of the Act.

(e) The present notice includes various items of business not listed in the earlier requisition lodged by the second respondent with the company.

(f) Sec.284 of the Act has not been complied with by the second respondent since he wanted to remove the third respondent as the Managing Director of the company and he was also not given any opportunity to show cause about the receipt of the requisition from the second respondent.

Thus, Mr.A.K.Mylsamy, learned counsel appearing for the applicant contends that looking at any point of view the notice convening the Extraordinary General Meeting by the second respondent on 23.4.1992 to consider various items of business as set out in the said notice is illegal and opposed to the mandatory provisions of the Act. Therefore he prays that an injunction order should be issued restraining the second respondent and his men associates from holding an Extraordinary General Meeting on 23.4.1992 pursuant to the notice dated 28.3.1992 or any other adjourned date pending disposal of the main company petition.

4. The second respondent M.Sekaran filed a detailed counter affidavit. He is represented by Mr.A.C.Muthanna, learned Senior Advocate appearing on behalf of Mr.S.Sandurkar. The main defence raised by the second respondent in his counter affidavit at the time of hearing are:

1. The applicant has no *locus standi* to interfere in the requisition meeting convened by the second respondent. As on date the applicant is neither a director of the company nor is he empowered to represent the first respondent company. Hence the present application is misconceived.

2. The present application cannot be maintained in this company petition, but only by way of separate suit and as the main company petition is not maintainable, this Application is also not sustainable.

3. The conduct of the applicant clearly brings out the collusion between the applicant and the third and fifth respondents Directors. The present application has been presented in collusion with them.

4. The applicant is holding only 3.5% of the paid up share capital of the company. Therefore such a minority shareholder cannot interfere with the Extraordinary General Meeting of the members convened by the second respondent holding nearly 62% of the paid up capital of the respondent company, in his own capacity and along with his friends. This is a clear case of minority oppressing the majority.

5. The purchase of shares by the second respondent to seek control of the respondent cannot constitute acts of oppression. The requisition deposited by the second respondent is in accordance with the provisions of law. As required by the law the requisition clearly sets out the matters for the consideration of which the meeting is convened. The allegation that as per Sec.169 of the Act the requisitionist must lodge necessary resolution with the company is misconceived.

6. Sec.284 of the Act has no application to any of the matters to be considered at the said requisition meeting, as there is no proposal to remove any Director. In any event, the present applicant has no *locus standi* to raise any of the alleged objections which is purely within the domain of the Board and the respondent company.

7. The requisition notice has been properly lodged and the matters to be considered have been properly set out therein.

8. Every shareholder of the company has the right to call an Extraordinary General Meeting in accordance with the provisions of the Act.

9. Since the Board of the respondent company did not even consider the requisition and it failed and neglected to take steps to convene the requisition meeting, the requisitionists themselves have every right to convene this meeting as per the provisions of law.

5. Mr.Subramaniam, learned counsel appearing on behalf of Mr.S.Sandurkar, learned counsel for the respondents 3, 6 and 7 has also raised the following submissions at the time of hearing:

1. The applicant has no *locus standi* to file this application.

2. The fundamental requisites under O.39, Rule 1 have not been satisfied.

3. There is no violation of Sec.169 of the Act. According to Mr.Subramaniam, there is distinction between Secs.169 and 172 of the Act. Under Sec.172 of the Act statement of the business to be transacted must be given whereas under Sec.169 it is enough if the matters are mentioned. There is no further requirements necessary. It is only when the notice under Sec.172 is sent, the details are necessary. Even if the notice contains additional matters to be considered it is for the General Body to decide on the consideration of these matters. The notice is not invalid on that score. The word 'Agenda' is not used anywhere in the Act, 'Agenda' means the business to be transacted at the meeting. This has been mentioned in the requisition and the notice.

4. In any event, this is a new cause of action and cannot be agitated by way of an interlocutory application instead of a separate suit. The meeting by the requisitionists cannot be injuncted as long as there is a valid requisition.

5. Sec.284 does not apply to the removal of the Managing Director. Only the person concerned can question the resolution. The matter is one of internal management, and the court should not ordinarily interfere in such matters.

6. Mr.R.L.Narayanan, learned counsel appearing for the respondents 6 and 7 has adopted the arguments of the other learned counsel appearing for all other respondents.

7. In the light of the rival contentions urged by the learned counsel for both the sides, the following five crucial points arise for consideration:

1. Whether the notice sent on 8.2.1992 requisitioning the extraordinary General Meeting is valid or not and whether the notice of the extraordinary General Meeting dated 28.3.1992 conforms to the requirements of the statutes or not;
2. Whether the requirements of Sec.173(2) should be satisfied where the requisitionists issue the notice of Extraordinary General Meeting;
3. Whether the requirements of Sec.284 requires to be satisfied in the present case?
4. Whether the petitioner has *locus standi* to maintain the present application for injunction
5. Whether the petitioner is entitled for an order of injunction as prayed for.

8. In order to appreciate the above points, it is necessary to refer to the provisions of Secs.169, 172, 173 and 284 of the Companies Act. The said Sections run as follows:

Sec.169: Calling of Extraordinary General Meeting on requisition, (1) The Board of Directors of a company shall on the requisition of such number of members of the company as is specified in sub-sec.(4), forthwith proceed duly to call an Extraordinary General Meeting of the company.

(2) The requisition shall set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisitionists and shall be deposited at the registered office of the company.

(3) The requisition may consist of several documents in like form, each signed by one or more requisitionists.

(4) The number of members entitled to requisition a meeting in regard to any matter shall be--

(a) in the case of a company having a share capital, such number of them as hold at the date of the deposit of the requisition not less than one tenth of such of the paid up capital of the company as at that date carries the right of voting in regard to that matter;

(b) in the case of a company not having a share capital, such number of them as have at the date of deposit of the requisition not less than one tenth of the total voting power of all the members having at the said date a right to vote in regard to that matter.

(5) Where two or more distinct matters are specified in the requisition, the provisions of sub-sec.(4) shall apply separately in regard to each such matter; and the requisition shall accordingly be valid only in respect of those matters in regard to which the condition specified in that sub section is fulfilled.

(6) If the Board does not, within twenty one days from the date of the deposit of a valid requisition in regard to any matters, proceed duly to call a meeting for the consideration of those matters on a day not later than forty-five days from the date of the deposit of the requisition, the meeting may be called-

(a) by the requisitionists themselves;

(b) in the case of a company having a share capital, by such of the requisitionists as represent not less than one tenth of the total voting power of all the members of the company referred to in clause (b) of sub-sec.(4).

Explanation: For the purpose of this sub-section, the Board shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not have duly convened the meeting if they do not give such notice thereof as is required by sub-sec.(2) of Sec.189.

(7) A meeting called under sub-sec.(6) by the requisitionists or any of them-

(a) shall be called in the same manner, as nearly as possible as that in which meetings are to be called by the Board; but

(b) shall not be held after the expiration of three months from the date of the deposit of the requisition.

Explanation: Nothing in clause (b) shall be deemed to prevent a meeting duly commenced before the expiry of the period of three months aforesaid, from adjourning to some day after the expiry of that period.

(8) Where two or more persons hold any shares or interest in a company jointly, a requisition, or a notice calling a meeting, signed by one or

some only of them shall, for the purposes of this Section have the same force and effect as if it had been signed by all of them.

(9) Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board duly to call a meeting shall be repaid to the requisitionists by the company, any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default."

Sec.172: Contents and manner of service of notice and persons on whom it is to be served, (1) Every notice of meeting of a company shall specify the place and the day and hour of the meeting, and shall contain a statement of the business to be transacted thereat.

(2) Notice of every meeting of the company shall be given--

(i) to every member of the company, in any manner authorised by sub-secs.(1) to (4) of Sec.53;

(ii) to the persons entitled to a share in consequence of the death or insolvency of a member, by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in India supplied for the purpose by the persons claiming to be so entitled, or until such an address has been supplied, by giving the notice in any manner in which it might have been given if the death or insolvency had not occurred; and

(iii) to the auditor or auditors for the time being of the company in any manner authorised by Sec.53 in the case of any member or members of the company:

Provided that where the notice of a meeting is given by advertising the same in a newspaper circulating in the neighbourhood of the registered office of the company under sub-sec.(3) of Sec.53, the statement of material facts referred to in Sec.173 need not be annexed to the notice as required by that section but it shall be mentioned in the advertisement that the statement has been forwarded to the members of the company.

(3) The accidental omission to give notice, or the non-receipt of notice by any member or other person to whom it should be given shall not invalidate the proceedings at the meeting.

Sec.173: Explanatory statement to be annexed to notice, (1) for the purposes of this section-

(a) in the case of an annual general meeting, all business to be transacted at the meeting shall be deemed special with the exception of business relating to (i) the consideration of the accounts, balance sheet and the reports of the Board of Directors and auditors, (ii) the declaration of a dividend, (iii) the appointment of directors in the place of those retiring, and (iv) the appointment of, and the fixing of the remuneration of, the auditors, and

(b) in the case of any other meeting all business shall be deemed special.

(2) Where any items of business to be transacted at the meeting are deemed to be special as aforesaid, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each such item of business, including in particular (the nature of the concern or interest), if any, therein of every director, and the manager, if any;

Provided that where any item of special business as aforesaid transacted at a meeting of the company relates to, or affects, any other company, the extent of share-holding interest in that other company of every director and the manager, if any, of the first mentioned company shall also be set out in the statement if the extent of such share-holding interest is not less than twenty per cent of the paid up share capital of that other company.

(3) Where any item of business consists of the according of approval to any document by the meeting, the time and place where the document can be inspected shall be specified in the statement aforesaid.

Sec.284: Removal of Directors: (1) A company may, by ordinary resolution, remove a director (not being a director appointed by the Central Government in pursuance of Sec.408) before the expiry of his period of office:

Provided that this sub section shall not in the case of a private company, authorise the removal of a director holding office for life on the 1st day of April, 1952, whether or not he is subject to retirement under an age limit by virtue of the articles or otherwise.

Provided further that nothing contained in this sub section shall apply where the company has availed itself on the option given to it under Sec.265 to appoint not less than two thirds of the total number of directors according to the principle of proportional representation.

(2) Special notice shall be required of any resolution to remove a director under this section, or to appoint somebody instead of a director so removed at the meeting at which he is removed.

(3) On receipt of notice of a resolution to remove a director under this Section, the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

(4) Where notice is given of a resolution to remove a director under this section and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it do so.

(a) in any notice of the resolution given to members of the company state the fact of the representations having been made and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company) and if a copy of the representations is not sent as aforesaid because they were received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting:

Provided that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Company Law Board is satisfied that the rights conferred by this sub section are being abused to secure needless publicity for defamatory matter, and the company law Board may order the company's costs of the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

(5) A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board in pursuance of Sec.262, be filled by the appointment of another director in his stead by the meeting at which he is removed, provided special notice of the intended appointment has been given under sub-sec.(2).

A director so appointed shall hold office until the date up to which his predecessor would have held office if he had not been removed as aforesaid;

(6) If the vacancy is not filled under sub-sec.(5) it may be filled as a casual vacancy in accordance with the provisions so far as they may be applicable, of Sec.262, and all the provisions of that section shall apply accordingly.

Provided that the director who was removed from office shall not be reappointed as a director by the Board of Directors:

(7) Nothing in this section shall be taken--

(a) as depriving a person removed thereunder of any compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director; or

(b) as derogating from any power to remove a director which may exist apart from this section."

9. It is also necessary for me to refer to the contents of the notice of requisition dated 8.2.1992 and the notice of the Extraordinary General Body Meeting dated 28.3.1992:

M.Sekaran,
Managing Director,
Venkateswaran Solvent Extraction (Pvt.) Ltd.,
Pudukkottai Road, Annavasal, Pudukkottai Dist.
Phone: 47 Extn./55Per./48 R.H.

Dated: 08-02-1992.

To
M/s.Venkateswaran Solvent Extraction (Pvt.) Ltd.,
Pudukkottai Road,
Annavasal,
Pudukkottai Dist.

Dear Sirs,

Sub: Extraordinary General Meeting.
Request to convene the Extraordinary General Meeting under Sec.169 of the Company's Act, 1956.

I am having 49.2% share-holding in our company and I request to convene the Extraordinary General Meeting immediately to fill the vacancy in our Board and elect proper

Managing Director for our company.

Thanking you,

Yours faithfully,
(sd.) M.Sekaran.

C.C. All Directors,
The Registrar of Companies,
Shastri Bhavan,
Haddows Road,
Madras.

Venkateswara Solvent Extraction Pvt. Ltd.,
16, K.M.Pudukkottai Road,
Annavasal-622 101.
Pudukkottai District.

Dated: 28.03.1992.

From
M.Sekaran,
No.30, Agraharam,
Varaganneri,
Trichy - 620 008.

To
All Shareholders,
M/S. Venkateswara Solvent Extraction Pvt. Ltd.,
Pudukkottai Road,
Annavasal.

An Extraordinary General Meeting of the shareholders of the company was requisitioned by the undersigned as per the provisions of Sec.169 of the Companies Act, 1956, by a requisition dated 8.2.1992.

Although the said requisition was deposited with the company on 8.2.1992 the Board of Directors of the Company have not called for a meeting of the shareholders in the manner contemplated under the said section.

Hence, the undersigned requisitionist is issuing this Notice to convene the Extraordinary General Meeting of the members of the company on Thursday the 23rd April, 1992 at 4 p.m. at No.1, South Street, Annavasal, Pudukkottai, to consider and transact the following business.

1. To elect a Director to fill the vacancy on the Board due to death of A.A.M.Ismail by passing the following resolution as ordinary resolution:

"Resolved that Mr.K.Palaniandi Pillai be and is hereby elected as Director of the Company liable to retire by rotation."

2. To elect a Director to fill the vacancy on the Board due to death of Mr.P.R.Muthiah by passing the following resolution as Ordinary resolution:

"Resolved that Mr.K.Kandaswami Pillai be and is hereby elected as Director of the Company liable to retire by rotation."

3. To elect a Director to fill the vacancy on the Board due to resignation of Mr.N.M.A.Jamal Mohideen by passing the following resolution as Ordinary resolution:

"Resolved that Mr.K.Natesan Pillai be and is hereby elected as Director of the Company liable to retire by rotation."

4. To remove Mr.K.Dorai Raj from the office of the Company by passing the following resolution as a Special Resolution:

"Resolved that Mr.M.Dorai Raj, who is appointed as Managing Director by the Board on 20.12.1991 be and is hereby removed as the Managing Director."

Immediately after conclusion of the above meeting, a meeting of the Board of Directors will be held at the same place.

Date: 28.03.1992. (sd.) xxxxxx
Place: Trichy. Requisitionist.

Note:

1. A member entitled to attend and vote at the meeting is entitled to appoint a proxy. The proxy need not be a member of the Company.

2. The proxy should be lodged at the Registered office of the Company not later than 48 hours of the time of commencement of the meeting.

3. The explanatory statement in regard to business under items 1 to 3 is annexed.

(sd.) xxxxxx
Requisitionist.

Explanatory statement as required under Sec.173 of the Companies Act, 1956.

Items (1) to (3) of the Agenda: The Directors referred to under items (1) to (3) were on the Board of the Company as First Directors. Over the years Mr.P.R.Muthiah and Mr.A.A.M.Ismail died while they were holding office of the Director. Mr.N.M.A.Jamal Mohideen resigned from the Board. However, the said vacancies on the Board were not filled up. Hence this meeting is requisitioned to consider the following names who have been proposed to the office of Director by one of the shareholders *i.e.*, appointment of (a) Mr.K.P.Palaniandi Pillai, age 65, in place of vacancy under Item (1); (b)

Mr.K.Kandaswami Pillai, age 52, in the place of vacancy under Item (2); (c) Mr.K.Natesan Pillai, age 47 in the place of vacancy under item (3) Each of them has consented to be a Director, are businessmen and traders in Rice and allied products, which are raw materials for the Company. Hence it is felt that their association with the company would be of immense benefit to the company. Each of the above resolutions recommended for approval by the members. The above directors are related to M.Sekaran, Director of the Company.

Item 4: The appointment of Mr.M.Dorai Raj was made as Managing Director at the Board Meeting held on 20.12.1991 when the company petition is pending. This meeting was allegedly convened pursuant to Order of the Hon'ble Court at Madras on 5.12.1991 in C.A.No.2356 of 1991 in C.P.No.126 of 1989 restraining the M.Sekaran, Managing Director and Director. However, the Hon'ble Court was pleased to modify its order on 20.12.1991 whereby Mr.M.Sekaran was allowed to function as a Director.

Thereafter, the Hon'ble Court heard the arguments on both sides, and dismissed the said application on 30.1.1992. Consequently, the injunction order was also vacated.

It is noticed that Mr.M.Dorai Raj is in active collusion with V.Varadharajan, the 1st petitioner in C.P.No.126 of 1989. He also parted with confidential information relating to the company to the first petitioner. He has thus created a situation as above. Therefore, Mr.M.Dorai Raj has not acted in the best interest of the company. Hence it is proposed to remove from the office of the Managing Director by passing the special resolution placed on the Agenda under this item.

Place: Trichy (sd.) xxxxxx
Date: 28.03.1992. Requisitionist.

10. It is clear from the requisition dated 8.2.1992 sent by Mr.Sekaran (second respondent) that the Extraordinary General Meeting is to be called for the consideration of the following matters:

1. To fill vacancy in the Board of Directors of the company.
2. To elect proper Managing Director for the company.

It is also the claim of the second respondent that he has got the numerical strength to requisition the Extraordinary General Meeting.

11. Most of the legal controversies between the parties which arise for consideration in this case have been settled by the Highest Court of the land in the case of *L.I.C. of India v. Escorts Ltd, (1986)56 C.C. 548.*

12. A shareholder of a company possessing the numerical strength as required by the Act has the right to requisition an Extraordinary General Meeting. Such a shareholder cannot be restrained by injunction from calling the meeting and he is not bound to disclose the reasons for the resolutions proposed at the meeting. Nor are the reasons for the resolutions subject to judicial review. Though the Sec.169 uses the expression 'such number of members of the company' in the plural, yet the requirements of the provisions would be satisfied even if one member holding the requisite number of shares or voting rights makes the requisition. It is also well settled that words in the plural include the singular.

13. As already stated by me the requisition dated 8.2.1992 clearly mentions the purpose for which the Extraordinary General Meeting is to be called. Therefore it has to be held that the requisition dated 8.2.1992 made by the second respondent is in strict conformity with the statutory requirements of Sec.169 of the Act.

14. The notice of the meeting by the requisitionists issued on 28.3.1992 to all share holders has been issued because the company did not call the Extraordinary General Meeting within 21 days from 8.2.1992 (date of deposit of the requisition) and therefore the second respondent himself called the Extraordinary General Meeting under the notice dated 28.3.1992 and the said meeting was convened on 23.4.1992 at 4.00 p.m. at No.1, South Street, Annavasal, Pudukkottai. It is significant to notice that the aforesaid notice dated 28.3.1992 clearly sets out the business proposed to be transacted in the Extraordinary General Meeting convened on 23.4.1992. Hence, the notice dated 28.3.1992 has been issued in accordance with sub-sec.(6) of Sec.169. The meeting was convened on 23.4.1992 which is well within the period of three months from 8.2.1992 that is the date of deposit of requisition.

15. The Apex Court in *L.I.C. of India v. Escorts Ltd., (1986)56 C.C. 548,* has laid down the following legal proposition while construing the scope of Sec.173(2) of the Act:

"Thus we see that every shareholder of a company

has the right, subject to statutorily prescribed procedural and numerical requirements, to call an Extraordinary General Meeting in accordance with the provisions of the Companies Act. He cannot be restrained from calling a meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting. Nor are the reasons for the resolutions subject to judicial review. It is true that under Sec.173(2) of the Companies Act, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning each item of business to be transacted at the meeting including in particular the nature of the concern or the interest, if any, therein, of every director, the managing agent, if any the secretaries and treasurers, if any, and the manager if any. This is a duty cast on the management to disclose, in an explanatory note, all material facts relating to the resolution coming up before the General Meeting to enable the shareholders calling a meeting to disclose the reasons for the resolutions which they propose to move at the meeting. The Life Insurance Corporation of India, as a shareholder of Escorts Ltd., has the same right as every shareholder to call an Extraordinary General Meeting of the company for the purpose of moving a resolution to remove some directors and appoint others in their place. The Life Insurance Corporation of India cannot be restrained from doing so nor is it bound to disclose its reasons for moving the resolutions."

Thus it is clear that the obligation to annexe explanatory statement to the notice of the meeting is only on the company when it calls for a meeting to transact special business. When requisitionists call for an Extraordinary General Meeting under Sec.169 there is no obligation on the requisitionists to annexe an explanatory statement to the notice of the meeting. There is in my view no warrant for imposing such an obligation on the requisitionists. Therefore, I am of the view that there is no merit in the contention of Mr.A.K.Mylsamy, learned counsel for the petitioner that the requisition notice dated 8.2.1992 and the notice of the meeting dated 28.3.1992 are bad and that they contravene the provisions of the Companies Act.

16. Hence point Nos.1 and 2 are answered against the applicant in Application No.602 of 1992.

17. Then comes point No.3 in regard to the satisfaction of requirement of Sec.284 of the Act. Sec.284 of the Act deals with the removal of Directors. This Section does not deal with the power of the Board of Directors to revoke the appointment of Managing Director. The Board of Directors in the meeting of the Board appoint a Managing Director. When the authority given to the Managing Director is sought to be revoked by the Directors the provisions of Sec.284 would not come into play. It has been held in the case of *Major General Shanta Shamshur v. Kamani Brothers, (1959)29 C.C. 501,* that Sec.284 does not affect the power of the Board of Directors to revoke the appointment of Managing or other Director made by the Board. There is no controversy that in the present case that the business proposed to be transacted in the Extraordinary General Meeting merely related to the removal of Mr.Dorai Raj as the Managing Director and fill up the vacancies of three Directors due to death and resignation of some Directors. Therefore there is no scope for invoking Sec.284 when Mr.Dorai Raj is not disturbed from his office as a Director and the business proposed to be transacted related only to the removal of Mr.Dorai Raj as Managing Director. Hence, I answer point No.3 in the negative.

18. Further I may add that very strangely Mr.Dorai Raj whose appointment as Managing Director is one of the subject matters of the Agenda of the Extraordinary General Meeting has not chosen to raise his little finger on the above plea. It is the individual and personal right of Mr.Dorai Raj to continue as Managing Director and it is for him to come and approach this Court and seek appropriate redressal if there is a threat to disturb his continuance as Managing Director of the company. The said Dorai Raj is either in deep slumber or adopting an attitude of supine indifference. His cause if any cannot be espoused or projected by the applicant who is neither a Director not the Managing Director.

19. However, I am unable to accept the argument of Mr.M.Subramaniam, learned counsel appearing for some of the respondents that the present applicant cannot maintain the application because of the main petition itself is not maintainable has to be rejected because the present applicant holds less than the required share strength as on date even though as on the date of filing the

main company petition there was satisfaction of the required strength by the present applicant and four others. In view of my decision in *L.RM.K.Narayanan v. Puthuthottam Estates Ltd. and others*, *(1992)74 C.C. 30*, this contention of Mr.M.Subramaniam does not deserve acceptance. In my aforesaid judgment it has been held by me as follows:

"Once a petition under Secs.397 and 398 of the Companies Act, 1956 is validly presented, it is open to a shareholder to ask for substitution and prosecute the proceedings even though such a shareholder by himself could not have presented a petition under Sec.397 for want of the required share qualification. The court, has in such a case only to consider whether the petition was a valid petition at the time of its presentation. The requirement as to the share qualification is relevant and material only at the time of institution of proceedings and once there is a valid petition and a shareholder seeks to substitute himself in order to merely continue such a valid petition, such a shareholder need not hold 10 per cent of the share capital. It is not incumbent upon the court to dismiss a petition because a proceeding under Sec.397 or 398 of the Act is a representative proceeding. Even if the original petitioner does not want to continue the proceedings, the court cannot be compelled to dismiss the petition. Even then, it is open to the court to consider the merits of the case without dismissing the petition. Sec.399(3) of the Act permits an individual member to make an application 'on behalf and for the benefit of all' members of a company entitled to move the court. He acts clearly in a representative capacity. Rule 9 of the Companies (Court) Rules, 1959, declaring inherent powers of the court gives the court authority to transpose the other party as applicant in the interest of justice."

20. *Point No.5*: As already observed by me a shareholder has the statutory right subject to the fulfilment of the provisions of Sec.169 to call an Extraordinary General Meeting. No junction can be issued restraining him from calling for a meeting. I have already found that the requisition as well as the notice of meeting are valid. The Supreme Court in *L.I.C. of India v. Escorts Ltd., (1986)56 C.C. 548*, case referred to supra has also ruled that no injunction can be granted restraining a share holder from convening an Extraordinary General Meeting and the said view is clear from the following ratio found at page 549 and 550 and 551 which is as follows:

"A shareholder has an undoubted interest in a company, an interest which is represented by his share-holding. Share is movable property, with all the attributes of such property. The rights of shareholder are: (i) to elect directors and thus to participate in the management through them (ii) to vote on resolutions at the meeting of the company (iii) to enjoy the profits of the company in the shape of dividends (iv) to apply to the court for relief in the case of oppression (v) to apply to the court for relief in the case of mismanagement and (vi) to apply to the court for winding up of the company (vii) to share in the surplus on winding up."

"The only effective way the members of a company in a general meeting can exercise their control over the directorate in a democratic manner is to alter the articles of association so as to restrict the powers of the directorate and appoint other directors in their place. The holders of the majority of the stock of a corporation have the power to appoint, by election, directors of their choice and the power to regulate them by a resolution for their removal. An injunction cannot be granted to restrain the holding of a general meeting to remove a director and appoint another."

"Every shareholder of a company has the right, subject to statutorily prescribed procedural and numerical requirements to call an Extraordinary General Meeting in accordance with the provisions of the Companies Act. He cannot be restrained from calling a meeting and he is not bound to disclose the reasons for the resolutions proposed to be moved at the meeting. Sec.173(2) of the Companies Act does not require the shareholder requisitioning a meeting to disclose the reasons for the resolutions which he proposes to move at the meeting."

21. Thus all the points are answered accordingly as above and Company Application No.602 of 1992 is dismissed. No costs.

B.S. ---- *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Kanakaraj, J.*

S.A.No.160 of 1982 *29th November, 1991.*

Marappa Gounder and others ...*Appellants*
v.
Chennimalai Gounder and others ...*Respondents.*

Transfer of Property Act (IV of 1882), Sec.52 - Object of - Property belonging to three groups of persons - Defendants 4 and 5 entering into agreement of sale in respect of their 1/3rd share - Eight other sharers entering into agreement with first defendant to sell the entire property - First defendant filing suit for specific performance of that agreement - Defendants 4 and 5 giving effect to their sale agreement after the filing of the suit - Suit dismissed - Appeal filed - By way of compromise defendants 4 and 5 executing a sale deed in favour of sons of first defendant in pursuance of the latter agreement of sale - Sale deed executed by defendants 4 and 5 in pursuance of earlier agreement of sale, if hit by doctrine of lis pendens.

The suit property of the extent of 7.83 acres belonged to three groups, defendants 4 and 5 (in O.S.No.282 of 1975) being one of them. On 9.8.1966, the fourth defendant for himself and on behalf of his minor son, 5th defendant entered into a sale agreement with the plaintiffs for sale of a 1/3rd share belonging to defendants 4 and 5.

On 29.8.1966, there was an agreement of sale of the entire property to and in favour of the first defendant. The agreement was signed by eight persons as vendors but defendants 4 and 5 were not parties to it. The first defendant filed a suit O.S.No.250 of 1966 seeking specific performance of the agreement. The plaintiffs were impleaded as defendants 9 and 10. On 26.12.1966, the agreement dated 9.8.1966 was given effect to and defendants 4 and 5 executed the sale deed in respect of 1/3rd share to the plaintiffs. O.S.No.250 of 1966 was dismissed on 5.8.1970. An appeal A.S.No.706 of 1970 was filed. On 24.1.1975, the defendants 4 and 5 executed a sale deed in favour of defendants 2 and 3 who are the sons of the 1st defendant in pursuance of the agreement dated 29.8.1966. It was stated that it was decided to enforce that agreement by way of compromise. A compromise was effected in A.S.No.706 of 1970 only between the first defendant and defendants 4 and 5. The appeal was allowed against defendants 4 and 5 and was dismissed against the other respondents. The plaintiffs filed a suit O.S.No.282 of 1975 on account of the cloud caused by the compromise decree in A.S.No.706 of 1970. The trial court held that the sale deed Ex.A-4, dated 26.12.1966 was binding on the defendants and that the plaintiffs were entitled to partition and separate possession of 1/3rd share. The appellate court also upheld the validity of the sale deed Ex.A-4. In second appeal, it was contended that the sale deed Ex.A-4 having been executed pending O.S.No.250 of 1966 was invalid being hit by the doctrine of *lis pendens.*

Held:- The object of Sec.52 of the Transfer of Property Act is to afford protection of law in respect of a property which is the subject matter of litigation being alienated to the prejudice of the decree which may ultimately result in the pending suit. The law does not allow litigant parties to give others pending the litigation, rights in the property under dispute so as to prejudice the opposite party. The decision of the court shall be binding not only on the litigating parties but also on those who derive title under them by alienations *pendente lite.* Respondents herein (plaintiffs in suit) can take advantage of the judgment in *Veeraraghava Reddi v. Subba Reddi, I.L.R. 43 Mad. 37,* only to the limited extent that they are not bound by the compromise decree in O.S.No.250 of 1966 (*sic.*) entered into between the plaintiffs and the defendants 1 and 2 therein. To put it conversely, the defendants 1 and 2 therein (defendants 4 and 5 in the present proceedings) are disabled by Sec.52 of the Transfer of Property Act from alienating the property to any third party prejudicing the rights of the plaintiff in O.S.No.250 of 1966 (first defendant in these proceedings) who obtained a decree in his favour compelling defendants 1 and 2 therein to execute a sale deed in his favour as provided in the agreement dated 29.8.1966. In other words, the sale dated 26.12.1966 executed by defendants 1 and 2 in O.S.No.250 of 1966 in favour of the plaintiffs in these proceedings is hit by the doctrine of *lis pendens.* The suit based on that sale deed has to fail necessarily. *[Paras 9 and 10]*

Case referred to:

Veeraraghava Reddi v. Subba Reddi, 37 *M.L.J.* 449: *I.L.R. 43 Mad. 37: 53 I.C. 428.*

S.Venkateswaran, for Appellants.

V.Bharathi Dasan, for Respondents.

The Court delivered the following

JUDGMENT:- The defendants 1 to 3 in O.S.No.282 of 1975, who suffered a decree in the trial court as well as in the first appellate court, are the appellants in the second appeal. Respondents 1 and 2 herein were the plaintiffs in the suit. Respondents 3 and 4 were the defendants 4 and 5 in the suit. For the purpose of convenience, I will refer to the parties as per their rank in the original suit.

2. The suit was for declaring the plaintiffs title to 1/3rd share in the suit property, for partition and separate possession of the same, for directing the defendants to pay Rs.7,500 as mesne profits for three years prior to the suit and for future mesne profits.

3. The case of the plaintiffs was as follows:

"The suit property of the extent of 7.83 acres belonged to three groups, namely, the defendants 4 and 5 being one branch, Bomma Naicker and his two sons being the second branch and Nagammal and her minor sons being the third branch. On 9.8.1966 the fourth defendant (Malla Naicker) for himself and on behalf of his minor son-5th defendant (Kuppa Naicker) entered into a sale agreement with the plaintiffs for sale of a 1/3rd share belonging to the defendants 4 and 5 in the entire property, for a total consideration of Rs.17,500. On 28.9.1966 there was an agreement for sale of the entire property for a total consideration of Rs.52,000 to and in favour of the first defendant (Marappa Gounder), the agreement having been signed by eight persons as vendors. The defendants 4 and 5 were not signatories to the said agreement dated 29.8.1966. On the basis of the said agreement dated 29.8.1966, the first defendant (Marappa Gounder) filed O.S.No.250 of 1966 seeking specific performance of the agreement. The plaintiffs in this suit (Chennimalai Gounder and R.Gurusami) were impleaded as nineth and tenth defendants in O.S.No.250 of 1966. The said suit was filed on or about 15.12.1966. On 26.12.1966 the agreement dated 9.8.1966 was given effect to and defendants 4 and 5 executed the sale deed in respect of 1/3rd share to the plaintiffs herein. O.S.No.250 of 1966 was dismissed on 5.8.1970. An appeal was filed in this Court in A.S.No.706 of 1970. On 24.1.1975 the defendants 4 and 5 (Malla Naicker and Kuppa Naicker) executed a sale deed in favour of defendants 2 and 3 sons of (Marappa Gounder) in pursuance of the agreement dated 29.8.1966. In this sale deed defendants 4 and 5 referred to the pendency of A.S.No.706 of 1970 and by way of compromise it has decided to enforce the agreement dated 29.8.1966. A compromise was effected in A.S.No.706 of 1970 only between the first defendant (Marappa Gounder) and defendants 4 and 5 (Malla Naicker and Kuppa Naicker) on 12.2.1975. The appeal was allowed only against the defendants 4 and 5 (Malla Naicker and Kuppa Naicker). The appeal was not pressed against the other respondents and accordingly the appeal was dismissed against the other respondents. The plaintiffs have come forward with this suit O.S.No.282 of 1975 on account of the cloud caused by the compromise decree in A.S.No.706 of 1970. They claimed an annual income of Rs.2,500 from their 1/3rd share and claimed mesne profits for a period of three years.

4. The third defendant alone had filed a written statement and the same has been adopted by defendants 1 and 2. Defendants 4 and 5 remained *ex parte*.. According to them they are entitled to the entire property including the suit property. The sale deed dated 26.12.1966 (Ex.A-4) would not bind the defendants. Defendants 2 and 3 have acquired valid title under the sale deed dated 24.1.1975 (Ex.A-2). The decree in O.S.No.250 of 1966 as modified by the High Court in A.S.No.706 of 1970 would operate as *res judicata* against the claim of the plaintiffs.

5. The trial court held that the plaintiffs are the absolute owners in respect of 1/3rd share of the property, that the sale deed dated 26.12.1966 (Ex.A-4) is binding on the defendants and that the plaintiffs are entitled to partition and separate possession of 1/3rd share. The mesne profits of Rs.7,500 for three years was also decreed. The future mesne profits was directed to be ascertained under O.20, Rule 12, C.P.C.

6. On appeal, the appellate court framed the main point for consideration as follows:

> "Whether the original of Ex.A-2 sale deed, dated 24.1.1975 executed by fourth defendant Malla Naicker and his son fifth defendant Kuppa Naicker in favour of second defendant C.M.Ramasamy Goundar and third defendant C.M.Arumugham who are appellants No.2 and 3 in this appeal is valid or Ex.A-4 which is the sale deed executed by fourth defendant Malla Naicker for himself and on behalf of his then Minor son Kuppa Naicker on 26.12.1966 in

favour of the plaintiffs is valid?

Inasmuch as on the date of Ex.A-4, dated 26.12.1966 the fifth defendant, Kuppa Naicker, was a minor, the appellate court has elaborately discussed the validity of the passing of consideration under Ex.A-4. The appellate court has also discussed the evidence and come to the conclusion that Ex.A-4 was for the discharge of binding antecedent debts of the father and so the sale was binding on the minor, 5th defendant. On the question whether Ex.A-4 was hit by the doctrine of *lis pendens*, the appellate court held as follows:

> "Hence so far as the plaintiffs are concerned, they are entitled to ignore Ex.A-2 and file the present suit for partition and separate possession (in O.S.No.282 of 1975). The appeal so far plaintiffs are concerned in A.S.No.706 of 1970 was dismissed and therefore the dismissal of the suit in O.S.No.250 of 1966 so far as the plaintiffs are concerned has been confirmed in appeal and hence the plaintiffs have won the appeal. The result is that the agreement dated 29.8.1966 in favour of first defendant, Marappa Gounder has not been held as true, valid and binding on merits by the High Court and consequently Ex.A-4 sale deed dated 26.12.1966 cannot be held as having been decided invalid."

The appellate court also went into the question whether the defendants 2 and 3 can question the alienation under Ex.A-4, dated 26.12.1966. It was held that the minor, fifth defendant had not questioned the sale under Ex.A-4 within three years of his attaining majority and consequently it was held that the transferees from minor, fifth defendant, namely, defendants 2 and 3 cannot question the sale deed under Ex.A-4, For all the above reasons, the appellate court found that Ex.A-4, dated 26.12.1966 was a valid document which transferred the share of defendants 4 and 5 to the plaintiffs. The decree for partition of 1/3rd share in favour of the plaintiff was therefore confirmed by the appellate Court. So far as the past mesne profits were concerned, the appellate court reduced the same to Rs.5,250.

7. Before me in second appeal, the only point argued by Mr.S.Venkateswaran, for the appellants is that the sale deed Ex.A-4, dated 26.12.1966 having been executed during the pendency of O.S.No.250 of 1966 was invalid, being hit by the doctrine of *lis pendens*. The argument is that even though the suit was dismissed on 5.8.1970, on appeal, by a compromise decree the suit was decreed for specific performance as against the defendants 4 and 5 herein (Malla Naicker and Kuppa Naicker). The decree in A.S.No.706 of 1970 was made on 12.2.1975. The contention therefore is that Sec.52 of the Transfer of Property Act cannot be avoided and the sale deed dated 26.12.1966 cannot be upheld. Sec.52 of the Transfer of Property Act reads as follows:

> "During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

The learned counsel for the appellants relies on the words that the property cannot be transferred by any party to the suit so as to affect the rights of any other party thereto under any decree or order which may be made therein. The contention therefore is that defendants 1 and 2 in O.S.No.250 of 1966 cannot transfer the property to the plaintiffs herein so as to affect the rights of the plaintiffs (Marappa Gounder) in that suit, who is the first defendant in this suit and who ultimately obtained a decree in A.S.No.706 of 1970.

8. On the other hand, Mr.V.Bharathi Dasan, learned counsel for the respondents 1 and 2 contends that the decree in A.S.No.706 of 1970 was collusive and behind the back of the plaintiffs. Therefore, according to them Sec.52 cannot be invoked in this case. Before considering the rival submissions, I would like to refer to a few facts. O.S.No.250 of 1966 was filed on or about 15.12.1966. The exact date of filing of the suit is not clear from the records. The sale deed Ex.A-4 was executed on 26.12.1966. There is no evidence and the parties did not consider it important to find out whether the plaintiffs had been served with summons in O.S.No.250 of 1966 prior to the date of the sale deed Ex.A-4. The parties have proceeded on the basis that the sale deed Ex.A-4 was during the

pendency of O.S.No.250 of 1966. Defendants 4 and 5 had been impleaded as defendants 1 and 2 in O.S.No.250 of 1966 and were therefore made subject to the bar of *lis pendens* under Sec.52 of the Transfer of Property Act, O.S.No.250 of 1966 was dismissed on 5.8.1970. On the basis of the dismissal the sale deed Ex.A-4 would have been valid. But in A.S.No.706 of 1970 a decree was obtained by Marappa Gounder (first defendant) against Malla Naicker and Kuppa Naicker (defendants 4 and 5) for specific performance. So far as the other respondents, including the plaintiffs herein (Defendants 9 and 10 in O.S.No.250 of 1966) the appeal was dismissed confirming the dismissal of the decree in O.S.No.250 of 1966. Even assuming that the compromise decree as between the consenting parties cannot be assumed to be collusive, the question is whether the plaintiffs were bound by the decree and at any rate whether for the purpose of Sec.52 the sale deed, dated 26.12.1966 would come under the mischief of Sec.52.

9. The object of Sec.52 of Transfer of Property Act is to afford protection of law in respect of a property which is the subject matter of litigation, being alienated to the prejudice of the decree which may ultimately result in the pending suit. The law does not allow litigant parties to give others, pending the litigation rights, in the property under dispute, so as to prejudice the opposite party. The decision of the court shall be binding not only on the litigating parties, but also on those who derive title under them by alienations *pendente lite*. The learned counsel for the respondent has cited a decision reported in *Veeraraghava Reddi v. Subba Reddi and seven others, 37 M.L.J. 449: I.L.R. 43 Mad. 37: 53 I.C. 428.* It appears to me that the facts of the said case are very close to the facts of the present case. I will therefore refer to the facts of the said case before referring to the ratio of the said decision. The first defendant had executed two mortgages in favour of the fourth respondent (party subsequently impleaded) in the year 1914. The plaintiff's mortgagee was long anterior to the said mortgages, being of the year 1895. The suit was brought upon the mortgage of 1895 in or about February, 1907. The decree of the trial court was on March, 1910. It was during the pendency of the appeal against the decree that the mortgage in favour of the fourth respondent were created. The fourth respondent filed an application seeking to be impleaded in the suit, at the stage of the appeal. He was so impleaded. On 16.9.1915 a compromise was entered into between the plaintiff and the first defendant. The fourth respondent objected to the said compromise and a decree in terms of the compromise. It was found that the compromise was not collusive, or the result of fraud. The question was whether the fourth respondent was bound by the terms of the compromise. The Full Bench decision of this Court took note of the fact that the purchaser had been made a party to the suit and the subject matter of the dispute in which he is interested could not be decided upon, to his prejudice without hearing him. That right the purchaser acquired once he is made as a party to the suit. While recognising right of the parties to enter into a compromise under O.23, Rule 3 of C.P.C., the Full Bench pointed out:

> "If any one of them stands out it is a well recognised principle of jurisprudence that the compromise between the other parties should not in the least derogate from his rights. It follows from these provisions of the Code of Civil Procedure that although a purchaser *pendente lite* takes the transfer subject to the result of the litigation, and if he is not impleaded as a party he will be bound by any lawful compromise or adjustment which may be entered into between the plaintiff and his transferor, the moment that he becomes a defendant, the only detraction of right to which he subjects himself is the result of the litigation which has been openly and in his presence tried and decided upon. Once he is in the array of parties what could have been done by way of compromise or adjustment if he is not before the Court should not be allowed to interfere with his claim for a fair trial and a decision on the merits."

The Full Bench therefore gave the opinion that the compromise although it may be binding upon the parties to the compromise, could not affect the rights of the fourth respondent in that case. It was held that the fourth respondent could argue and contest the validity of the compromise.

10. Respondents 1 and 2 herein can take advantage of the said judgment only to the limited extent that they are not bound by the compromise decree in O.S.No.250 of 1966 entered into between the plaintiff and the defendants 1 and 2 therein. To put it conversely the defendants 1 and 2 therein (defendants 4 and 5 in the present proceedings) are disabled by Sec.52 of the Transfer of Property

Act from alienating the property to any third party, prejudicing the rights of the plaintiff in O.S.No.250 of 1966 (first defendant in these proceedings) who obtained a decree in his favour compelling defendants 1 and 2 therein to execute a sale deed in his favour as provided in the agreement dated 29.8.1966. In other words, the sale dated 26.12.1966 executed by defendants 1 and 2 in O.S.No.250 of 1966 in favour of the plaintiffs in these proceedings is hit by the doctrine of *lis pendens*. The suit based on that sale deed has to fail necessarily. The courts below have wrongly decided this substantial question of law. The second Appeal is therefore allowed. The judgments of the courts below are set aside. The suit O.S.No.282 of 1975 shall stand dismissed. There will however be no costs throughout..

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Ratnam, J.*

C.M.A.No.257 of 1987 *8th November, 1991.*

Mariyayee alias Rajalakshmi Ammal ...*Appellant*
v.
M.Basheer and another ...*Respondents.*

(A) Motor Vehicles Act (IV of 1939), Secs.110 and 110-A - Motor accidents - Claims for compensation in - Interest - Award of - Date from which can be made.

It is well-settled by decisions of the Supreme Court that claimants in motor accident cases are entitled to be paid interest at the rate of 12% per annum from the date of the claim petition till the date of payment. *[Para 3]*

(B) Motor Vehicles Act (IV of 1939), Secs.3(1),(2), 96(2)(b)(ii) and 110-A and Tamil Nadu Motor Vehicles Rules, Rule 39 - Motor Accidents - Liability of insurer - Nature of - It is purely contractual - Policy containing clause that driving by holders of learner's licence cannot be regarded as holding a valid driving licence - Clause does not run counter to Sec.96(2) - Such exclusion would enable the insurance company to avoid liability.

The liability of the insurance company is purely contractual and necessarily, therefore, that would depend upon the terms and conditions incorporated in the policy as well as the availability of one or more of the defences permitted to be raised by the insurance company under the provisions of the Act and on a consideration of the Tamil Nadu Motor Vehicles Rules framed under the Act. While under Sec.3(1) of the Act, a person can drive a motor vehicle only if he holds an effective driving licence authorising him to drive the vehicle by Rule 39 of the Rules, that had not been made applicable to a learner. A combined reading of Sec.3(1) and (2) of the Act and Rule 39 of the Rules thus clearly establish that an effective driving licence contemplated under Sec.3(1) of the act and a learner's licence as provided under Rule 39 of the Rules are not the same. Indeed, Rule 39 of the Rules creates a separate class of licences known as learner's licences distinct from the licences contemplated by Sec.3(1) of the Act. Under Sec.96(2)(b) of the Act, it is open to the insurer who is made a party to a claim proceeding, to defend such an action on receipt of notice on the ground that there has been a breach of a specified condition of the policy, being one of the conditions enumerated thereunder, Sec.96(2)(b)(ii) of the Act states that if there is a breach of a condition excluding driving by a named person or persons, then, it would be open to the insurer to defend the claim for compensation on that ground. In this case, the condition in the policy excludes driving by holders of learner's licence. The provision under Sec.96(2)(b)(ii) of the Act excluding driving by a named person or persons cannot be construed only as referring to individuals A, B or C but would also be applicable to a class of persons named learners. In other words, the provision under Sec.96(2)(b)(ii) of the Act could be read as excluding driving, by persons all of whom would be under one name learners. The word 'named' cannot be literally interpreted to refer to the name of a particular person but as comprehending specified person or persons cited as instance. So construed, even though the driver of the vehicle involved in the accident in this case held only a learner's licence on the date of the accident such licence had been excluded from the purview of the liability under the policy and that exclusion has been incorporated in the policy as a condition that

driving by holders of a learner's licence cannot be regarded as either holding a valid driving licence or as having held a permanent driving licence. The exclusion of a class of licence holders known as learner's licence holders as persons driving the vehicle for purposes of one of the conditions of the policy cannot as assumed in *National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305 at 311*, run counter to the provisions of Sec.96(2) of the Act and would therefore be unenforceable. In the above view of the terms of the policy, Secs.3(1) and (2), 96(2)(b)(ii) of the Act and Rule 39 of the Rules, it would follow that the exclusion of the holders of learner's licences under the terms of the policy would constitute a condition in the policy excluding the driving of vehicles by a class of persons named learners and that would enable the insurance company to avoid its liability on the ground that there has been a breach of one of the conditions of the policy under Sec.96(2)(b)(ii) of the Act. *[Para 5]*

Cases referred to:

National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305; Ambujam v. Hindustan Ideal Insurance Company, 1981 A.C.J. 175.

G.Rajan, for Appellant.

S.I.Samiullah and *K.Ranganathan*, for Respondents.

The Court delivered the following

JUDGMENT:- This appeal has been preferred by the claimant against the award of the Motor Accidents Claims Tribunal (District Court) Tiruchirapalli, in M.C.O.P.No.64 of 1984. According to the case of the appellant, on 20.7.1983, at about 9.45 p.m., the appellant, along with her husband was walking along Tiruvanaikkaval South Street on the left side of the road. At that time, a moped bearing registration No.TNG.9782, and belonging to the first respondent, came driven by one Singaram from the opposite direction and dashed against the appellant, as a result of which she sustained a fracture in her left arm and other injuries. The accident, according to the appellant, took place only on account of the rash and negligent driving of the moped of the first respondent by its driver. In respect of that, the appellant prayed that compensation in a sum of Rs.50,000 should be awarded to her against the owner and the insurer of the vehicle involved in the accident, who are the respondents herein. The first respondent did not contest the claim of the appellant, but remained *ex parte*. In the counter filed by the second respondent, apart from disputing the rash and negligent driving of the moped it put forward the plea that the amount of compensation claimed was exorbitant and disproportionate and no liability could be fastened on it, as the driver of the vehicle did not have a valid driving licence at the time of the accident. The tribunal, on a consideration of the oral as well as the documentary evidence, found that the rash and negligent driving of the moped TNG.9782 by its driver had caused the accident and that the appellant deserved to be awarded compensation in a sum of Rs.12,000 in respect of the injuries sustained by her. Considering the plea of the second respondent-insurance company regarding its liability for the payment of compensation, the tribunal found that the second respondent-insurance company had established that driver of the moped, at the time of the accident, held only a learner's licence and under the terms of the policy, the liability for payment of compensation could not be fastened on the second respondent-insurance company. Ultimately, the tribunal passed an award in favour of the appellant and against the first respondent for recovery of a sum of Rs.12,000 together with interest at 15% per annum thereon from the date of the award till the date of payment, if the first respondent defaulted in the payment of the compensation amount within two months from the date of the award. It is the correctness of the award so passed that is challenged in this appeal in which the appellant has prayed for the award of the disallowed portion of the compensation in a sum of Rs.38,000.

2. Learned counsel for the appellant first contended that the tribunal, after determining the amount of compensation awardable to the appellant in a sum of Rs.16,000 in respect of the injuries sustained by her in the accident, erroneously proceeded to deduct Rs.4,000 on the ground of lump sum payment. It was also further contended that the quantum of compensation awardable to the appellant as fixed by the tribunal in a sum of Rs.16,000 was too low, meagre and inadequate and that a higher compensation should have been awarded together with interest at 12% per annum from the date of the claim petition till the date of payment. On the other hand, learned counsel for the respondents submitted that having regard to the injuries sustained by the appellant in the

accident and their after-effects, the tribunal was justified in awarding to the appellant compensation in a sum of Rs.12,000 with interest as provided in the award.

3. It is seen from the claim petition that the appellant had claimed compensation in a sum of Rs.50,000 comprised of Rs.7,500 under no fault liability, Rs.10,000 for pain and suffering, Rs.7,500 towards medical expenses and Rs.25,000 in regard to permanent disability. Ex.A-13 is the wound certificate and that shows that the appellant had sustained a fracture of the left upper arm and two abrasions, one on the lower half of left fore-arm and another on the lower lip. The appellant examined as P.W.1, referring to the fracture sustained by her in the left upper arm, stated that though her left arm was put in plaster of paris cast for nearly one year and further treatment was also given by Dr.John Karuppiah for another year, the fracture had not united and that she was advised that internal fixation had to be done. P.W.1 further added that owing to the non-union of the fracture, she has been experiencing lot of pain and was unable to sleep on her left side and that she was also obliged to seek the help and assistance of another person to look after her normal day to day needs. In the course of her cross-examination, P.W.1 reiterated that she had engaged another person, a relative, for help and that that person was staying with her and was also fed by her and that person had helped her when she was in the hospital and continued to do so and further that without the assistance of that person, she cannot do anything. P.W.2 is the husband of the appellant and in his evidence, he stated that his wife sustained a fracture in her left upper arm and she was admitted first into the Government Hospital at Srirangam and subsequently she was admitted into a private Nursing Home where she underwent treatment for more than six months. P.W.2 had also referred to the advice given to the appellant that internal fixation by insertion of plates required to be done, the facilities for which were available either at Madurai or at Madras. A sum of Rs.10,000 had been spent by P.W.2 on the treatment to the appellant and that to undergo internal fixation surgery, it would cost Rs.20,000, according to him. P.W.2 had also referred to the employment of a person to help the appellant. In his cross-examination, P.W.2 stated that though P.W.1 was initially admitted into the Government Hospital at Srirangam, she was later admitted into a private Nursing Home because of the seriousness of her condition and the inattention in the Government Hospital. P.W.2 was obliged to admit that to establish the incurring of expenditure of Rs.10,000 no documents were filed. P.W.3 is the doctor who attended on the appellant on her admission into the private Nursing Home and he has spoken to the taking of the X-rays marked as Exs.A-2 to A-10 with reference to the fracture sustained by the appellant in her left upper arm. P.W.3 has also spoken to the issue of Ex.A-12 to the effect that the appellant had been admitted in the G.V.N.Hospital for treatment for compound fracture on 20.7.1983 and was discharged on 10.1.1984 and that during that period, the appellant would have spent Rs.10,000 towards medical expenses. P.W.3 was unable to state how much it would cost for the appellant to undergo surgery for internal fixation. From the aforesaid evidence, it is clearly established that the appellant had sustained a compound fracture on her left upper arm which had not united inspite of prolonged treatment having been given to her. The evidence also discloses that immediately after the accident, the appellant was admitted in the Government Hospital at Srirangam and later, in a private Nursing Home between 20.7.1983 and 10.1.1984. Owing to the non-union of the fracture, the appellant has not been able to use her left arm and has been obliged to seek the help of another person even to look after her daily needs. The medical evidence further discloses that surgery for internal fixation for insertion of plates required to be done and that would also cost the appellant quite a bit. The tribunal, in paragraph 7 of its award, observing the appellant at the time when she gave evidence, stated that owing to the fracture, she had not been able to use her left hand at all. It is in the background of the aforesaid evidence that the amount of compensation awardable to the appellant has to be determined. Under the head of pain and suffering, the tribunal had not awarded to the appellant any compensation separately. The nature of the injuries sustained by the appellant in the accident as well as the period of her hospitalisation has already been referred to. The appellant had sustained a compound fracture in her left upper arm and immediately after the accident as well as during the period of her undergoing treatment, the appellant would have undoubtedly

undergone considerable pain on account of the fracture and the other injuries. Taking into account the nature of the injuries sustained by the appellant and the period of her hospitalisation and also her evidence as P.W.1 that she was still experiencing pain, it would be just, fair and reasonable to award to the appellant compensation in a sum of Rs.4,000. Under the head of medical expenses, the tribunal had awarded to the appellant Rs.6,000 against her claim for Rs.7,500. The amount of expenditure incurred on the treatment of the appellant while she was in the Government Hospital and also in the private Nursing Home has not been clearly made out by evidence. Merely relying upon Ex.A-12 issued by P.W.3 and others, it cannot be assumed, in the absence of other supporting documentary evidence, that the appellant had spent Rs.10,000 on her treatment. Indeed, it is seen that towards the medical expenses, the appellant had claimed Rs.7,500. Considering the injuries sustained by the appellant and also the treatment undergone by her, initially in the Government Hospital at Srirangam and later in the private Nursing Home between 20.7.1983 and 10.1.1984, in the absence of clinching and reliable evidence, the award of Rs.6,000 under this head by the tribunal cannot be stated to be either meager or low. Regarding the permanent disability and pain and suffering, the tribunal had awarded to the appellant compensation in a sum of Rs.10,000. Earlier, the injuries sustained by the appellant in the accident and her inability to use her left upper arm inspite of treatment which had also been observed by the tribunal, had been noticed. On account of the inability of the appellant to use her left hand, she is obliged to depend upon another person for help and assistance and that would undoubtedly create a feeling of dependence and depression in the appellant. It has also to be borne in mind that the appellant has crossed 50 and that the fracture had not united completely and that internal fixation by insertion of steel plates required to be done and that would mean more expenditure for the appellant on that account either at Madras or at Madurai. That she had been advised to undergo corrective internal fixation surgery is clearly established by Ex.A-11. It is thus clearly made out by the evidence that as it is, the appellant is not able to have the use of her left arm for any purpose and is obliged to depend on others and that deserves to be adequately and sufficiently compensated for. On the available evidence, in my view, it would be just, fair and reasonable to award to the appellant compensation in a sum of Rs.15,000 under the head of permanent disability. In other words, the appellant would be entitled to recover compensation in a sum of Rs.25,000 in all. In paragraph 7 of the award of the tribunal, it had determined the amount of compensation awardable to the appellant in a sum of Rs.16,000 and had deducted Rs.4,000 on the ground of lumpsum payment. The deduction in respect of lumpsum payment and other uncertainties of life would be more relevant in assessing the compensation awardable in the case of death rather than in a case of injury. A careful consideration of the evidence does not in any manner justify a further reduction from the amount of compensation recoverable by the appellant and as stated earlier, the appellant, on the facts and circumstances of this case, would be entitled to recover compensation in a sum of Rs.25,000 without any further deduction. In regard to the interest on the amount of compensation awarded to the appellant, the tribunal fell into an error in depriving the appellant of the interest from the date of the claim petition till the date of the award and also for two months thereafter. It is well settled by decisions of the Supreme Court that claimants in motor accident cases are entitled to be paid interest at the rate of 12% per annum from the date of the claim petition till the date of payment. In view of this, the appellant would be entitled to recover compensation in a sum of Rs.25,000 with interest at 12% per annum thereon from 19.1.1984 till the date of payment, credit being given to payments, if any, made meanwhile.

4. Learned counsel for the appellant next contended that the view taken by the tribunal that the second respondent-insurance company cannot be made liable for the payment of compensation to the appellant, is erroneous. According to learned counsel, though the driver of the vehicle involved in the accident, at the time of the accident, had only a learner's licence, that would be a valid driving licence, sufficient to fasten liability on the second respondent-insurance company, for the payment of compensation. Reliance in this connection was placed, amongst others, on the decision reported in *National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305.* Per contra, learned counsel for the second

respondent-insurance company, drawing attention to the terms of the policy Ex.B-4, submitted that one of the conditions in the policy is to exclude its liability in the event of the vehicle involved in the accident being driven by the holder of a learner's licence. Attention in this connection was also drawn to the decision reported in *Ambujam v. Hindustan Ideal Insurance Company, 1981 A.C.J. 175.* It was also submitted on the basis of Sec.96(2)(b)(ii) of the Motor Vehicles Act (hereinafter referred to as 'the Act') that a condition excluding liability in respect of vehicles driven by those holding a learner's licence, as found in the policy, would be quite in order and the distinction pointed out in *National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305,* in regard to the decision in *Ambujam v. Hindustan Ideal Insurance Company, 1981 A.C.J. 175,* would not stand attracted.

5. The liability of the second respondent-insurance company is purely contractual and necessarily, therefore, that would depend upon the terms and conditions incorporated in the policy as well as the availability of one or more of the defences permitted to be raised by the insurance company under the provisions of the Act and on a consideration of the Tamil Nadu Motor Vehicles Rules (hereinafter referred to as 'the Rules') framed under the Act. It is seen from the evidence of R.W.1 that the driver of the moped which was involved in the accident had been granted a learner's licence for the period 2.6.1983 to 1.12.1983. The accident had taken place on 20.7.1983 as a result of the rash and negligent driving of the moped by Singaram, while he was the holder of a learner's licence. R.W.3 has spoken to the terms of the policy issued by the second respondent-insurance company under Ex.B-4. In order to ascertain whether the second respondent-insurance company would be liable for payment of compensation to the appellant, a reference has to be made to the conditions incorporated in the policy Ex.B-4. In regard to the limitations found in the Schedule for the driver of the vehicle insured, it had been stated that the driver, driving the vehicle at the time of the accident, should hold a valid driving licence or had held a permanent driving-licence (other than a learner's licence) and is not disqualified from holding or obtaining such a licence. A further condition in the policy is to the effect that the insured is not indemnified, if the vehicle is driven otherwise than in accordance with the terms of the Schedule. Under Sec.3(1) of the Act, no person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to himself authorising him to drive the vehicle; and no person shall so drive a motor vehicle as a paid employee or shall so drive a transport vehicle; unless his driving licence specifically entitles him so to do. Under Sec.3(2) of the Act, the State Government is enabled to prescribe the conditions subject to which sub-sec.(1) of Sec.3 of the Act shall not apply to a person receiving instructions in driving a motor vehicle. Under Rule 39 of the Rules, as it stood at the relevant time, framed under Sec.3(2) of the Act, the applicability of Sec.3(1) of the Act to learner's licences, has been excluded. In other words, while under Sec.3(1) of the Act, a person can drive a motor vehicle only if he holds an effective driving licence authorising him to drive the vehicle, by Rule 39 of the Rules, that had not been made applicable to a learner. A combined reading of Sec.3(1) and (2) of the Act and Rule 39 of the Rules thus clearly establish that an effective driving licence contemplated under Sec.3(1) of the Act and a learner's licence as provided under Rule 39 of the Rules are not the same. Indeed, Rule 39 of the Rules creates a separate class of licences known as learner's licences distinct from the licences contemplated by Sec.3(1) of the Act. Under Sec.96(2)(b) of the Act, it is open to the insurer, who is made a party to a claim proceeding, to defend such an action on receipt of notice on the ground that there has been a breach of a specified condition of the policy, being one of the conditions enumerated thereunder. Sec.96(2)(b)(ii) of the Act states that if there is a breach of a condition excluding driving by a named person or persons, then, it would be open to the insurer to defend the claim for compensation on that ground. In this case, the condition in the policy excludes driving by holders of learner's licence. The provision under Sec.96(2)(b)(ii) of the Act excluding driving by a named person or persons, cannot be construed only as referring to individuals A, B or C, but would also be applicable to a class of persons named learners. In other words, the provision under Sec.96(2)(b)(ii) of the Act could be read as excluding driving by persons, all of whom would go under one name "Learners". The word 'named' cannot be literally interpreted to refer to the name of a particular person, but as

comprehending specified person or persons cited as instance. So construed, even though the driver of the vehicle involved in the accident in this case held only a learner's licence on the date of the accident, such licence had been excluded from the purview of the liability under the policy and that exclusion has been incorporated in the policy as a condition that driving by holders of a learner's licence cannot be regarded as either holding a valid driving licence or as having held a permanent driving licence. The exclusion of a class of licence holders known as learners' licence holders as persons driving the vehicle for purposes of one of the conditions of the policy cannot, as assumed in *National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305 at 311,* run counter to the provisions of Sec.96(2) of the Act and would, therefore, be unenforceable. In the above view of the terms of the policy, Secs.3(1) and (2) and 96(2)(b)(ii) of the Act and Rule 39 of the Rules, it would follow that the exclusion of the holders of learner's licences under the terms of the policy, would constitute a condition in the policy, excluding the driving of vehicles by a class of persons named learners and that would enable the insurance company to avoid its liability on the ground that there has been a breach of one of the conditions of the policy under Sec.96(2)(b)(ii) of the Act. In *National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305,* only the latter part of Sec.96(2)(b)(ii) of the Act had been taken into account in relation to Rule 39 of the Rules framed under the Act and there had been no consideration whether a provision in the policy, such as there is in this case, could not be considered as a condition of the policy excluding driving by the class of persons named learners and, therefore, the decision in *National Insurance Co., Ltd., v. A.Babu, 1990 A.C.J. 1003: A.I.R. 1990 Mad. 305,* cannot have any application here. Likewise, the decision in *Ambujam v. Hindustan Ideal Insurance Company, 1981 A.C.J. 175,* has also not taken into account the first part of Sec.96(2)(b)(ii) of the Act and has confined itself to the question whether a learner's licence, would be a valid driving licence or not within the meaning of the latter part of Sec.96(2)(b)(ii) of the Act and that decision also cannot be pressed into service. Thus, on a due consideration of the terms of the policy and the relevant provisions in the Act and the Rules, no liability could be fastened on the insurance company for the payment of compensation to the appellant. It would, therefore, follow that only the first respondent can be made liable for payment of compensation to the appellant. In the result, the Civil Miscellaneous Appeal is allowed in part against the first respondent and the appellant will be entitled to recover from the first respondent herein compensation in a sum of Rs.25,000 together with interest at 13% per annum thereon from 19.1.1984 till the date of payment, credit being given to payments, if any, made meanwhile and the award of the tribunal will stand modified accordingly. The appeal against the second respondent will stand dismissed. There will be no order as to costs.

B.S. ---- *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Swamidurai, J.*

A.A.O.No.43 of 1985 *7th October, 1991.*

Ramasundaram and others ...*Appellants*

v.

Rakkammal and others ...*Respondents.*

Provident Fund Rules of the Bharat Heavy Electricals Limited, Rule 42(3) - Nomination under - Intendment of - Benefit of nomination is not in favour of nominee only.

Rule 42(3) of the Provident Fund Rules of the Bharat Heavy Electricals Limited reads that if a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid. Therefore the intendment of nomination is in favour of members belonging to his family only. From a reading of Rule 42 of the Rules, it can be inferred that the intention of nominations by a deceased employee is not in favour of the nominee only but to benefit the entire members of his family. *[Para 6]*

Cases referred to:
Krishnamoorthy v. Tmt.Anandalakshmi, (1980)II M.L.J. 321; Malati v. Dharma Rao, A.I.R. 1968 Orissa 8; Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346; Pichammal v. I.C.F., (1989)II M.L.J. 351; Meenambal v. Sornathammal, (1990)I L.W. 302; M.Mon Singh v. Mothi Bai, (1936)I.L.R. 59 Mad. 855.

Appeal against the Order of the Court of the Principal Subordinate Judge, Tiruchirapalli, dated 12.9.1984 and made in O.P.No.164 of 1983.

Y.K.Rajagopal, for Appellants.

K.Mohanram, for Respondents.

The Court made the following

ORDER:- The petitioners in O.P.No.164 of 1983 on the file of the learned Subordinate Judge, Tiruchirapalli are the appellants. They filed the petition before the lower court under Sec.372 of the Indian Succession Act for issue of succession certificate on the death of their father, Pichai who was employed as a scanvanger in the Bharat Heavy Electricals Limited, Tiruverumbur and who died on 9.6.1983 leaving the petitioners as his only legal heirs. The succession certificate was sought for by the petitioners for receiving the family benefit funds due from the abovesaid firm. That application was resisted by the respondents. But according to the petitioners, they are the concubine and illegitimate children of the deceased born through the first respondent. The contention of the respondents is that the first respondent is the wife of the deceased Pichai and that the respondents 2 to 4 are the minor children born to Pichai through the first respondent. Further it is the case of the respondents that the deceased Pichai nominated the first respondent as the nominee for receiving the amounts due to him after retirement.

2. The parties went on trial and the trial court, after considering the oral and documentary evidence, dismissed the petition on the ground that the first respondent being the nominee appointed by the deceased Pichai she alone is entitled to receive the amount due to the deceased employee and that the petition for issue of Succession Certificate is not maintainable. The petitioners have filed the present appeal as against the order of the lower court.

3. Learned Senior Advocate Mr.R.Alagar appearing for the appellants contended that mere nomination of late Pichai in favour of the first respondent does not give a right to get the entire amount and appropriate the same since as per the Hindu Succession Act, the respondents are not at all the legal representatives of late Pichai. In the course of argument, learned counsel appearing for the appellant has not pressed this aspect of the case to say that the respondents are not the legal representative of the deceased Pichai since that is a question of fact learned counsel for the appellants argued with regard to the second aspect of the case, namely, that mere nomination in favour of the first respondent would give right in favour of the respondents only to succeed to the estate of the deceased.

4. There is no dispute with regard to the fact that the petitioners/appellants are the children of late Pichai born through his first wife Rani. Learned counsel for the appellants relied upon the decision reported in *Krishnamoorthy v. Tmt.Anandalakshmi, (1980)II M.L.J. 321.* Learned single Judge of this Court, while deciding the case arising under the Life Insurance Corporation Provident Fund Acts and Rules has held that the main purpose of nomination is intended to benefit the custodians-trustees of the Provident Fund to know how or to whom they should hand over the amounts and held not make themselves answerable to a multiplicity of claims from different persons claiming to succeed to the interests of the deceased member. It is further observed by the learned Judge (Sathiadev, J.), that the use of the word 'nomination' which means only appointment to receive the amount, cannot be so construed as to confer any absolute right in the funds to the exclusion of the rights of the lawful heirs, because even a stranger may be nominated in whom the nomination may have trust. If the intendment is to make the nominee the absolute owner, there can be no difficulty in incorporating the necessary recitals to the effect that he has got, on the date of nomination, his legal heirs and inspite of it, he bequeaths the amount only to the nominee to make the funds to the exclusion of the other heirs. When such an unequivocal expression is not present, in a nomination, it would not be proper to hold that such a nomination would result in absolute conferment of rights in the nominee to take the amount for himself. Learned Judge relied upon a judgment reported in *Malati v. Dharma Rao, A.I.R. 1968 Orissa 8.* The Judgment referred to above in *A.I.R. 1968 Orissa 8* was relied upon by the lower court and the same has

been referred to by the learned single Judge of this Court in the decision referred to above. Learned counsel for the appellants Mr.R.Alagar, Senior Advocate relied upon another judgment reported in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346.* That was a case arising under the Insurance Act. Their Lordships of the Supreme Court held in that case that mere nomination made under Sec.39 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them. In another decision reported in *Pichammal v. I.C.F., (1989)II M.L.J. 351,* cited by the learned counsel for the appellant, learned Judge of this court has held that the legal heirs alone of the deceased are, entitled to Provident Fund amount, Group Insurance amount, Gratuity amount, and Death Relief Fund amount and that the nominee has to share the amount along with the legal heirs. That case was covered under Employees Provident Funds and Miscellaneous Provisions Act (XIX of 1952). In another case relied upon by the learned counsel for the appellants reported in *Meenambal v. Sornathammal, (1990)I L.W. 302,* this Court (Srinivasan, J.) held that the claim by the widow of a deceased Government servant as the only person exclusively entitled to the entirety of the amount as the nominee under the Rules governing Tamil Nadu Government Servant's Family Benefit Fund, as against the mother, is not sustainable. Learned Judge held that the family benefit amount payable on the death of a Government servant will go to all the legal heirs of the deceased irrespective of the nomination made by him.

5. Learned counsel for the respondents in contra to the judgments referred to by the learned counsel for the appellants, referred to the judgment reported in *M.Mon Singh v. Mothi Bai, (1936)I.L.R. 59 Mad. 855.* There, a Division Bench of this Court held that under Sec.5 of the Provident Funds Act the absolute right in receiving the money which was conferred by the Provident Fund Rules meant a vested right in the money which passed to the heir of the nominee at his death and that the respondent was therefore entitled to the amount in question. This judgment was rendered under the Provident Funds Act (XIX of 1925).

6. The judgments relied upon by the learned counsel for the appellants Mr.R.Alagar, Senior Advocate are in support of the latest view of the Supreme Court that the legal heirs of the deceased are entitled to get the money of the deceased inspite of the nomination. Learned counsel for the respondents submitted that the Provident Fund Rules of the Bharat Heavy Electrical Limited are the rules governing the distribution of the Provident Fund in the case of death of an employee. Rule 42 of the said Rules reads as follows:-

"42. *Nominations*: 1. Each member shall make in his declaration in the prescribed form, a nomination conferring the right to receive the amount that may stand to his credit in the Fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made.

2. A member may in his nomination distribute the amount that may stand to his credit in the fund amongst his nominees at his own discretion.

3. If a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid.

4. If at the time of making a nomination the member has no family, the nomination may be in favour of any person or persons but if the member subsequently acquires a family, such nomination shall forthwith be deemed to be invalid and the member shall make a fresh nomination in favour of one or more persons belonging to his family.

5. A nomination made under Sub-rules (1) may at any time be modified by a member after giving a written notice of his intention of doing so in the prescribed form. If the nominee predeceases the member, the interest of nominee shall revert to the member who may make a fresh nomination in respect of such interest.

6. A nomination or its modification shall take effect to the extent that it is valid on the date on which it is received by the Secretary."

Rule 42(3) of the said rules, reads that if a member

has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid. Therefore, the intendment of nominations is in favour of members belonging to his family only. From a reading of Rule 42 of the Rules, it can be inferred that the intention of nomination by a deceased employee is not in favour of the nominee only but to benefit the entire members of his family. This view has been reiterated in the decisions referred to above which I respectfully agree. The trial court dismissed the application on the ground that the nomination would take away the right of other members of the family, namely, legal heirs of the deceased employer to claim the benefits due to him after his death or superannuation. I am unable to subscribe my views to that of the trial court. Therefore, I am of the view that inspite of the nomination, the petitioners are entitled to share the amount along with the nominee.

7. Therefore, the order of the lower Court is set aside and the appeal is allowed. No costs. The trial court is directed to issue succession certificate in favour of the appellants for their share in the entire amount.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

A.A.O.No.958 of 1991 *13th December, 1991.*

Vijayalakshmi and others ...*Appellants*
v.
Vasantha and others ...*Respondents.*

Practice and procedure - Finding of Court - To be based on inference to be drawn on evidence on record.

It is the duty of the Court to give effect to the inference to be drawn from the evidence on record even if the finding is not consistent with the pleadings of either party. *[Para 10]*

Cases referred to:
Thirumalai Iyengar v. Subba Raja, (1962)1 M.L.J. 193; Nemi Chand v. Onkar Lal, A.I.R. 1991 S.C. 2046; Nandlal v. Sukh Dev, (1987) S.C.C. (Supp.) 87; Shah Mathuradas Maganlal and Company v. Nagappa Shankarappa Malage, (1976)3 S.C.R. 789; Galbangi Appalaswamy Naidu v. Behara Venkataramanayya Patro, A.I.R. 1984 S.C. 1728: (1984)4 S.C.C. 382.

Appeal against the Order of the Court of the Subordinate Judge, Tuticorin, dated 31.7.1991 and made in E.A.No.30 of 1988 in E.P.No.113 of 1987 in O.S.No.92 of 1980.

K.Padmanabhan, for Appellants.
P.Peppin Fernando, for Respondent Nos.1 and 2.

The Court delivered the following

JUDGMENT:- This appeal is taken up for final disposal with the consent of parties.

2. In a suit for partition, namely, O.S.No.92 of 1980 on the file of the Subordinate Judge's Court, Tuticorin, a decree was passed in favour of respondents 1 and 2 herein. Clause 12 of the decree directed the plaintiffs in that suit to deliver possession of items 7 and 9 to 12 of the plaint II schedule properties to defendants 2 and 3 therein respondents 1 and 2 herein are defendants 2 and 3 in that suit. Item 7 in that suit is the property to which the present proceedings relate. When the decree holders attempted to take delivery of possession of the property, the appellants herein obstructed. A petition to remove their obstruction was filed by the decree holders in E.A.No.30 of 1988 and the petition was ordered by the executing court. The appellants filed C.M.A.No.1070 of 1990 in this Court. By order dated 4.2.1991, I set aside the order passed by the executing court to a limited extent and remanded the matter for fresh disposal for the purpose of considering the claim put forward by the appellants 2 and 4 in that appeal, who are appellants 2 and 4 herein. Inspite of the remand being a limited one, the present appeal has been filed once again by all the appellants who are obstructors. In view of the earlier order in C.M.A.No.1070 of 1990, appellants 1 and 3 have no case. I have to consider only the claim put forward by the appellants 2 and 4.

3. I will refer hereafter appellants 2 and 4 as claimants. It is the case of the claimants that their father Duraisami Nadar took on lease the vacant site of the premises in question on 15.9.1952 under the document marked on Ex.B-22. According to

them, the superstructure was constructed by Duraisami Nadar, who was running a business in the name of Duraisami Nadar & Co. in partnership with one Sankaralingam Pillai-third respondent herein. It is also their case that in 1962 a fresh lease deed was executed on 21.8.1962 under Ex.B-23. According to the claimants, they became partners of the firm during the life time of Duraisami Nadar and after his death, they were entitled to continue the partnership firm and as such, entitled to be in possession of the property. According to them, they cannot be dispossessed of the property.

4. The decree-holders contended that the lease in favour of Duraisami Nadar was that of the building and not vacant site and that lease came to an end when Duraisami Nadar got assignment of the othi in favour of Pon Singh, executed by the first defendant in the suit. It is the case of the decree-holders that on the assignment being taken by Duraisami Nadar, his leasehold rights, if any, ceased to exist and thereafter, he could have a right only as an othidar or usufructuary mortgagee. It is, therefore, contended by the decree-holders that the only claim if at all that can be put forward by the claimants is that of an usufructuary mortgagee and there is already a suit filed by the decree-holders for redemption of the said mortgage in O.S.No.246 of 1991 on the file of the District Munsif's Court, Tuticorin.

5. The executing court has after remand come to the conclusion on a consideration of the evidence on record that the claimants have no right to continue in possession as their rights as lessees, if any, came to an end on their father taking an assignment of the othi and the othi being during the pendency of the suit was hit by the doctrine of *lis pendens* with the result that they were not entitled to resist the decree for possession. It is also the finding of the lower court that the subject matter of the lease in favour of Duraisami Nadar was only a building and not a vacant site.

6. It is argued on behalf of the claimants that the court below has overlooked the evidence on record, which proves conclusively that the subject matter of the original lease was a vacant site and that the building was erected by Duraisami Nadar. It is also argued that the court below has misread the documents filed in this case. It is the contention of the claimants that there was no merger of the tenancy rights with the rights under the othi and the claimants had both rights intact. According to learned counsel, even if the othi is redeemed, the claimants will continue to be tenants and they cannot be dispossessed. Alternatively it is contended that even if the claimants are tenants of the building, they cannot be evicted except in accordance with the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act and the decree passed by the Civil Court cannot be executed against them. It is the further contention of learned counsel that the othi was taken by Duraisami Nadar in his individual capacity and that will not effect the leasehold rights of the firm Duraisami Nadar & Co. According to him, the claimants being partners of the firm are entitled to have the leasehold rights intact. Thus it is contended that the order passed by the Court below should be set aside.

7. It is not necessary to set out the contentions put forward by the decree-holders as they are only in support of the order made by the court below. The earliest document relied on by the claimants is Ex.B-22, dated 15.9.1952. In the body of the said document, there are recitals to the effect that the subject matter of the lease was a vacant site and it was being let out for the purpose of running a business. Clause 5 permits the lessees to erect superstructures at their own cost with the permission of the lessor. Clause 4 provides that such superstructures shall be removed at the time of expiry of the lease without causing any damage to the subject matter of the demise and possession should be handed over to the lessor. The lease is in favour of two persons, namely, Duraisami Nadar and Sankaralingam Pillai. It is not in favour of the firm as such. The contention of learned counsel for the claimants that the firm was a lessee cannot be accepted. The description of Duraisami Nadar reads that he is a proprietor of Duraisami Nadar & Co. The description of Sankaralingam Pillai is that he is a partner in the aforesaid firm. There was no necessity to mention two persons as parties to the lease deed, if the lease was in favour of the firm. One of them could have represented the firm as partner thereof. The very fact that both of them were made parties to the document and the reference made in other clauses of the document show that the lease was in favour of individuals and not in favour of the firm.

8. No doubt the door number is mentioned in the schedule as 54-A and 65-A. But, t[illegible] at will not go

against the express recitals in the body of the documents to the effect that the subject matter of the lease was a vacant site. The court below relied on the reference to the door number and has taken the view that the subject matter of the lease was a building. That view is erroneous.

9. The next document of lease is dated 21.8.1962 and it is marked as Ex.B-23. It is in favour of Duraisami Nadar only as a lessee. The recitals in the body of the document refer to land rent. In the schedule, the property is described as Door No.64-A timber shop, land and site. There is no comma in between the words. Learned counsel for the claimants wants to read it as "timber shop and land and site". Unless there is a specific averment to that effect it is not possible to read it so. At any rate, the recitals inside the document show that it was land rent. Hence, the subject of the demise under Ex.B-23 could only be a land and not a superstructure. Both the documents Exs.B-22 and B-23 are registered documents. But the genuineness of the same has not been shaken in the evidence, though challenged initially. But that does not bring to an end the claim put forward by the decree-holders. The othi deed dated 31.7.1978 executed in favour of Pon Singh by Sankaralingam Pillai, the lessor supports the decree-holders. The recitals as well as the schedule show undoubtedly that the subject matter of the usufructuary mortgage is the building and the site beneath. There is an express reference in the schedule to the building erected on the site bearing Door No.64. The document reads as if the mortgagor/lessor was the owner of the site as well as the superstructure. It is stated that the mortgagee Pon Singh wanted the father of the claimants, who was the lessee to vacate the premises. Copy of the letter said to have been written by Pon Singh on 10.11.1978 is filed and marked as Ex.B-6. Prior to that, the lessee is said to have sent a cheque along with a covering letter dated 8.11.1978. That letter has not been produced before the court. On 31.1.1979, Duraisami Nadar had taken an assignment of the othi for a sum of Rs.3,500 under Ex.B-12. That document clearly refers to the building on the property. The recitals of the document are to the effect that the assignee should hand over possession of the property described in the schedule thereof, when the mortgagor pays the money. The assignee was also directed to take such steps as necessary to collect the mortgage amount, in the event of the mortgagor failing to pay the same. In the description of property, there is an express reference to the building. In the sworn statement given under Rule 3(1) of the Rules framed under the Tamil Nadu Stamps (Prevention of Under-valuation) Act, there is a break up of value of the site, building and compound wall. The site is separately valued at Rs.25,000 the building is valued at Rs.2,500 and that compound wall is valued at Rs.2,500. The total value is mentioned as Rs.30,000 There can be no doubt whatever the Duraisami Nadar took assignment of the othi of the building as well as the site. If on that date, he was the owner of the building he would have definitely taken care to introduce such recitals as may be necessary to indicate his ownership of the building in the document. The mere fact that he had taken the assignment of the othi as if the building and the site both belonged to the mortgagor shows that by the time of the othi in favour of Pon Singh executed on 31.7.1978, the mortgagor had become the owner of the building.

10. No doubt, there is no documentary evidence to show as to how the mortgagor became the owner of the building. The case of the decree-holders is that the building was always owned by the mortgagee. There is a time gap of atleast 16 years between Ex.B-23, the second lease and the usufructuary mortgage dated 31.7.1978 (Ex.B-11). What transpired between Duraisami Nadar and Sankaralingam Pillai during that period is not made available to the Court. Nobody who has knowledge about the facts had been examined by the claimants. The only witness who has been examined on the side of the claimants is Ramamoorthy, second appellant. He does not know anything about the relevant facts. He was born, according to him, on 29.11.1953, that is, after Ex.B-22. According to him, he became a partner with his father in 1975. He does not give any explanation as to why his father took assignment of the othi in favour of Pon Singh without raising a demur as to the validity of the usufructuary mortgage in so far as the building was concerned. In the absence of an attempt even to explain the assignment of the othi over the building as well as the site, the unmistakable evidence afforded by the documents Exs.B-11 and B-12 should be accepted by the court and it has to be held that on the date of Ex.B-11. Duraisami Nadar was not the owner of the superstructure even if he had been the owner thereof earlier. At some

earlier point of time, the ownership had passed on to the mortgagor. It is the duty of the court to give effect to the inference to be drawn from the evidence on record even if in finding is not consistent with the pleadings of either party. (*Vide: Thirumalai Iyengar v. Subba Raja, (1962)1 M.L.J. 193.*)

11. It is argued that Ex.B-24 account book of the shop run by the firm Duraisami Nadar & Co., proves the construction of the building by the firm. Nobody has been examined to prove the entries in Ex.B-24, The second appellant has admitted that he does not know anything personally about the said accounts. The mere production of the account book will not be sufficient to prove the claim of the claimants. Even assuming that the account book proves that the superstructure was constructed by Duraisami Nadar, the ownership did not continue with him till 1978 when the usufructuary mortgage was executed in favour of Pon Singh. Hence, no reliance can be placed on the account book to prove the present ownership of the superstructure with the claimants.

12. The contention that the assignment of othi has been taken by Duraisami Nadar, individually and the lease was in favour of the firm is without any substance. I have already referred to the fact that Ex.B-22 was not in favour of the firm, but on the other hand, in favour of two individuals. Ex.B-23 is undoubtedly in favour of only one individual, namely, Duraisami Nadar. Hence the assignment of othi taken by Duraisami Nadar proves conclusively that the ownership of the building had not continued with him till 1978. Ex.D-11 was drawn to the attention of the second appellant in the cross examination and he merely states that Pon Singh took usufructuary mortgage both for the building and the vacant site and that the claimants had taken assignment of the same othi. It is his further case that his wife and his brother's wife, who are appellants 1 and 3 have taken othi of the building and the land from Sankaralingam Pillai. That othi is dated 31.5.1984 marked as Ex.B-18. Obviously Sankaralingam Pillai was trying to place hurdles in the way of the successful parties in the suit for partition and effecting alienations during the pendency of the litigation. One such alienation is the othi in favour of appellants 1 and 3. That was clearly during the pendency of the suit. Hence, that othi is wholly ineffective.

13. The contention that there is no merger of the leasehold rights with othi rights and that the claimants will continue to have both rights is unsustainable. Reliance is placed by learned counsel for the claimants on the judgment of the Supreme Court in *Nemi Chand v. Onkar Lal, A.I.R. 1991 S.C. 2046*, in support of his proposition that when a lessee enters into a transaction of usufructuary mortgage, the lease does not come to an end and it will subsist even after redemption of the mortgage. In the case before the Supreme Court, the lessee in possession lent certain amount to the lessor on the security of the property and it was mortgaged to him by the landlord. One of the terms of the mortgage was that during the period of the mortgage, which was to last five years, neither interest nor rent was payable by the tenant, both the amounts being equal. Relying on that clause, the Supreme Court held that the document showed that rent was kept alive and it had to be adjusted against interest due under the mortgage. It was only in those circumstances, the Supreme Court held that the relationship of landlord and tenant subsisted and there was no merger of the lease and the mortgage. The observations of the Supreme Court that there was no extinction of either of the two rights should be understood in the context of the facts. The Supreme Court made reference to its earlier judgments in *Nandlal v. Sukh Dev, (1987) S.C.C. (Supp.) 87, Shah Mathuradas Maganlal and Company v. Nagappa Shankarappa Malage, (1976)3 S.C.R. 789* and *Galbangi Appalaswamy Naidu v. Behara Venkataramanayya Patro, A.I.R. 1984 S.C. 1728: (1984)4 S.C.C. 382.* The ruling in Shah Mathuradas case applies squarely to this case. In that case, the Supreme Court on a construction of the mortgage deed held that there was a surrender of tenancy rights. In this case too, the recitals in Ex.B-12 prove that the household rights were not kept alive. On the other hand, the claimants themselves understood that they had rights only as othidars and they did not have any other right *vis-a-vis* the mortgagor. I have already referred to the terms of Ex.B-12, the deed of assignment to the effect that the assignee was directed to hand over possession of the property as and when the money due under the mortgage was paid by the mortgagor to him. In the counter statement filed by the claimants in the present proceedings for removal of obstruction, it is stated in paragraph 10 as follows:

"ஒத்தி மேடோவர் பெற்ற காலத்திலிருந்து 3,5

எதிர் மனுதாரர்களுடைய ஒத்திதார் நிலைமையிலும் மனுதரப்பில் சொத்துக்கு முனிசிபல் தீர்வையும் செலுத்தி வருகிறார்கள்",

(From the date of assignment of othi, respondents 3 and 5 are paying the tax in their capacity as othidars). In paragraph 11, it is stated as follows:

"பின்னர் 30.5.1984ல் 3வது எதிர் மனுதாரரின் மனைவியான 2வது எதிர் மனுதாரர் பெயருக்கும் 5வது எதிர் மனுதாரரின் மனைவி 4வது எதிர் மனுதாரர் பெயருக்கும் 30.5.1984ல் 1வது எதிர் மனுதாரரான சங்கரலிங்கம் பிள்ளை ரூ.25,000/- ரொக்கம் பெற்றுக் கொண்டு அது தேதி முதல் 10 வருட தவணை போட்டு ஒத்தி எழுதி கொடுத்திருக்கிறார். அதுமுதல் 2,4 எதிர் மனுதாரர்களுக்கு 3,5 எதிரி மனுதாரர்கள் வாடகையும் செலுத்தி வருகிறார்கள். மேற்படி இரண்டு ஒத்தியும் இருக்கும். மனுதாரருக்கு நன்கு தெரிந்திருக்கும். வேண்டும் என்றே உண்மை விவரங்களை காட்டாமல் எதிர் மனுதாரர்கள் பெயரில் இந்த மனு தாக்கல் செய்யப்பட்டிருக்கிறது".

The contention in paragraph 11 is that on 30.5.1984 Sankaralingam Pillai executed the othi in favour of second respondent, wife of third respondent and 4th respondent, wife of 5th respondent, on receiving a sum of Rs.25,000 for a period of 10 years., and thereafter respondents 3 and 5 are paying rent to respondents 2 and 4. Thus the claim put forward by the claimants in paragraph 11 is that they are tenants under respondents 2 and 4 and their wives are entitled to be in possession pursuant to the othi dated 30.5.1984.

14. It is stated again in paragraph 14 of the counter statement that respondents 3 and 5 are in possession in their capacity as othidars and the petitioners had no right to remove them. In paragraph 15, it is asserted that the othi in favour of respondents 2 and 4 is for a period of 10 years which expires on 30.5.1994 and therefore, the decree-holders have no right to dispossess the claimants till 30.5.1994.

15. In the evidence, second appellant has categorically admitted in cross examination that all the taxes have been paid only in the capacity of othidars and that they pertain to land as well as the building. It is also admitted that Ex.B-19 which is a receipt for payment of rent dated 31.3.1988 is for the building also. Thus, the evidence on record proves beyond doubt that the claimants are putting forward their rights as othidars and not as lessors. It is not open to them at this stage to turn round and contend that they are lessors and therefore, entitled to continue in possession till appropriate proceedings are taken against them for evicting them in accordance with law.

16. As I have already held, the claimants were only tenants of the building and that their tenancy rights had come to an end on the date of the assignment of the othi obtained by their father Duraisami Nadar. Therefore, the claimants cannot resist the execution of the decree obtained by the respondents 1 and 2 herein.

17. The rights of the claimants as othidars continue to subsist as there is so far no redemption of the othi by the decree-holders. It is stated that a suit has been filed by respondents 1 and 2 herein in O.S.No.246 of 1991 on the file of the District Munsif's Court, Tuticorin, for redemption of the said othi. It is only on redemption of the othi, the decree-holders in that suit, namely, respondents 1 and 2 herein are entitled to get actual possession of the property. As at present, the executing court can only direct symbolic possession in favour of the decree-holders on removal of obstruction caused by the claimants. It is open to the decree-holders to take actual possession after getting a decree for redemption in O.S.No.246 of 1991 on the file of the District Munsif's Court, Tuticorin.

18. In the result, the appeal is partly allowed and the order of the trial court is modified as follows: The obstruction caused by the claimants/appellants is removed. But, there will be delivery of possession symbolically to respondents 1 and 2 herein. It is for respondents 1 and 2 to get a decree for actual possession in O.S.No.246 of 1991 on the file of the District Munsif's Court, Tuticorin. The parties will bear their own costs.

B.S. ---- *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram* and *Thanikkachalam, JJ.*

L.P.A.No.39 of 1991 *8th April, 1991.*

India Forge & Drop Stampings Employees Union, represented by its General Secretary, M.Ganesh ...*Appellant*

v.

Sri Deepak Raj Sood, Managing Director, Kaushal and others ...*Respondents.*

Contempt of Court - Person committing contempt - Refusal to hear him in his cause - When can be ordered.

There was an Industrial dispute between the fifth respondent India Forge and Drop Stampings Ltd., and the workmen. The Industrial Tribunal ordered reinstatement of the workmen. The 5th respondent (management) filed a writ petition in W.P.No.618 of 1990 against it. When stay was asked for by the 5th respondent, a single Judge directed payment to the Workmen full wages drawn by them under Sec.17-B of the Industrial Disputes Act. The order was confirmed by a Bench of the court. The orders were not complied with. The workmen filed Contempt Application No.158 of 1990 against the management. The management was found guilty of Contempt of Court and was punished by the imposition of a fine of Rs.2,000. The Management preferred an appeal and it was dismissed. The original order was still not complied with. The Workmen filed Contempt Application No.15 of 1991 praying *inter alia* to strike off W.P.No.618 of 1990 from the records of the High Court.

Held:- The rule that should form the guideline for the court in such matters is that it will refuse to hear a party to a cause if there is a warrant and justification therefor, on grave considerations of public policy. Such a step will be taken only when the contempt itself impedes the course of justice and there is no effective means of securing the compliance with the orders of the court. *[Para 3]*

Cases referred to:

Hackinson v. Hackinson, (1952)2 All E.R. 567; Shyam Murari Lal Saxena v. The District Magistrate, A.I.R. 1977 All. 198; Ramayya Servai v. R.Sama Ayyar, (1946)2 M.L.J. 200: I.L.R. 1947 Mad. 397.

Appeal under Clause 15 of the Letters Patent against the Order of Bakthavatsalam, J., dated 8.3.1991 and made in the exercise of the Appellate Jurisdiction of the High Court in Contempt Application No.15 of 1991 (I.D.No.23 of 1984, Industrial Tribunal, Madras).

V.Prakash, for Appellant.

The Judgment of the Court was delivered by

Nainar Sundaram, J.:- This Letters Patent Appeal is directed against the order of the learned single Judge in Contempt Application No.15 of 1991. That contempt application has got a sphere of factual data behind it. The 5th respondent, hereinafter referred to as the management, is the petitioner in W.P.No.618 of 1990 with which alone we are concerned herein. That writ petition is directed against the award of the Industrial Tribunal, Madras, in I.D.No.23 of 1984 in so far as it directed reinstatement of the workmen. Pending the writ petition, when stay was asked for by the management, the learned single Judge of this Court directed payment to the workmen full wages last drawn by them under Sec.17-B of the Industrial Disputes Act, 1947, hereinafter referred to as the Act. The order of the learned single Judge has been confirmed by a Bench of this Court, to which one of us (Nainar Sundaram, J.) had been a party. Since there was non-compliance with the orders with regard to payment of the full wages as per Sec.17-B of the Act, the workmen filed Contempt Application No.158 of 1990 against the management. The learned single Judge of this Court in that contempt application found the management guilty of contempt and punished it by imposing a fine of Rs.2,000. The learned single Judge postponed execution of the order of imposition or fine for a period of two weeks, giving a further chance to the management for compliance with the order of the court, flouted. However, the management preferred Contempt Appeal No.8 of 1990 and that was dismissed by the First Bench of this Court. Finding no compliance with the order of the court, the workmen filed Contempt Application No.15 of 1991 putting forth the following prayer:

"For the aforesaid reasons it is prayed that this Honourable court may be pleased to punish the respondents 1-5 for the wilful disobedience of the common orders of this Hon'ble court in W.M.P.Nos.929, 3567, 3568, 4243, 4244, 4867 and 4868 of 1990 and may be pleased to strike off

W.P.No.618 of 1990 from the records of this Honourable court and sequester the properties of the respondents set out in Schedule 'A' of this application and issue such further or other appropriate directions or orders as this Honourable court may deem fit and proper in the facts and circumstances of the case, award exemplary costs and render justice."

In this contempt application, apart from the management, its officers were also made party-respondents. The learned single judge, dealt with this Contempt Application No.15 of 1991 and found no warrant to countenance the prayer projected therein and giving liberty to the workmen to move the Labour court to obtain the reliefs granted by this Court, dismissed it. As already noted, this Letters Patent Appeal is directed against the order of the learned single judge.

2. We heard Mr.V.Prakash, learned counsel for the workmen represented by their Union. The present contempt application has got three limbs. The first limb asks for punishing the respondents for disobedience of the orders of court. The 5th respondent herein, the management, has been already punished for contempt as noted above for the disobedience. It will not be in order, on facts, for the workmen to complain once again of disobedience independently against the individual officers of the management. Apart from the fact that the individual Officers as such were not parties to the orders of court, they could not be stated to have had any separate and independent volition of theirs in the matter. Realising this position, Mr.V.Prakash confined his submissions, asking us either to strike off W.P.No.618 of 1990 or sequester the properties as asked for in the latter two limbs of present contempt application. In support of his submission to strike off W.P.No.618 of 1990, learned counsel placed reliance on the following pronouncements:

Hackinson v. Hackinson, (1952)2 All E.R. 567 and *Shyam Murari Lal Saxena v. The District Magistrate, A.I.R. 1977 All. 198.*

In the first pronouncement, on a petition by the wife for dissolution of her marriage, a decree *nisi* was granted and it was directed that the child of the marriage should remain in the custody of his mother, but that he should not be removed out of the jurisdiction without the sanction of the court. On the decree being made absolute, the mother married and without the sanction of the court she removed the child to Australia. On a summon by the father, an order was made directing the mother to return the child within the jurisdiction, and on appeal by the mother against the order, the father objected that as she was in contempt, she was not entitled to be heard. The decision in that case has gone to the following effect:

> "It was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt; where an order related to a child the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction."

The guidelines as to when the court should, in its discretion, refuse to hear a party to a case, has been spoken to by Denning, L.J. in the following terms:

> "It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."

3. In the second pronouncement in *Shyam Murari Lal Saxena v. The District Magistrate, A.I.R. 1977 All. 198,* this rule was adverted to by a Bench of the High Court of Allahabad and on the facts of the case dealt with by the Bench, there was a decline to strike down the very writ petition. The rule that should form the guideline for the court in such matters is that it will refuse to hear a party to a cause if there is a warrant and justification therefor, on grave considerations of public policy. Such a step will be taken only when the contempt itself

impedes the course of justice, and there is no other effective means of securing the compliance with the order of the court. Applying this rule to the facts of this case, we are not persuaded to hold that there is no other effective means of securing compliance with the order of this Court. We should not be understood to have for a moment commended the action on the part of the management in not obeying the order of this Court. The management as such has been already punished for contempt. Now we are on the larger question as to whether we should strike off the very writ petition itself. The considerations which should weigh with the court do not impel us on the facts of this case to resort to this extreme course of striking off the very writ petition. It is not possible for us to say that contempt itself has impeded the course of justice. Further, it is not as if the workmen are left without any remedy to secure compliance with the order passed by this Court.

4. Mr.V.Prakash, learned counsel for the workmen, submits that the reliance placed by the learned single judge on the pronouncement of the Bench of this Court in *R.T.Ramayya Servai v. R.Sama Ayyar, (1946)2 M.L.J. 200: I.L.R. 1947 Mad. 397,* is not a proper one. This submission of the learned counsel for the workmen is not without substance. In the case dealt with by the Bench, the lower court proceeded to strike off the defence invoking the power under O.11, Rule 21 and Sec.151 of the Code of Civil Procedure and decreed the suit; and on appeal the Bench of this Court found that there was no scope for bringing the case within the ambit of O.11, Rule 21 of the Code. The Bench also opined that it will not be in order to invoke Sec.151 of the Code. But, our accepting this submission of the learned counsel for the workmen does not improve the position for the workmen, and alter our approach to the main question. We have not found a warrant to say that grave considerations of public policy justify us to take the extreme course of striking off the very writ petition. Though the conduct of the management is not to be commended, with regard to non-compliance with the order of this Court, we cannot straightaway characterise the position as one impeding the course of justice. Furthermore, it is not as if there is no other effective means of securing compliance with the order of this Court. As found by the learned single judge, there is scope for the workmen to resort to the process under the Act. On the facts and circumstances of the case, we have also not found a warrant to straightaway sequester the properties of the respondents. In view of our analysis of the position as done above, we are not persuaded to interfere in this Letters Patent Appeal and accordingly, the same is dismissed.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Bakthavatsalam, J.*

W.P.No.10611 of 1991 *17th December, 1991.*

Tirumala Tirupathi Devasthanam represented by its Marketing Officer, V.Venkataramana Reddy, Tirupathi *...Petitioner*

v.

Madras Port Trust represented by the Traffic Manager and others *...Respondents.*

(A) Sale of Goods Act (III of 1930), Secs.16(2), 17, 40, 41, 42, 43 and 49(9) - Contract and sale by samples - Tirumala Tirupathi Devasthanam contracting for the purchase of 20 tonnes of raisins from foreign seller through State Trading Corporation - Title of goods vesting in Devasthanam by endorsing bill of lading - Devasthanam rejecting goods after inspection - State Trading Corporation ought to have reshipped goods to the foreign supplier.

(B) Sale of Goods Act (III of 1930), Sec.40 - Devasthanam contracting to buy raisin from foreign seller through State Trading Corporation - Devasthanam held, had no privity of contract with seller.

(C) Sale of Goods Act (III of 1930), Sec.43 - Sale of goods on sample and C.I.F. Contract - Goods rejected - Tirumala Devasthanam contracting for purchase of raisin from foreign seller through State Trading Corporation - State Trading Corporation held to be owner of goods and directed to face proceedings before Customs Authorities and Port Trust Authorities.

The petitioner, Tirumala Tirupathi Devasthanam obtained an import licence for the import of dried grapes (raisins) for a value of Rs.40 lakhs. The

import has to be routed through the second respondent, State Trading Corporation. Quotations were got from overseas suppliers and the petitioner asked the second respondent to negotiate the rate with the foreign suppliers. It accepted the rate negotiated by the second respondent and placed orders for two containers of 20 tonnes each. The second respondent informed the petitioner that they had placed an order for 20 tonnes of raisin. The sale was made on the High seas by endorsing the shipping documents. The consignment reached Madras harbour on 24.12.1990. The goods were not cleared as they did not conform to the standards laid down in the Prevention of Food Adulteration Act. The petitioner informed the second respondent that the goods might have to be reshipped back to the foreign seller. The Port Health Officer informed the petitioner that the consignment did not conform to the standards laid down for raisins in the Prevention of Food Adulteration Act. The petitioner asked the second respondent to take immediate action for reshipment. Notices were issued by the Customs Department for confiscation of the goods and the Port Trust Authorities issued notices for demurrage port charges etc. The second respondent stated that it was the responsibility of the petitioner to take suitable action. Thereupon, the petitioner filed a writ petition for the issue of a writ directing the 2nd respondent to reship the imported raisin to the foreign buyer.

The contention of the learned counsel for the second respondent that since the petitioner-Devasthanam endorsed the bill of lading, the Corporation lost its control over the goods cannot be accepted. On the basis of the certificate of the analyst for the purpose of customs clearance, the goods were rejected by the Devasthanam by asking the second respondent to reship the goods and as such it cannot be said that the petitioner has to let in oral evidence. It is settled position of law as has been decided by this Court, in *In re. Firm Beharilal Baldeoprasad, A.I.R. 1955 Mad. 271,* considering the provisions of Sale of Goods Act with regard to C.I.F. Contract since all the goods are rejected. *[Para 9]*

It has been decided in *Mohd.Serajuddin v. State of Orissa, (1975)36 S.T.C. 136,* when considering the issue 'in the course of export' under Sec.5 of the Central Sales Tax Act, 1956, that the privity of contract was only between the Corporation and the foreign buyer in that case. It has been held in the abovementioned case that the appellant therein was under no contractual obligation to the foreign buyer either directly or indirectly. Here, the State Trading Corporation, the second respondent herein is the buyer and the seller is in Turkey. As such, the contention of the learned counsel for the petitioner that the petitioner-Devasthanam had no privity of contract with the foreign seller has to be accepted on the principles laid down by the Supreme Court in *Mohd.Serajuddin v. State of Orissa, (1975)36 S.T.C. 136.*

It is true that under Sec.43 of the Sale of Goods Act, the buyer is not bound to return rejected goods but it is sufficient to intimate the seller that he refused to accept the same. But in view of the provisions of Sale of Goods Act, with regard to the sale of goods on sample with regard to the position of law laid down by this court with regard to C.I.F. Contract and rejection of goods, the court is not inclined to accept the argument of the learned counsel appearing for the State Trading Corporation that it has no duty and that the petitioner-Devasthanam alone has to look after the same. Considering the facts of the case as a whole, a public authority like the State Trading Corporation, the second respondent herein cannot and should not be allowed to evade its duties on the pretext that the Devasthanam, the petitioner herein is the owner of the goods and the second respondent has lost the right over the goods. On a consideration of the cases cited by the learned counsel for the petitioner on this aspect, the court is of the opinion that the State Trading Corporation, the second respondent herein, has to take steps to reship the goods if possible otherwise to face the proceedings taken by the Customs Authorities as well as by the Port Trust Authorities. As on date, the State Trading Corporation is the owner of the goods and the petitioner-Devasthanam cannot be compelled to answer either to the first respondent (Madras Port Trust) or the third respondent (Chakist Agencies Private Ltd.). So though the relief asked for in the writ petition is for re-shipment of goods, considering the facts and circumstances of the case on hand, a direction is to issue to the second respondent to face the proceedings before the Customs Authorities as well as the Port Trust Authorities. The first respondent herein, the Port Trust, Madras is also directed to issue notice to the second respondent,

the State Trading Corporation with regard to dues and proceed as if the second respondent is the owner of the goods. It is open to the second respondent to take any appropriate action for reshipment and against the petitioner-Devasthanam for damages, if so advised on the basis of the contentions raised before this Court in a Civil Court. *[Para 9]*

Cases referred to:

Muthukrishna v. Madhavji Devichand and Company, (1952)2 M.L.J. 385: 1952 M.W.N. 808: A.I.R. 1953 Mad. 817; Sha-Trilokchand Poosaji v. Crystal and Company, (1955)1 M.L.J. 494: I.L.R. 1955 Mad. 927: 1955 M.W.N. 221: A.I.R. 1955 Mad. 481; In re, Firm Beharilal Baldevprasad, 1954 M.W.N. 279: A.I.R. 1955 Mad. 271; Sorabji H.Joshi & Company v. V.M.Ismail, A.I.R. 1960 Mad. 520; J.V.Gokal and Company v. Assistant Collector Sales Tax, 1960 S.C.J. 671: (1960)2 S.C.R. 852: 1960 M.W.N. (S.C.) 476: A.I.R. 1960 S.C. 595; Mohd.Serajuddin v. State of Orissa, (1975)36 S.T.C. 136.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 2nd respondent to reship the consignment of 20 Tonnes each of raisins lying with the 1st respondent back to the supplier at Turkey after complying with the proceedings of the 1st respondent dated 11.7.1991 in U.G.No.8/CM/CAT/890/1189/91/TC.

George Cherian, for Petitioner.

A.E.Chelliah, N.Sridharan and *V.Aravamudhan*, for Respondents.

The Court made the following

ORDER:- The prayer in the writ petition is as follows:-

> "......to issue a writ of *mandamus* or any other order or direction of like nature of a writ, directing the second respondent to reship the consignment of 20 Tonnes each of raisins lying with the first respondent back to the supplier at Turkey after complying with the proceedings of the first respondent dated 11.7.1991....."

2. The petitioner-Devasthanam obtained an import licence for the import of dried grapes (raisins) *vide* licence No.0348730, dated 30.1.1989 for a value of Rupees 40 Lakhs. The raisins to be imported by the petitioner-Devasthanam is for preparing prasadams like Laddus etc. As per the licence, the import has to be routed through the State Trading Corporation, the second respondent herein, and as such the petitioner-Devasthanam had to import the dried grapes through the second respondent herein. The Executive Officer of the petitioner-Devasthanam sent a telex on 28.8.1990 to the second respondent requesting quotations from overseas suppliers for the supply of two containers of 20 tonnes each of dried grapes. The second respondent replied by telex dated 7.9.1990 stating that they have asked for fresh quotations for further import of raisins from overseas suppliers by inviting samples. This was followed by another telex by the second respondent dated 17.9.1990 stating that only two suppliers from Turkey who had earlier supplied raisins to the petitioner-Devasthanam have quoted prices and sent samples. It was also communicated in the said telex that fresh samples of certain type of raisins are being sent by air parcel for approval by the petitioner-Devasthanam. On 3.10.1990, the petitioner-Devasthanam wrote a letter to the second respondent that among the samples received, it favoured Standard 9 Natural Sultana and as the price seemed to be high, it requested the rate to be negotiated with the supplier. Later on, on 11.10.1990, the petitioner-Devasthanam accepted the re-negotiated rate of U.S. 1070 metric tonne for standard 9 Sultana and placed orders for two containers of 20 tonnes each. The second respondent informed the petitioner by telex dated 19.10.1990 that they have placed an order for 20 tonnes of raisins as required by the Devasthanam. It is stated in the affidavit filed in support of the petition that the sale of the consignment of dried grapes by the second respondent to the petitioner-Devasthanam was made on the High seas by endorsing the shipping documents, and that the second respondent informed the petitioner that the consignment has leached Madras Harbour on 24.12.1990. When the petitioners' clearing agent Shaw Wallace Company Limited took the original documents to process the clearance of the goods on behalf of the petitioner-Devasthanam, it was not cleared by the Port Health Authorities and on enquiry the petitioner was informed that the consignment of raisins did not conform to the standards laid down for raisins under the Prevention of Food Adulteration Act, 1954 and the final report of Central Food and Technological Research Institute, Mysore (in short "C.F.T.R.I.") is awaited. On the basis of this

information, the petitioner informed the second respondent on 29.1.1991 that the goods were rejected by Port Health Authorities and that the clearance was held up for want of final report from C.F.T.R.I., Mysore. It is also stated in the affidavit that the petitioner-Devasthanam informed the second respondent that in the event of the outcome of the final report being adverse, the goods may have to be shipped back to the party in Turkey requesting the second respondent to advise the procedure to be followed. On 31.1.1991, the fourth respondent informed the petitioner that the consignment of grapes does not conform to the standards laid down for raisins under the Prevention of Food Adulteration Act and Rules thereof according to the analysis report received from C.F.T.R.I., Mysore. Therefore, the delay of two months occurred between the date of discharging of cargo at Madras Harbour and the date of rejection of the goods by the Port Health Authorities. It is alleged in the affidavit that the petitioner has remitted the entire purchase consideration to the second respondent herein, that thereafter the second respondent asked the report of the C.F.T.R.I., Mysore in order to take up the matter with the foreign supplier and that the second respondent has subsequently been corresponding with the foreign supplier from time to time. It is further alleged in the affidavit that on 17.2.1991, the petitioner-Devasthanam wrote a letter to the second respondent stating that as the consignment has not been cleared under the Prevention of Food and Adulteration Act, 1954, the goods will have to be reshipped back to Turkey. In that letter it has also been stated that immediate action for reshipment has to be taken as the container are incurring demurrages. It is also stated in the affidavit that the petitioner-Devasthanam has not accepted the goods, that it has also made it clear to the State Trading Corporation, the second respondent herein that the goods should be reshipped and that it had also called upon the second respondent not to delay the matter further. A telex was also given on 6.3.1991 asking the second respondent to take immediate action regarding reshipment or dispose of the cargo. At this point of time, a notice under Sec.124 of the Customs Act, 1962, was issued to the second respondent, with a copy marked to the petitioner's agent Shaw Wallace Company Ltd., stating that as the goods appear to have been imported contrary to the prohibitions imposed by Sec.5 of the Prevention of Food and Adulteration Act, 1954 read with Sec.6 and 11 of the Customs Act, 1962, the goods are rendered liable for confiscation under Sec.111(d) of the Customs Act, 1962, besides liability under Sec.16 of the Prevention of Food and Adulteration Act, 1954. A show cause notice was forwarded by Shaw Wallace Company, the clearing agent of the petitioner, to the petitioner on 12.3.1991. On 14.3.1991 the petitioner-company informed the second respondent to take necessary steps to return the goods and get refund of the purchase consideration and demurrages, port charges etc. in the light of the confiscation notice issued by customs and requested the second respondent to appear before Customs to settle the issue. However, the petitioner was informed by the second respondent by telex dated 23.4.1991 that subsequent to the hearing and pursuant to the show cause notice issued, the Additional Collector of Customs had agreed that the fresh samples for conformation of fitness for human consumption may be sent to a recognised test house like C.F.T.R.I. Again the petitioner was informed by telex dated 16.5.1991 that the second respondent had taken up the matter with the Director General of Health Service. On 11.7.1991, the first respondent issued a show cause to the petitioner and the clearing agent of the petitioner Shaw Wallace and Company, stating that the aforesaid consignment of raisins will be sold by auction if the Port Charges recoverable thereon have not been paid and the goods were not cleared. Subsequently, Shaw Wallace and Company informed the second respondent to look into the matter and take necessary steps by its letter dated 24.7.1991. On the same day, the second respondent has sent a telex to the petitioner stating that as the goods have been sold in High seas it is the responsibility of the petitioner-Devasthanams to take suitable action. At this stage, the petitioner-Devasthanams has come to this Court with the prayer as stated supra.

3. It is alleged in the affidavit that the petitioner-Devasthanam is a premier religious Institution in the country it has been put to unnecessary financial hardship as the petitioner has already paid for the consignment of raisins imported and that it has not been able to take delivery and put to further hardship to clear the port dues such wharfages, demurrages etc. for no fault of the petitioner. It is also alleged in the affidavit that the petitioner has paid the second respondent the

entire purchase consideration for goods, that it has been unable to take possession of the goods as the goods have not been cleared by the Port Health authorities and that the said fact had been brought to the notice of the second respondent. It is further alleged in the affidavit that the invoice for the purchase of goods is made in the name of the second respondent, that the order was placed on the foreign supplier by the second respondent and as such it is only the second respondent who can take action against the foreign supplier. The petitioner refers to the Bill of Lading which states that in case cargo has been rejected by the Port Health Authorities in the discharge point the reshipment expenditure and freight charges are on the shippers account and as such the second respondent has to reship the goods as they were not cleared by the Port Health Authorities. It is further alleged in the affidavit that as early as 17.2.1991 the petitioner had written to the second respondent to reship the goods, back to the supplier, and that the second respondent did not take prompt action which it was legally bound to do. It is further alleged in the affidavit that in C.I.F. Contract, the purchaser is entitled to reject the goods if the goods are not in accordance with terms and conditions of the contract notwithstanding the fact that the property in the goods has passed to the purchaser by delivery of Bills of Lading if the purchaser had no opportunity to inspect the goods before. It is further alleged in the affidavit that since the goods have not been cleared by the Port Health authorities there is no question of petitioner-Devasthanam inspecting the goods and that the petitioner has already stated to the respondent to dispose the cargo and get free replacements or obtain refund of the amount from the foreign supplier. It is further alleged in the affidavit that in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description but also be merchantable, that the second respondent is aware from the very nature of the import that the raisins are imported by the petitioner for the purpose of consumption, that the goods are unmerchantable as the Port Health Authorities have not cleared the consignment as it was not in accordance with the specifications provided in the Prevention of Food and Adulteration Act and that the mere fact that the second respondent has sold the goods to the petitioner on the High seas does not amount to an acceptance of the goods by the petitioner. It is further alleged in the affidavit that admittedly the goods imported are not fit for human consumption and that it was a breach of condition of the contract and more so the petitioner was not aware of the standard and quality of the goods. It is further alleged that the second respondent had a legal duty to reship the goods, that it is allowing the first respondent to bring the goods for auction placing the petitioner in such a situation.

4. Notice of motion has been ordered by me on 1.8.1991.

5. The main contesting respondent, the second respondent herein, has filed a counter-affidavit. The facts relating to the import are not disputed in the counter-affidavit. It is further claimed in the counter-affidavit that the sale of consignment of raisins by the second respondent to the petitioner-Devasthanam was made on High seas basis by endorsing the shipping documents. It is also explained in the counter-affidavit that how the second respondent requested the Turkish Shipper that for the supply of raisins Sultans Standard 9 Natural they should produce quality inspection certificates, that the shipper should confirm that they will ship the raisins of same quality as requested by the petitioner by its telex dated 11.10.1990 and that it is clear that the second respondent had merely acted upon the order placed by the petitioner-Devasthanam by its telex dated 11.10.1990 and as such the second respondent cannot be held responsible for any consequences. It is further claimed in the counter-affidavit that after endorsing the shipping documents in favour of the petitioner-Devasthanam, the second respondent lost control over the goods, that the title to the goods passed on to the petitioner for all purposes, and as such the clearance of the consignment was to be made only by the petitioner-Devasthanam. It is further claimed in the counter-affidavit that the invoice for the purchase of raisins was made in the name of second respondent by overseas supplier since the import licence dated 30.1.1989 was issued in favour of the petitioner-Devasthanam for importing raisins through the second respondent. It is further stated in the counter-affidavit that in the Bill of Lading No.129-001185 dated 31.10.1990 issued by the carrier in Column No.3 under the heading "Consignee" the following words are incorporated:

"To order of State Trading Corporation of India Ltd., and account M/s.Tirumala Tirupathi Devasthanams, Tirupathi, A.P.".

It is further claimed in the counter-affidavit that after endorsing the shipping documents in favour of the petitioner-Devasthanam, the second respondent is in no way responsible for reshipment of the goods, that the fact that the Insurance Policy stands in the name of the second respondent does not stand in the way for getting goods cleared by the petitioner-Devasthanam, that the second respondent though not legally bound to take up the matter with the overseas supplier/shipper for reshipment of the goods for which the shipper through the message dated 4.3.1991 informed that it has no right to claim anything on the merchandise after more than 45 days. It is further claimed in the counter-affidavit that in paragraph 18 of the counter-affidavit, the reply of the foreign supplier is extracted. It is further stated in the counter-affidavit that in the meanwhile, the Assistant Collector of Customs had issued a show cause notice under Sec.124 of the Customs Act stating that the samples from the consignment was drawn by the fourth respondent and that the fourth respondent commented that the goods namely raisins do not conform to the standards laid down for raisins under the provisions of Prevention of Food Adulteration Act and the Rules thereof. It is stated that the second respondent and the clearing agent of the petitioner-Devasthanam *viz.*, M/s.Shaw Wallace Company participated in the enquiry and after hearing the views of the parties present and on mutual concurrence of the parties the Additional Collector of Customs on 18.4.1991 referred the matter once again for fresh opinion to the Central Food Technical Research Institute, Mysore for the specific purpose of ascertaining whether the goods are fit for 'human consumption'. In pursuance of the said decision, the second respondent wrote a letter to the petitioner-Devasthanam requesting to render its assistance and co-operation in drawing fresh samples from the consignment lying at Madras Port Trust, that the petitioner has not co-operated in drawing the fresh samples for the purpose of obtaining fresh opinion from the Central Food Technical Research Institute, Mysore and that the Additional Collector of Customs has not passed any final orders and that the confiscation proceedings are still continuing. It is further claimed in the counter-affidavit that when the proceedings are pending before the Additional Collector of Customs, the first respondent herein issued a notice on 11.7.1991 for auctioning the consignment for non-payment of the dues, that the petitioner is not justified in asking the second respondent to bear the expenses in connection with the drawal of fresh samples, that by letter dated 7.8.1991 the Assistant Collector of Customs has concluded that the petitioner-Devasthanam is the ultimate buyer and the user of the goods, that as buyer and owner of the goods the petitioner-Devasthanam has a right even to relinquish the goods at any time, that the second respondent is not the owner of the goods, that it is not liable to incur any expenses in his regard, and that in view of the stand taken by the foreign shipper the petitioner-Devasthanam is not entitled to get refund of the purchase money and other expenses. It is further stated that the matter is purely of civil nature based on contract, that the civil court has ample jurisdiction to go into the issue and the petitioner-Devasthanam cannot invoke the extraordinary jurisdiction of this Court. It is further claimed in the counter-affidavit that the writ petition is directed mainly against the second respondent and that nearly 11 months are over since the arrival of the goods and therefore the overseas supplier/shipper is not interested in taking back the goods and as such it is not possible to reship the goods and as such it is not possible to reship the goods without concurrence of the overseas shipper. It is categorically claimed in the counter-affidavit that since the second respondent sold the goods on High seas basis, it has lost its control over the goods and as such the second respondent should not be compelled to re-sale the goods.

6. The first respondent Madras Port Trust has filed a counter-affidavit claiming that as per the declaration in the ship's manifest filed by the agents through the Collector of Customs, the consignee is the petitioner herein, that as consignee, the Port Trust has to look to the petitioner-Devasthanam only for all the dues to the Trust. It is further claimed in the counter-affidavit that the second respondent is only a canalising agent and that the Port Trust cannot look to them for its dues since the cargo has been sold on high sea sale to the petitioner-Devasthanam. It is further claimed in the counter-affidavit that the entire transaction is purely commercial in nature

and that the Port Trust had to look to the petitioner-Devasthanam for realisation of its legitimate dues. It is further claimed in the counter-affidavit that the total demurrage charges from 3.1.1991 to 31.8.1991 amounts to Rs.4,61,239 and further demurrage accrues at Rs.2,088 per day. It is further claimed in the counter-affidavit that the petitioner-Devasthanam is liable to pay the dues and that the Madras Port Trust may be directed to clear the goods or to auction the goods and realise the dues as contemplated under the Major Port Trusts Act, 1963.

7. Mr.George Cherian, the learned counsel appearing for the petitioner-Devasthanam contends that the State Trading Corporation, the second respondent herein has failed in its duty to re-ship the goods. The learned counsel argues that there is no privity of contract between the petitioner-Devasthanam and the foreign seller. Referring to Secs.16(2) and 17 of the Sale of Goods Act with regard to sale by samples, the learned counsel contends that in such matters the question has to be considered along with c.i.f. contract and the goods should revest with the seller. The learned counsel relies upon the decision in *Muthukrishna v. Madhavji Devichand and Company, (1952)2 M.L.J. 385: 1952 M.W.N. 808: A.I.R. 1953 Mad. 817.* According to the learned counsel for the petitioner, if goods are rejected after inspection it revests with the seller. He further relies upon the decision in *Sha Thilokchand Poosaji v. Crystal and Company, (1955)1 M.L.J. 494: I.L.R. 1955 Mad. 927: 1955 M.W.N. 221: A.I.R. 1955 Mad. 481* and *In re. Firm Beharilal Baldeoprasad, 1954 M.W.N. 279: A.I.R. 1955 Mad. 271* and *Sorabji H.Joshi & Company v. V.M.Ismail, A.I.R. 1960 Mad. 520.* The learned counsel further relies upon 'Chalmers Sale of Goods' and refers to Sec.40 of the Sale of Goods Act to substantiate his contention. The sum and substance of the argument of the learned counsel appearing for the petitioner-Devasthanam is that in so far as there is no privity of contract between the petitioner and the second respondent, even though the title of the goods is vested on the petitioner by endorsing the bill of lading when once it is rejected after inspection, it re-vests with the seller. The learned counsel further contends that even though the petitioner was informed to take immediate action, the State Trading Corporation failed to take action at the appropriate time and as such the property is being brought to auction by the Madras Port.

8. *Per contra*, Mr.N.Sridharan, the learned counsel appearing for the State Trading Corporation; the second respondent herein, relying upon the decision in *J. V. Gokal and Company v. Assistant Collector Sales Tax, 1960 S.C.J. 671: (1960)2 S.C.R. 852: 1960 M.W.N. (S.C.) 476: A.I.R. 1960 S.C. 595,* contends that the petitioner-Devasthanam can abandon the goods and that the title does not re-vest with the second respondent on the facts of the case. The learned counsel refers to the effect of Sec.45 of the Sale of Goods Act and contends that since the goods are routed out through the State Trading Corporation, the contract is made by the State Trading Corporation with foreign seller and it is done only after the orders placed by the petitioner-Devasthanam and as such it cannot be contended that the State Trading Corporation is the owner of goods and it has to take action for the re-shipment of the articles. According to the learned counsel for the State Trading Corporation, once bill of lading is endorsed in highseas in favour of the petitioner, the State Trading Corporation lost its control over the goods and as such there is no legal duty cast upon the State Trading Corporation to re-ship the goods. The learned counsel further contends that if at all the petitioner-Devasthanam is aggrieved the petitioner has to approach the civil forum and that the petitioner cannot come up to this court praying for a writ of *mandamus* directing the State Trading Corporation to reship the consignment, especially when the foreign seller is not ready to take back the goods. He further contends that since the entire consideration has been paid by the petitioner to the State Trading Corporation, it is always open to the petitioner to file a civil suit, if it is so advised, for damages, against any of the respondent or against the foreign seller.

9. I have carefully considered the arguments of Mr.George Cheriyan, the learned counsel appearing for the petitioner-Devasthanam, Mr.N.Sridharan, the learned counsel appearing for the main contesting respondent, the second respondent herein, Mr.A.E.Chelliah, the learned counsel appearing for the first respondent and of Mr.V.Aravamudan, the learned counsel appearing for the third respondent. The facts are not disputed. An order was placed by the petitioner-Devasthanam for the purchase of raisins from the

foreign seller and due to canalising it has been routed through the State Trading Corporation, the second respondent herein. As such, the State Trading Corporation has placed orders with the foreign seller to the account of petitioner-Devasthanam. It is true that the import licence and insurance stand in the name of the State Trading Corporation. But, it is to be noted that it is only to the account of the petitioner-Devasthanam. It is also not disputed that a sale was concluded by highseas by endorsing the bill of lading by the petitioner-Devasthanam. The only question to be decided is who is the owner of goods, when the goods arrived at Madras Port and when it is rejected, whether the petitioner-Devasthanam or the S.T.C. A Division Bench of this Court in *Muthukrishna v. Madhavji Devichand and Company, (1952)2M.L.J. 385: 1952M.W.N. 808: A.I.R. 1953 Mad. 817,* has considered the scope of Secs.42 and 59 of the Sale of Goods Act, 1930 and held as follows:

> ".....In a c.i.f. contract the purchaser is entitled to reject the goods as not being in accordance with the terms of the contract notwithstanding that the property in the goods has passed to him by delivery of the bills of lading if he had no opportunity to inspect the goods before, It is only when buyer does any act which is inconsistent with the ownership of the seller that buyer loses his right of rejecting under Sec.42, Sale of Goods Act.....

".....When a purchaser rejects the goods after inspection the ownership would revest in the seller and the purchaser has no right to have the goods sold at the risk of the seller. If the purchaser sells the goods by public auction on ground that the seller had repudiated any liability, his right is only to damages for breach of warranty....."

In *In re. Firm Beharilal Baldeoprasad, 1954 M.W.N. 279: A.I.R. 1955 Mad. 271,* while considering the scope of Secs.15 and 16 of Sale of Goods Act with regard to implied condition as to goods being of merchantable quality a Division Bench of this Court has observed as follows:

> ".....The sale of goods by description may have reference to the quality of the goods. To that extent the goods must satisfy the conditions as to quality. In the case of foodstuffs where they are purchased by description an implied condition as to their being sound and of merchantable quality may also arise. The condition of the article being reasonably fit for a purpose maybe implied from the nature or description of the article itself as in the case of 'dal':
>
> *Held,* that only the goods corresponding to the quality stipulated for by the plaintiff's firm could sell as 'dhall'. Therefore, the seller was bound to supply goods in conformity with the contract and of merchantable quality and this was not found to be the case of examining the goods.....
>
> ".....Secs.41, 16 and 17 show that even after the buyer had a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract and even when such an examination has taken place, it might still be open to the buyer to reject the goods where they are not in conformity with the contract, because of some defect, which was not apparent on such examination. In other words, Sec.41 gives the buyer a right of inspection and unless he has had an opportunity of exercising that right, he is not deemed to have accepted the goods and has a right to reject them and therefore till the goods are inspected and accepted, it cannot be stated that the relationship of buyer and seller has been extinguished and the relationship of debtor and creditor or of principal and agent alone remained to be considered. In other words, contract to buy does not immediately transfer ownership but only when goods are found by buyer to be in good condition or when he has accepted them....."

Again, in the very same judgment, the Division Bench, considering the scope of provision of Sale of Goods Act with regard to sale by description, considered the remedies of the buyer and observed as follows:

> ".....On rejection of the goods as not answering to description the buyer, if he has paid for them, is entitled to recover from the seller the price as money had and received for his use. Ordinarily when there is a dispute between a buyer and a seller with reference to quality, it would be the duty of the seller to prove that the goods were of the quality contracted for....."

In *Sorabji H.Joshi & Company v. V.M.Ismail, A.I.R. 1960 Mad. 520,* a Division Bench of this Court has held that where goods are bought by description there is an implied condition that the goods shall be of merchantable quality. In that case, the

Division Bench has held that though reasonable opportunity was given for inspection, that opportunity was not availed of and as such the seller is not liable for any subsequent damages. It is further held that the inspection and rejection must be without practicable delay. It is further held in that case that whether a defect is latent or patent will depend on the nature of the goods and the nature of the defect and the extent of examination needed for its discovery and it is a question of fact in each case. Sec.41 of the Sale of Goods Act reads as follows:

> "......(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
>
> (2) Unless otherwise agreed when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract....."

However, it is to be seen that in this case the goods were found to be not in conformity with the provisions of the Prevention of Food Adulteration Act and a show cause notice has been issued to the Customs Authorities for confiscation. This is based upon a sample taken by C.F.T.R.I. Mysore. So, it is very clear that according to the report of C.F.T.R.I. Mysore, the raisins are useless and cannot be used for human consumption. On the basis of the said report of the Port Health Authorities, when the petitioner-Devasthanam informed the second respondent herein to take action to reship the goods to the authorities in Turkey no action seems to have been taken by the second respondent. The argument of the learned counsel for the second respondent. That since the petitioner-Devasthanam endorsed the bill of lading, the Corporation lost its control over the goods cannot be accepted. On the basis of the certificate of analyst for the purpose of customs clearance the goods were rejected by the Devasthanam by asking the second respondent to reship the goods and as such it cannot be said that the petitioner has to let in oral evidence. It is settled position of law, as has been decided by this Court mentioned supra, considering the provisions of Sale of Goods Act with regard to c.i.f. contract, since all the goods are rejected. The other question is who has got the privity of contract with the foreign seller. It has been decided in *Mohd.Serajuddin v. State of Orissa, (1975)36 S.T.C. 136*, when considering the issue 'in the course of export' under Sec.5 of the Central Sales Tax Act, 1956, that the privity of contract was only between the corporation and the foreign buyer in that case. It has been held in the abovementioned case that the appellant therein was under no contractual obligation to the foreign buyer either directly or indirectly. Here, it is a converse case. The State Trading Corporation, the second respondent herein, is the buyer, and the seller is in Turkey. As such, the contention of the learned counsel for the petitioner that the petitioner-Devasthanam had no privity of contract with the foreign seller has to be accepted on the principles laid down by the Supreme Court in *Mohd.Serajuddin v. State of Orissa, (1975)36 S.T.C. 136.* The decision relied upon by the second respondent in *J.V.Gokal and Company v. Assistant Collector Sales Tax, 1960 S.C.J. 671: (1960)2 S.C.R. 852: 1960 M.W.N. (S.C.) 476: A.I.R. 1960 S.C. 595*, is with regard to the question 'in course of import'. I do not think that the facts of the said decision will help the second respondent herein. The said decision is an authority for the proposition that in commercial world that a bill of lading represents the goods and the transfer of it operates as a transfer of the goods. That is all. It is true that under Sec.43 of Sale of Goods Act, the buyer is not bound to return rejected goods, but it is sufficient to intimate the seller that he refused to accept the same. But, in view of the provisions of Sale of Goods Act, with regard to the sale of goods on sample and with regard to the position of law laid down by this Court with regard to C.I.F. contract and rejection of goods, I am not inclined to accept the argument of the learned counsel appearing for the State Trading Corporation that it has no duty and that the petitioner-Devasthanam alone has to look after the same. Considering the facts of the case as a whole, in my view, a public authority like the State Trading Corporation, the second respondent herein, cannot and should not be allowed to evade its duties on the pretext that the Devasthanam, the petitioner herein, is the owner of the goods and the second respondent has lost the right over the goods. On a consideration of the cases cited by the learned counsel for the petitioner, on

this aspect, I am of the opinion that the State Trading Corporation, the second respondent herein, has to take steps to reship the goods if possible, otherwise to face the proceedings taken by the Customs Authorities as well as by the Port Trust Authorities. As on date, in my view, the State Trading Corporation is the owner of the goods and the petitioner-Devasthanam cannot be compelled to answer either to the first respondent or the third respondent. So, though the relief asked for in the writ petition is for re-shipment of goods, considering the facts and circumstances of the case on hand, I am of the view that a direction is to issue to the second respondent to face the proceedings before the Customs Authorities as well as the Port Trust Authorities. The first respondent herein, the Port Trust, Madras, is also directed to issue notice to the second respondent, the State Trading Corporation with regard to dues and proceed as if the second respondent is the owner of the goods. It is also made clear that it is open to the second respondent herein to take any appropriate action for reshipment and against the petitioner-Devasthanam for damages, if so advised, on the basis of the contentions raised before me in a civil court. The writ petition is allowed to the extent stated above. There will be no order as to costs.

B.S. ---- *Petition allowed with direction.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Janarthanam, JJ.*

O.S.A.No.103 of 1991 *3rd October, 1991.*

Indian Institute of Human Resources Development represented by its Founder and Honorary Director, P.Govindarajan ...*Appellant*

v.

National Institute of Human Resources Development represented by its Proprietor S.Muthu ...*Respondent.*

(A) Constitution of India (1950), Art.19(1)(g) - Trade or business - Not every organised activity of a sort of business will fall under Article - Right under Article cannot be claimed under a void agreement - Person engaged in a trade or business and contemplated a fraud or is regarded as immoral or opposed to public policy, not entitled to right under Article.

(B) Monopolies and Restrictive Trade Practices Act (LIV of 1969), Sec.36-A - 'Unfair trade practice' - Persons making false representations in their prospectus - Utilising name of Institutes established by them to elude students to join their respective institute, promising to give them diplomas which they are not entitled to award - Can be said to have indulged in unfair trade practice.

(C) Civil Procedure Code (V of 1908), Sec.151 - Constitution of India (1950) Arts.215 and 225 read with Sec.4, C.P.C. - High Court's power and Special jurisdiction in an appeal against order of injunction - Directions issued.

The plaintiff/respondent conceived of a new educational project and evolved a new original orientation of both the subjects of study and methods of instruction of inventive nature and designed the institution 'National Institute of Human Resources Development'. It started a business in Santhome High Road, Madras. The defendant, appellant was employer as its legal adviser. He had free access to the records, notes, study materials and other uniqueness of the Institution's management. He took away many copies and extracts of the records and study materials and came out with a press advertisement in newspapers that he had established 'Indian Institute of Human Resources Development' a business of his own. The plaintiff/respondent sought the relief of a permanent injunction restraining the defendant from using the plaintiff's trade name and mark or any other similar or colourable expression. He also made an application for a temporary injunction. A learned single Judge finding that there was a fundamental right under Art.19(1)(g) of the Constitution of India to trade or do business in some subjects of study but in view of the similarity in the names of the two institutions, granted the injunction. The appellant filed an appeal against the injunction order.

Held:- Any organised activity including establishment and administration, of an educational institution will be a business and fall under Art.19(1)(g) of the Constitution. But merely because it is an organised activity of a sort of business applied not only to education, but every other kind of trade or

business, it cannot be said that it will fall under Art.19(1)(g). Such activity to qualify for the right under Art.19(1)(g) must not be opposed to any public policy and must not be an act in the nature of an offence. There is yet another reason to take the view. It will always be correct to say that trade or business emanating from a contract will be a right guaranteed under Art.19(1)(g) of the Constitution. But no such right can be claimed under a void agreement such as an agreement void for uncertainty, void by way of wager, void in restraint of marriage, void in restraint of trade or void in restraint of legal proceedings etc. If, in a case, where a fraud is contemplated but not perpetrated, the court may think that such a contract is fraudulent and shall never allow a fraud to be perpetuated. These illustrations give some insight to understand and the court accordingly holds that the freedom under Art.19(1)(g) apart from and subject to the restrictions of laws made under Art.6 of the Constitution, shall always be subject to such restriction that public policy would create and if some one is engaged in a trade or business and contemplated a fraud or is regarded as immoral or opposed to public policy, he shall not have any fundamental right under Art.19(1)(g) to claim. *[Para 21]*

Both the plaintiff/respondent and the defendant/appellant have, indulged in unfair trade practice. They have both made false representations in their respective prospectus. They have utilised the name of the so called institute established by them to elude students to join their respective Institutes and promised to give them diplomas which they are not entitled to award. Their activities have the effect of contemplating a fraud and if they have awarded diplomas, they have perpetrated fraud upon the students who joined the Institute in the hope of obtaining the diploma of some use. They have taken up the idea of awarding P.G.Diplomas granted by the University of Madras. They have thus created a sort of a parallel authority of their own and initiated the role which the universities perform. Here again, they have acted, to say the least to cheat the students. *[Paras 28 and 29]*

A Full Bench of this Court has already (in L.P.A.No.123 of 1990) pronounced that if any source of power of this Court is not traceable in one or the other provision of the law of the land, it can always be traced in Sec.151 of the Code of Civil Procedure and in Arts.215 and 225 of the Constitution of India read with Sec.4 of the Code of Civil Procedure. This Court's power and special jurisdiction thus is the same as that of the King's Bench or Queen's Bench of England and it is inherent in its Constitution that it shall make such orders which shall be promoting the ends of justice. The court is conscious that it heard an appeal against an order of injunction. It is also conscious that in that sense, its jurisdiction is limited but thus as observed earlier, by affirming the impugned order granting injunction, the Court shall allow the plaintiff to continue their offensive activity and by setting aside the order, it shall permit both the plaintiff and the defendant to continue with their offensive activities that no Court of Law can afford to do. If there is any duty assigned to a Court, it is to undo every wrong and ensure that only lawful activities are allowed. As a result of the conclusion, the appeal is disposed of on the following terms. (1) The plaintiff/respondent as well as the defendant/appellant are restrained from admitting students on the basis of the prospectus syllabus issued by them and awarding diplomas to them - in short restrained from indulging in the activities on the basis of their respective prospectus and syllabus; (2) The commission under the Monopolies and Restrictive Trade Practices Act, 1969 should forthwith take cognizance of the activities of the plaintiff/respondent and the defendant/appellant and proceed in accordance with law to ensure that they do not indulge in such activities in future (3) The State Government of Tamil Nadu and the Central Government may take up the issue at the appropriate level and if necessary make laws to prohibit establishment of such institutions unless they conform to the rules and regulations made in this behalf by the competent authority. *[Paras 32 and 36]*

Cases referred to:

State of Bombay v. R.M.D.Chamarbaguwala, A.I.R. 1957 S.C. 699; Nashirwar v. State of Madhya Pradesh, A.I.R. 1975 S.C. 360: (1975)1 S.C.C. 29: (1975)2 S.C.J. 285; State of Andhra Pradesh v. Guntakkal Toddy Tappers Co-operative Society, A.I.R. 1985 S.C. 1676; Cooverjee B.Bharucha v. Excise Commissioner and the Chief Commissioner, Ajmer, A.I.R. 1954 S.C. 220: 1954 S.C.J. 246: 1954 S.C.R. 873; Krishnan Kumar v. J.& K. State, A.I.R. 1967 S.C. 1368: (1967)2 S.C.J. 273; Narain Swadeshi Weaving Mills v. The Commissioner of Excess Profits Tax, A.I.R. 1955 S.C. 176: 1955 S.C.J. 30: (1955)1 S.C.R.

952; T.B.Ibrahim v. Regional Transport Authority, A.I.R. 1953 S.C. 79: (1953)1 M.L.J. 205: 1953 S.C.J. 31: 1953 S.C.R. 290; Corley v. Christensen, (1989)34 Law.Ed. 620; Sidhrabhai v. State of Gujarat, A.I.R. 1963 S.C. 540; Sri Dwarkanath Tewari v. State of Bihar, A.I.R. 1959 S.C. 249; The Sakharkherda Education Society v. State, A.I.R. 1969 Bom. 91; Bapuji Educational Association v. State, A.I.R. 1986 Karn. 119; State of Maharashtra v. Lok Shikshan Sanstha, A.I.R. 1973 S.C. 588: (1973)1 S.C.C. 410: (1973)2 S.C.J. 224; B.W.S.S.B. v. Rajappa, A.I.R. 1978 S.C. 548; University of Delhi v. Ramnath, A.I.R. 1963 S.C. 1873.

Appeal under Clause 15 of the Letters Patent against the order of Maruthamuthu, J., dated 16.4.1990 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No.6887 of 1990 in C.S.No.1307 of 1990.

U.N.R.Rao, Senior Counsel, for *K.Subramaniam, C.S.Krishnamurthy* and *V.Rathinakimar,* for Appellant.

T.Chengalvaroyan, Senior Counsel, for *Mrs.T.Kokilavani,* for Respondent.

Halibullah Badsha, Senior Advocate, *N.A.K.Sarma* who assisted the Court as *amicus curie.*

The Judgment of the Court was delivered by

Mishra, J.:- This appeal under Clause 15 of the Letters Patent is directed against the judgment in Application No.6887 of 1990 in C.S.No.1307 of 1990, National Institute of Human Resources & Development by Proprietor S.Muthu Indian Institute of Human Resources Development by P.Govindarajan, granting interim injunction restraining the appellant/respondent, its agents, men and representatives from using the name of "Indian Institute of Human Resources Development" in their business and passing off teaching materials in that name, which according to the respondent/applicant-plaintiff is deceptively similar to "National Institute of Human Resources Development" a proprietary concern of the respondent/plaintiff.

2. In the plaint in C.S.No.1307 of 1990, the plaintiff/respondent has claimed that it had conceived of a new educational project and evolved a new original orientation of both the subjects of study and methods of instruction of inventive nature and designed the institution "National Institute of Human Resources Development" in the context of national objectives of education and training for simultaneous development of knowledge skill and aptitude. It thus started the business at Santhome High Road, Madras wherein, according to it, the defendant/appellant was employed as its legal adviser on a monthly remuneration of Rs.500. The latter, according to the plaintiff/respondent had free access to the records, notes, study materials and other uniqueness of the Institution's management. He, however, taking advantage of his fiduciary capacity had easy and full access to all records and study materials, notes and other printed materials, took away many copies and extracts with the fraudulent intention to use the same as his own and accordingly came out with a press advertisement in newspapers that he had established "Indian Institute of Human Resources Development", a business of his own. Alleging that the defendant/appellant has dishonestly taken away the plaintiff/respondent's business and that he has been fraudulently passing off the same, the plaintiff/respondent sought the relief of a permanent injunction restraining the defendant by himself, his servants, agents or anyone claiming through him from using the plaintiff's trade name and mark "National Institute of Human Resources Development" or any other similar or colourable expression and words for his Institute or any other allied business and passing off of the name as that of the plaintiff, by using the name and style of "Indian Institute of Human Resources Development" or similar expression or words in any manner of passing off his institute as that of the plaintiff, by using its name, besides other reliefs.

3. He also made an application for interim injunction as above in Application No.6887 of 1990.

4. The respondent/appellant was issued notices and it (he) submitted a return stating that it (he) had not committed any act of passing off a alleged by the plaintiff/respondent and had not infringed its name or the trade mark of the plaintiff institute. It, however, admitted that its Proprietor, Govindarajan was engaged as the legal adviser for the plaintiff/respondent, but contended that the trade name or trade mark of the Institute were entirely different from that of the plaintiff/respondent and that the words "Institute of Human Resources Development" were only descriptive words to denote the business in which no right of monopoly could be claimed by anyone.'

5. Maruthamuthu, J., who heard the injunction petition and who has passed the impugned order

(judgment) has said:

"A perusal of the two advertisements made by the applicant and also the respondent and the other features and the documents placed at present shows that the respondent has infringed the trade name and the trade mark and the goodwill of the applicant and has committed an act of passing of as pleaded by the applicant. Undeniably, the respondent is imparting the course teaching human resources development as it is done by the applicant. It is the applicant who has started the institute earlier in point of time than the respondent. The applicant has obtained registration of the trade name and trade mark "National Human Resources Development Institute", 1988 whereas the respondent has started the institute only in the end of 1990 and he has given almost all the details and the information in his advertisement as it is seen in the advertisement made by the applicant. The qualification prescribed for admission of the candidates for the course, the duration of the course, the nature of the course taught and their fitment after undergoing the course have all been stated by the respondent as those of the applicant. We find here that except the word "National" which is prefixed in the trade name of the applicant and the word "Indian" which is prefixed in the trade name of the respondent, everything is found to be the same. There will be nothing wrong on the part of the applicant if he would state in the circumstances that the respondent has wrongfully adopted the strikingly similar trade name and the trade mark of the applicant in order to pass off the institute of the respondent as that of the applicant. Mere adding or changing the common words does not take away the offensive infringement. The applicant will not be wrong if he would state that there is every scope for reasonable apprehension that the graduates who would like to apply to the applicant are misled or confused and that it would be difficult for any unwary person to distinguish between the two names.

After saying as above and referring to certain case law on the point, Maruthamuthu, J. has further said:

"In the present case, we find that the applicant has got his copy right registered and has been running the business earlier to the respondent. The applicant may, therefore, be said that he has become the owner of the copyright and the trade name "National Institute of Human Resources Development". One important circumstance that has to be noted here is that the respondent who was in the employ of the respondent as a legal adviser has started a similar business as that of the applicant almost under the same trade name, but with the same object and purpose and has fraudulently copied down the activities of the applicant. In fact, the main grievance of the applicant is that the respondent who was a legal adviser and was in a fiduciary capacity had easy access to all the records and study materials, printed materials etc. and has clandestinely taken away many copies and extracts with the intention of using the same as his own and that is how the respondent has issued the advertisement in the newspaper.

.....It is not possible to accept the contention of the respondent that the words "Institute of Human Resources Development" which are found in common in both the trade names are merely descriptive and are of common use and that the use of these words by the respondent is not likely to deceive the public.....The respondent was not correct in alleging that the action of the applicant amounts to an interference in the fundamental right of the respondent under Art.19(1)(g) of the Constitution of India. It must be stated that there is reasonable restriction even on the fundamental right and the restriction has been held to be unconstitutional. The respondent may be free to carry out a coaching institute, but the law requires that the respondent shall not assume or arrogate himself the name and style of another or any name which is a colourable name similar to that of another. I am satisfied that the applicant has made out a *prima facie* case and that the balance of convenience is in favour of grant of an order of injunction in favour of the applicant."

6. Maruthamuthu, J. has thus found:

"(i) both the respondent/appellant and the applicant/plaintiff/respondent are engaged in trade or business of imparting training and education to the students of a certain eligibility and awarding post-graduate diploma;

(ii) the plaintiff/respondent has got its trade

name registered as "National Institute of Human Resources Development";

(iii) the respondent/appellant was employed with the plaintiff/respondent as legal adviser; and

(iv) it has started its own business in the name of "Indian Institute of Human Resources Development" and has been passing-off the trade or business of the plaintiff/respondent to the students of a certain eligibility and awarding post-graduate diploma to them."

7. He has found that there is fundamental right under Art.19(1)(g) of the Constitution of India to trade or do business in some subjects of study by instrument of innovative nature, but in view of the similarity in the name of the two institutions, the respondent/applicant's right stood concised.

8. The Trade and Merchandise Marks Act, 1958 provides for the registration and better protection of trade marks and for the prevention of the use of fraudulent marks on merchandise. It has defined "trade mark" in Sec.2(1)(v) to mean:

"(i) in relation to Chapter X (other than in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark, and

(ii) in relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without an indication of the identity of that person, and includes a certification trade mark registered as such under the provisions of Chapter VIII."

Chapter X of the act contains provisions in respect of offences, penalties and procedure. Sec.81 therein speaks of penalty for falsely representing a trade mark as registered (excluded from the definition). Sec.76 says, "meaning of applying trade marks and trade description

(1) A person shall be deemed to apply trade mark or mark or trade description to goods who----

(a) applies it to the goods themselves, or

(b) applies it to any package in or with which the goods are sold, or expressed for sale, or had in possession for sale or for any purpose of trade manufacture; or

(c) places, encloses, or annexes any goods which are sold, or exposed for sale, or had in possession for sale or for any purpose of trade or manufacture, in or with any package or other thing to which a trade mark or mark or trade description has been applied; or

(d) uses a trade mark or mark or trade description in any manner reasonably likely to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description; or

(e) in relation to the goods used a trade mark or trade description in any sign, advertisement, invoice, catalogue business letter, business paper, price list, or other commercial document and goods are delivered to a person in pursuance of a request or order made by reference to the trade mark or trade description as so used.

2. A trade mark or mark or trade description shall be deemed to be applied to goods whether it is woven in, impressed on, or otherwise worked into, or annexed or affixed to, the goods or to any package or other thing.'

9. Registered trade mark" has been defined in Sec.2(1)(r) of the Act to mean a trade mark which is actually on the register. "Register" is defined in Sec.2(1)(o) of the Act to mean the Register of Trade Marks referred to in Sec.6. Sec.6 says that a record called the Register of Trade Mark shall be kept at the Head Office of the Trade Marks Registry, wherein shall be entered all registered trade marks with the names, addresses and descriptions of the proprietors, notifications of assignments and transmissions, the names, addresses and description of registered users, disclaimers, conditions, limitations and such other matters relating to registered trade marks as may be prescribed.

10. We are not referring to various other provisions of the Act at this stage, but we cannot fail to notice that for the purpose of this a trade mark, description or mark as such is in respect of goods and goods only and under Sec.2(1)(g) 'goods' is defined to mean anything which is the subject of trade or manufacture and unmistakably something which is transferable; it is something saleable *i.e.*, to say by transfer of property in the goods. This is so understood because any other meaning to the provisions of this Act will cause violation of the

registration of a particular goods. Sec.8 of the Act says that a trade mark may be registered in respect of any or all of the goods comprised in a prescribed class of goods and that any question arising as to the class within which any goods fall shall be determined by the Registrar whose decision in the matter shall be final. The word "prescribed" is defined in Sec.2(n) to mean in relation to proceedings before a High Court, prescribed by rules made by the High Court and in other cases, prescribed by Rules made under the Act. Such prescription is available in Rule 26 of the Trade and Merchandise Mark Rules, 1959, which states:

> "(1) Every application for the registration of a trade mark shall be in respect of goods comprised in one class only of the Fourth Schedule.
> (2) In the case of an application for registration in respect of all the goods included in a class or of a large variety of goods in a class, the Registrar may refuse to accept the application unless is satisfied that the specification is justified by the use of the mark which the application has made or intends to make if and when it is registered.
> (3) Applications for the registration of the same trade mark in different classes shall be treated as separate and distinct applications, and in all cases where a trade mark is registered under the same official number for goods in more than one class, whether on conversion of the specification under Rule 105 or otherwise, the registration in respect of the goods included in each separate class shall be deemed to be a separate registration for all the purposes of the Act."

The Fourth Schedule of the Schedule to the Rules contains the names of the goods and refers to various kinds of articles or apparatus, But nowhere mentions education, skill or training as a commodity qualifying as good under the Act.

11. We would have chosen to confine ourselves to the extent of maintainability of a suit claiming such a trade mark and its alleged violation, had we not noticed a certain objection to or claim of the fundamental right under Art.19(1)(g) of the Constitution in this regard. We propose, for the said reason, to venture into this aspect of the matter in the hope of finding out whether such a right can at all be claimed in the name of a so-called educational institution or in the so-called imparting of education and training culminating in the so-called post graduate diploma.

12. Art.19(1)(g) enshrines one of the rights of freedom to all citizens of the country to practise any profession or to carry on any occupation, trade or business. This Article, however, in clause (6) states:

> "Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular (nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to--
> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
> (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial of citizens or otherwise."

13. The extent of the meaning the words "trade, or business or commerce" should receive, has been considered by the Supreme Court in *State of Bombay v. R.M.D.Chamarbaugwala, A.I.R. 1957 S.C. 699.*

14. In *State of Bombay v. R.M.D.Chamarbaugwala, A.I.R. 1957 S.C. 699,* the Supreme Court, by keeping the scope of Arts.301 to 305 also in view, noted that Art.19(1)(g) in very general terms guarantees to all citizens the right to carry on any occupation, trade or business and clause (6) of Art.19 protects legislation, which may in the interest of the general public impose reasonable restriction on the exercise of the right conferred by Art.19(1)(g) and observed likewise Art.301 declares that trade, commerce and intercourse throughout the territory of India shall be free but subject to the provisions of Arts.302 to 305 of the Constitution. When it was argued before the Supreme Court that the word "trade or business or commerce" should be read in their widest applitude as meaning any activity which is undertaken or carried on with a view to earning profit and contended that there is nothing in those two Arts.19(1)(g) and 301, which may qualify or cut down the meaning of the critical words, the Supreme Court held there is no justification for not excluding from the meaning of

those words activities which may be looked upon with disfavour by the State or the Court as injurious to public morality, or public interest. The Supreme Court observed:

> "On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, of house breaking, of selling obscene pictures or trafficking in women and so on until the law curbs or stops such activities. This appears to as to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstances be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words. Learned counsel has to concede that there be no "trade" or "business" in crime but submits that this principle should not be extended and that in any event there is no reason to hold that gambling does not fall within the words "trade" or "business" or "commerce" as used in the Article under consideration."

The Court in coming to the said conclusion took notice of laws in various other countries and the public policy which should always inhere in interpreting our Constitution. The Court said so after noticing the avowed purpose of our Constitution to create a Welfare State. The Constitution Bench thus laid down the law to read in the freedom of trade of business guaranteed under Art.19(1)(g) such elements of public policy which would promote the welfare of the State and not to give to those words any extended or wider meaning so as to confer upon unscrupulous traders and businessmen a right to make profit at the cost of innocent people for whose welfare alone the State and the Constitution exist. We are aware that the Constitution Bench was dealing with some provisions of the Bombay Lotteries and Prize Competitions Control and Tax Act and was mainly concerned with the definition of "Prize Competition" in the said Act which was sandwitched in between gambling on the one hand and announcement of prize competition on the other hand. We are also aware of the other judgments of the Supreme Court in which sale of lottery tickets has been held to be a business and a right under Art.19(1)(g) of the Constitution. But we shall presently show that none of these judgments have taken away the effect of the principles stated by the Constitution Bench of the Supreme Court in *State of Bombay v. R.M.D.Chamarbaguwala, A.I.R. 1957 S.C. 699.*

15. The subsequent judgments in which reference to the judgment in *State of Bombay v. R.M.D.Chamarbaguwala, A.I.R. 1957 S.C. 699*, has been made, have not taken any exception to the principle stated therein. In *Nashirwar v. State of Madhya Pradesh, A.I.R. 1975 S.C. 360: (1975)1 S.C.C. 29: (1975)2 S.C.J. 285*, Bench of the three Judges of the Supreme Court, while considering whether there was any fundamental right of a citizen to carry on trade or to do business in liquor, has said:

> "There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades is power of the State to enforce an absolute prohibition of manufacture of sale of intoxicating liquor. Art.47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor."

This judgment thus took notice of the history of prohibition laws and stated that the fact that liquor which brings about moral degradation and adverse effect on health *i.e.*, spiritous liquor would fall beyond the fundamental right under Art.19(1)(g) of the Constitution.

16. In *State of Andhra Pradesh v. Guntakkal Toddy Tappers Co-operative Society, A.I.R. 1985 S.C. 1676*, a three Judges Bench of the Supreme Court, however, want by a general statement of law that the right to trade in intoxicating drugs is also a right to carry on any trade or business within the meaning of Art.19(1)(g), but added:

> "At the same time, it has been held by this Court in *Cooverjee B.Bharucha v. Excise Commissioner and the Chief Commissioner Ajmer, A.I.R. 1954 S.C. 220: 1954 S.C.J. 246:*

1954 S.C.R. 873, that for determining reasonable restrictions within the meaning of Art.19(6) of the Constitution on the right given under Art.19(1)(g) regard must be had to the nature of the business and the conditions prevailing in a particular trade. State has power to prohibit trades which are illegal or immoral or injurious to the health had welfare of the public and there is no inherent right in a citizen to sell intoxicating liquors by retail. In *Cooverjee B.Bharucha v. Excise Commissioner and the Chief Commissioner Ajmer, A.I.R. 1954 S.C. 220: 1954 S.C.J. 246: 1954 S.C.R. 873,* it was held that the charge of licence fee by public auction is more in the nature of a tax than a licence fee though it is described as a licence fee. One of the purposes of regulation was to raise revenue and revenue is to be collected by the grant of contracts to carry on trade in liquor and these contracts are sold by auction. In this backdrop of the legal position, no challenge is available against the Andhra Pradesh Act and the Rules made thereunder."

17. We have omitted to refer to two other judgments on this law, but we must, for the reason of an ostensible and contrary statement of law, refer to a judgment of the Supreme Court in *Krishnan Kumar v. J.& K. State, A.I.R. 1967 S.C. 1368: (1967)2 S.C.J. 273.* In that case Constitution Bench of the Supreme Court was considering whether dealing in liquor is business and a citizen has a right to do business in that commodity and is thus the fundamental right of a citizen under Art.19(1)(g) of the Constitution. It observed:

"A combined reading of Clause (1) and (6) of Art.19 makes it clear that a citizen has a fundamental right to carry on any trade or business, and the State can make a law imposing reasonable restrictions on the said right in the interests of the general public. It is, therefore, obvious that unless dealing in liquor is not trade or business, a citizen has a fundamental right to deal in that commodity. The learned Advocate General contended that dealing in liquor was not business or trade, as the dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morale. The acceptance of this broad argument involves the position that the meaning of the expression 'trade or business' depends upon and varies with the general acceptance of the standards of morality obtaining at a particular point of time in our country. Such an approach leads to incoherence in thought and expression. Standards of morality can afford a guidance to impose restrictions, but cannot limit the scope of the right. So too, a Legislature can impose restrictions, on, or even prohibit the carrying on of a particular trade or business and the court, having regard to the circumstances obtaining at particular time or place may hold the restriction or prohibition reasonable. The question, therefore, is, what is trade or business? Though the word 'Business' is ordinarily more comprehensive than the word' trade', one issued as synonymous with the other. It is not necessary to bring out the finer points of distinction between the said two concepts in this case. In the words of S.R.Das, J. as he then was, in *Narain Swadeshi Weaving Mills v. The Commissioner of Excess Profits Tax, A.I.R. 1955 S.C. 176: 1955 S.C.J. 30: (1955)1 S.C.R. 952,* the word 'business' connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. Even accepting this test, if the activity of a dealer, say, in ghee is business, then how does it cease to be business if it is in liquor? Liquor can be manufactured, brought or sold like any other commodity. It is consumed throughout the world, though some countries restrict or prohibit the same on economic or moral grounds. The morality or otherwise of a deal does not affect the quality of the activity though it may be a ground for imposing a restriction on the said activity. The illegality of an activity does not affect the character of the activity but operates as a restriction on it. If a law prohibits dealing in liquor, the dealing does not cease to be business, but the said law imposes a restriction on the said dealing. But it is said that the decisions of this Court have held that dealing in liquor is not a business or trade within the meaning of Art.19 of the Constitution. In *T.B.Ibrahim v. Regional Transport Authority, A.I.R. 1953 S.C. 79: (1953)1 M.L.J. 205: 1953 S.C.J. 31: 1953 S.C.R. 290,* it was held that restriction placed upon the use of the busstand for the purpose of picking up or setting down passengers to or from outward journeys could not be considered to be an unreasonable restriction on the right to carry on any

profession, trade or business of the appellant and, therefore, Art.268 was not in any way repugnant to Art.19(1)(g) of the Constitution. In that context, Ghulam Hasan, J. speaking for the court, observed:

"There is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience."

This Court did not say that there was no fundamental right to do business but only held that a citizen could not claim that his fundamental right could not be restricted in public interests. Nor the decision in *Cooverjee B.Bharucha v. Excise Commissioner and the Chief Commissioner Ajmer, A.I.R. 1954 S.C. 220: 1954 S.C.J. 246: 1954 S.C.R. 873,* laid down any such proposition. There the question was whether the Excise Regulation I of 1915 imposed a reasonable restriction within the meaning of Art.19(6) of the Constitution on the right given under Art.19(1)(g) thereof to carry on the business in intoxicating liquors. This Court held that the said Regulation was a reasonable restriction within the meaning of Art.19(6) of the Constitution. But in the course of the judgment, Mahajan, C.J., who spoke for the Court gave an extract from the judgment of Field, J. in *Corley v. Christensen, (1989)34 Law.Ed. 620 at p.623.* In that extract, the following passage is found.

"The police power of the State is fully competent to regulate the business-to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail, it is not a privilege of a citizen of the State or of a citizen of the united States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils"

After citing the entire passage, this Court concluded thus,

"These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner. The provisions of the regulation purport to regulate trade in liquor in all its different spheres are valid."

It will be seen that the said passage from the judgment of Field, J., has nothing to do with the construction of Art.19(1)(g) of the Constitution of India. The learned Judge was considering the scope of the 'police power' and in that context the said observations were made. This Court applied those observations in considering the reasonableness of the restrictions imposed on the fundamental rights. Indeed, perusal of the entire judgment shows that the Court conceded the fundamental right but held that the said regulations operated as a reasonable restriction on the said rights."

The earlier Constitution Bench judgment in the case of *State of Bombay v. R.M.D.Chamarbaguwala, A.I.R. 1957 S.C. 699,* however, was referred to in *Krishnan Kumar v. J.& K. State, A.I.R. 1967 S.C. 1368: (1967)2 S.C.J. 273,* in these words:

"This Court in *State of Bombay v. R.M.D.Chamarbaguwala, A.I.R. 1957 S.C. 699,* upheld the validity of the Bombay Lotteries and Prize Competition Control and Tax Act, 1948 (Bom.LIV of 1948) as amended by the Bombay Lotteries and Prize Competition Control and Tax (Amendment) Act (Bombay Act XXX of 1952). One of the questions raised was whether gambling was business or trade or commerce within the meaning of Art.19(1)(g) of the Constitution or Art.301 thereof. Das, C.J., after considering the various decisions, observed thus:

"We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subjectmatter of a fundamental right guaranteed by Art.19(1)(g)". This decision only lays down that gambling is not business or trade. We are not concerned in this case with gambling."

Apparently said, as we have noticed earlier, any systematic or organised course of activity or conduct with a set purpose will be business guaranteed under Art.19(1)(g) of the Constitution. While doing so, we reject the contention that a business noxious and dangerous to the community and

subversive of its morals will naturally be a business guaranteed under Art.19(1)(g)." In this judgment, the Supreme Court clearly found no reason to reject the approach based on the principles of public policy to give right to trade under Art.19(1)(g) a limited meaning to exclude all such trade or business which had the tendency of encouraging a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home.

18. Coming to the establishment of a technical institution and their administration and considering whether this will be a trade or business guaranteed under Art.19(1)(g) or not, we have some observations of the Supreme Court in *Sidhrabhai v. State of Gujarat, A.I.R. 1963 S.C. 540.* A Constitution Bench of the Supreme Court while considering whether interference by State Government by an executive order with the right of bare management of an educational institution does not amount to infringement of right to property under Art.19(1)(f) as it existed before Amendment Act incidentally said:

> "The word property" in Art.19(1)(f) must doubtless be extended to all those recognised types of interest which have the insignia or characteristics of proprietary rights, and a Mathadhipati has those rights, but it cannot be said that the petitioners in this case have any such proprietary rights as are vested in the Mahant of a Math. Nor does the principle of *Sri Dwarkanath Tewari v. State of Bihar, A.I.R. 1959 S.C. 249,* apply to this case......No attempt is made by the order of the State to deprive the petitioners of their right to property and fundamental freedom guaranteed by Art.19(1)(f) of the Constitution is therefore not violated. Nor is the right of the petitioners to practise any profession, or to carry on any occupation, trade or business, guaranteed under Art.19(1)(g) of the Constitution infringed by the impugned rules and directions."

19. A Bench of the Bombay High Court, however in *The Sakharkherda Education Society v. State, A.I.R. 1969 Bom. 91,* distinguished the above judgment of the Supreme Court, by making a comparison of the right under Art.30 with that under Art.19(1)(g). One of the arguments before the Court was that whatever may be the reason of non-recognition of any educational institution, the matter cannot fall within Art.19. Reliance in support of the said argument was placed upon the judgment of the Supreme Court in *Sidhrajbhai v. State of Gujarat, A.I.R. 1963 S.C. 540.* After referring to the facts of the case, the Bombay High Court commented in that case that the Government was conducting examinations not under any statutory provisions, but under its executive powers, and that the school Board Examinations are held under the Maharashtra Secondary Education Board's Regulations and, therefore, by mere executive action, under the rule-framing power, the Government cannot deprive the petitioners of their right to conduct the school and send pupils for the said examination, and held:

> "In our judgment, this decision cannot be regarded as an authority for holding that if the effect of the rule is such as to deprive the petitioners of their right to conduct the school, Art.19(1)(g) cannot be violated."

Dealing at one place with the right under Art.19(1)(g) and Art.30(1) of the Constitution, the Bombay High Court observed that the scope of Art.19(1)(g) and Art.30 will very much differ. Art.19(1)(g) is a general guarantee of a particular kind of fundamental right in wide words, while Art.30 is intended to guarantee certain rights to minorities an unless in the enumeration of the rights, the right to education was mentioned probably, it would have been excluded. The difference in wording, therefore, cannot support this contention.

20. In *Bapuji Educational Association v. State, A.I.R. 1986 Karn. 119,* a question had arisen whether the right to establish and administer educational institution would be a right under Art.19(1)(g) of the Constitution of India. That was a case in which the Karnataka Legilsature had introduced certain laws prohibiting the collection of capitation fee. Observing, however, as to the right under Art.19(1)(g), learned Single Judge of the Karnataka High Court, referred to the judgment of the Supreme Court in the case of *Sidharajbhai v. State of Gujarat, A.I.R. 1963 S.C. 540,* particularly the words in the said judgment:

> "Nor is the right of the petitioners to practise any profession, or to carry on any occupation, trade or business guaranteed under Art.19(1)(g)

infringed by the impugned rules and directions."

and stated:

"The above portion of the judgment of the Supreme Court, as rightly submitted for the petitioners does not support the stand taken by the State. The clear implication of the observations on the other hand, is, that the right is included in Art.19(1)(g) but was not infringed in that case. The Supreme Court did not say that Art.19(1)(g) could not be invoked. The decision of the Supreme Court, in *State of Maharashtra v. Lok Shikshan Sanstha, A.I.R. 1973 S.C. 588: (1973)1 S.C.C. 410: (1973)2 S.C.J. 224,* also indicated that but for the suspension of Art.19 during that period, the right of administration of an educational institution could have been traced to Art.19(1)(g). The matter is however placed beyond any controversy in the seven judge Bench decision of the Supreme Court in *B.W.S.S.B. v. Rajappa, A.I.R. 1978 S.C. 548.* In that case the Supreme Court overuled its earlier decision in *University of Delhi v. Ramnath, A.I.R. 1963 S.C. 1873,* and held that activity of running an educational institution was industry. The Supreme Court was considering the scope and meaning of the word 'Industry' used in the Industrial Disputes Act as defined *inter alia* to mean 'any business of service' the Supreme Court considered the question as to whether an educational establishment can be regarded as industry. The Supreme Court expressed in clearest terms that establishing and running of an educational institution was an industry for the reason it was not only a business, but was also a service. Para. 121 of that judgment reads:

The final ground accepted by the Court is that educations is a mission and vocation, rather than a profession or trade or business. The most that one can say is that this is an assertion which does not prove itself. Indeed, all life is a mission and a man without a mission is spiritually still-born. The high mission of life in the manifestation of the divinity already in man. To christen education as a mission even if true, is not to negate its being an industry. We have to look at educational activity from the angle of the Act, and so viewd the ingredients of education are fulfilled. Education is, therefore, and industry and nothing can stand in the way of that conclusion."

That being the position, the word 'business' in Art.19(1)(g) cannot be considered as excluding the right to establish and administer educational institution."

21. The case law has thus as above indicated in no uncertain terms that any organished activity including establishment and administration of an educational institution will be a business and fall under Art.19(1)(g) of the Constitution. But merely because it is an organised acticity of a sort of business applied not only to the education, but every other kind of trade or business, it cannot be said that it will fall under Art.19(1)(g). Such activity to qualify for the right under Art.19(1)(g) must not be opposed to any public policy and must not be an act in the nature of an offence. We have yet another reason to take this view. It will always be correct to say that trade or business emanating from a contract will be a right guaranteed under Art.19(1)(g) of the Constitution. But no such right can be claimed under a void agreement, such as an agreement void for uncertainity, void by way of wager, void in restraint of marriage, void in restraint of trade or void in restraint of legal proceedings etc., Sec.23 of the Contract Act goes further and says:

"The consideration or object of an agreement is lawful unless.
It is forbidden bylaws; or
is of such a nature that, if permitted it would defeat the provisions of any law; or
is fraudulent; or
involves or implies injury to the person or property of another; or
the court regards it as immoral, or opposed to public policy."

In each of these cases, the consideration or object of an agreement is said to be unlawful

"Every agreement of which the object or consideration is unlawful is void."

Illustrations under this Section of the Contract Act are helpful in understanding the effect of it. One illustration states that. "A, who is B's muktar, promises to exercise his influence as such with B in favour of C, A and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral". In another illustration it says:

"A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be

punishable under the Indian Penal Code (XLV of 1860)."

In another illustration, it states:

> "A being agent for landed proprietor agrees for money without the knowledge of his principal to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by cancealment by A, on his principal."

We have to understand that if in a case where a fraud is contemplated but not peretrated the court may think that such a contract is fraudulent and shall never allow a fraud to be perpetuated. These illustrations give us some insight to understand and we accordingly hold that the freedom under Art.19(1)(g) apart from and subject to the restrictions of laws made under Art.6 of the Constitution, shall always be subject to such restriction that public policy would create and if someone is engaged in a trade or business and contemplated a fraud or is regarded as immoral or opposed to public policy he shall not have any fundamental right under Art.19(1)(g) to claim.

22. We have already noticed that it will be difficult to bring the petitioner's right under the Trade and Merchandise Marks Act, 1958. But the Monopolies and Restrictive Trade Practices Act has a wide area to cover. It has defined 'Agreement' in Sec.2(a) to include any arrangement or understanding whether or not it is intended that such agreement shall be enforceable (Apart from any provisions of this Act) by legal proceedings and 'Trade' under Sec.2(s) to mean any trade, business, industry, profession or occupation relating to the production supply, distribution or control of goods and includes the provision of services.

23. There are two other relevant definitions in the Act. Sec.2(e) defines 'goods' to mean goods as defined in the Sale of Goods Act, 1930 and to include products manufactured processed or mined in India, shares and stocks and in relation to goods supplied distributed or controlled in India and goods imported into India. In Sec.2(r) "service" has been defined to mean service of any description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying the news or other information, but excludes the rendering of any service free of charge or under a contract of personal service. This act provides how any new undertaking can be established and says in Sec.22:

> "No person or authority, other than Government shall after the commencement of this act establish--
> (i) any new undertaking which when established would become an inter-connected undertaking of an undertaking to which this part applies; or
> (ii) add any new unit or division to an undertaking to which this part applies."

This Act in Sec.36-A defines "unfair trade practices" as follows:

> "In this part, unless the context otherwise requires "Unfair Trade Practice' means a trade practice which for the purpose of promoting the sale use or supply of any goods or for the provisions of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting compentition or otherwise namely;
> (1) the practice of making any statement, whether orally or in writing or by visible representation which--
> (i) falsely represents that the goods are of particular standard, quality, grade composition, style or model;
> (ii) falsely represents that the services are of a particular standard, quality or grade;
> (iii) falsely represents any re-built, second hand renovated re-conditioned or old goods as new goods;
> (iv) represents that the goods or services have sponsorship approval performance, characteristics accessories uses or benefits which such goods or services do not have;
> (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
> (vi) makes a false or misleading representation concerning the need for or the usefulness of any goods or services
> (vii) gives to the public any warranty or guarantee of the performance efficacy or length of life of a product or of any goods that is not hased on an adequate or proper test thereof;
> Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of

proof of such defence shall lie on the person raising such defence."

24. It is noticeable that any false representation, whether oral or in writing about the standard, quality and grade or service of the goods or about sponsorship approval or affiliation will be an unfair trade practice.

25. Before, however, we proceed further let us know what the appellant and the respondent have been doing. The defendant/appellant has issued an impressive prospectus in its name saying,

"Indian Institute of Human Resources Development was founded in 1990 to accelerate speedy evolution of the new concept of Human Resources Development as per the new national policy on education. The Human Resources Development concept is moving ahead repidly and therefore there is a need for a comprehensive course. The H.R.D. concept is dealt in detail by several managerial experts and academicians. Though several industitures of national level are rendering valuable services, Indian Institue of Human Resources Development is taking a new outlook on the subject. The curricular Programme will aim at providing education and training methods to the executives and labour force to sope up the needs of Industry or User System. The Institute encourages the students, to discover their potential and capability, to render services to the Society, Industry and nation at large.

Though some of the executives hold very good positions in middle and top Management in organisations, necessity arises to undergo specialised training in Human Resources Development in order to increase the production output. Young graduates who are aiming at a good career in Management and who are desirous to march forward and render a Yeoman service to the Nation expect proper guidance from Educational Institutions to choose their career,

To cater to these needs, Indian Institute of Human Resources Development launches an 18 months Post Graduate Diploma Course in Human Resources Development through correspondence to facilitate the executives and young and ambitious graduates in remote parts of the country to improve their managerial efficiency and prospects.

The Indian Institute of Human Resources Development has submitted the contents of the course and the impact the course may create to the Ministry of Human Resources Development, Government of India, to consider granting or recognition. The papers are under consideration."

After stating about the academic programmes etc, the prospectus reads about the scope of the diploma subjects taught in the diploma cover a wide area such as H.R.D. Function, Personnel Function, Training Industrial Relations arena, laws protecting the labour force and above all General Administration. It says successful candidates of the Diploma course are eligible to get appointed/elevated as H.R.D. Manager, Industrial Relations Manager, Personal Manager, Labour Officer, Labour Welfare Officer, Training Officer, Personal Executives and Administrative Officer in Central or State Government Departments, Public Sector undertakings, Industries, commercial and service organisations and adds in another place:

"In all matters concerning admission, conducting the H.R.D. course and awarding the P.G. Diploma the decision of the Institute shall be final. Candidates found to have furnished incomplete or false information will not be admitted. The Institute reserves the right to change any candition pertaining to the admission, contents of the course; the fees charged etc., given in the prospectus should these be deemed necessary in the interest of the students, the Institute and the course."

The prospectus thus invites students who satisfy an eligibility criteria to participate in its curriculam and receive instructions to finally qualify and receive P.G. Diploma. To elude students and more persons to apply and pay the feas stated in the prospectus, there is also an attraction of prices and awards for Academic Excellence, that the "Best Student Award" will be presented to the student who secures maximum marks in the course, which would carry a gold medal, prices and merit certificates in a Convocation Ceremony and a student who secures maximum marks in any of the eleven subjects would be awarded "Gold Medal" for proficiency in that subject and other awards and prizes.

26. The plaintiff/respondent has also issued a prospectus saying that the Institute is holding copy right from the Government of India and

stating that it would conduct P.G.Diploma Examination in Human Resources Development. In the language used in the Prospectus P.G.D. H.R.D.Diploma is the formal examination conducted as an external examination by the Institute which is under recognition by the Government of India for the purpose of recruitment to managarial posts and services under the Government of India. This Diploma also specifically covers the provisions of the Labour Welfare Officers Rules of State Governments enabling the candidates for the post of Labour Welfare Officers. PGDHRD-Diploma has been specifically designed for the employed graduates to those who have been put in the General Administration in Central/State Governments, Central/State Government undertakings and private organisations so as to enable them to take up the following assignments as their future careers such as: Industrial Relation Officers, Personnel Officers, Training Officers, Labour Welfare Officers, Public Relation Officers and Materials Managers/Purchase Officers.

27. Both the plaintiff/respondent and the defendant/appellant have to their credit some correspondence with the Officers in the Department of Education of the State Government and the Ministry of Human Resources Development, Government of India. They have something to do with the All India Council for Technical Education which is a body established under Act 52 of 1987 for proper planning and co-ordinated development of the Technical Education system throughout the country. They do not either have any recognition or affiliation from any University, Government or any other Authority yet they have issued invitations to people at large inviting them to join their Institutions and receive P.G.Diplomas. Are they not selfstyled institutions promising great future to the people to join their institutions representing to them that the training imparted by them shall improve their qualifications and diplomas awarded by them will be a valuable security? We are informed that the Bar and indeed our attention has been drawn to certain MRTPC orders by the Commission appointed under the said Act under which in similar circumstances actions have been taken against self-styled universities and the institutions. In one of such orders in UTPE No.329 of 1988 MRTC order dated 1.12.1989 the commission held an enquiry and found that Maithili Vishwavidyapeeth. Darbhanga was a self-styled university awarding degrees and that the self-styled university was indulging in unfair trade practices within the meanings of Sec.36A(1)(ii)(vi) of the MRTP Act. They also held that the practice of awarding so called degrees was prejudicial to the public interest and particularly the interest of students who after receiving the degrees found that the degrees were not of much use. The commission in that case ordered that they should not represent in any manner, that they were a university that they were empowered to confer degree and that degreesawarded by them were recognised by Government of India for employment purposes and further directed them to pay the costs of the proceedings. In the case of another institute which described itself as Indian Institute of Management Studies the commission started *suo motu* proceedings. The Institute had been using high sounding words to attract the students to join the so called course of study in their Institute and receive the diploma. The Commission took the view that 'Diploma' was a document conferring honour or privilege and that such honours could be conferred by a competent authority which was the creation of law. It accordingly pronounced that the word 'Diploma' as used by the said institute in the prospectus was objectionable and was an unfair trade practice.

28. What follows from our discussion above is that both the plaintiff/respondent and the defendant/appellant have indulged in unfair trade practice. They have both made false representations in their respective prospectus. They have utilised the name of the so called Institute established by them to elude students to join their respective Institute and promised to give them diplomas, which they are not entitled to award. Their activities have the effect of contemplating a fraud and if they have award/diplomas they have perpetrated fraud upon the students who joined the Institute in the hope of obtaining the diploma of some use.

29. They have taken up the idea of awarding P.G.Diplomas granted by the University of Madras. They have thus created a sort of a parallel authority of their own and imitated the role which the Universities perform. Here again they have acted to say the least, to cheat, the students. A teethless organisation like All India Council for Technical Education is of no use. Indeed, there are two such institutions before us. There may be hundreds of them tomorrow. We do not know if

there are many already in existence. We have before us only an interlocutory order passed in a suit on the original side of this Court under which the defendant/appellant had been restrained from using the socalled trade name of the plaintiff/respondent. We, however, felt that it was necessary to note the nature of the right claimed by the plaintiff/respondent in the suit and the alleged infringement of the said right by the defendant/appellant. That is how we learnt more about it and that is how we have been able to find that none of them has got any right to trade in that name, at least for the purpose of the Trade and Merchandise Marks Act, 1958. It is in course of that very investigation into the facts that we have found both of them have indulged in unfair trade practice and contemplated and perpetrated fraud in the name of awarding P.G.Diploma in Human Resources Development. An order limited to the matter under appeal will be of no consequence, for if we dismiss the appeal we allow the plaintiff/respondent to continue his unfair trade practice and further perpetuate fraud. If we allow the appeal, we sanction unfair trade practice of the defendant/appellant. We in such a situation, should do neither and we do not do that. This is a fit case in our opinion that this Court should take judicial notice of the activities of the plaintiff/respondent as well as the activities of the defendant/appellant and restrain them from proceeding with their so-called P.G.Diploma courses and to direct them to desist from awarding any diplomas, stating clearly and publicly that they do not have any authority to issue any such diploma and to apologise publicly that they committed a mistake in issuing prospectus for awarding P.G.Diplomas. If they do not do so within a reasonable time, we must ask the commission appointed by the M.R.T.P. Act to take *suo motu* cognizance of their activities and proceed against them in accordance with law. We shall not be wrong on the facts of this case if we expect from the State Government and the Central Government action against the plaintiff/respondent as well as the defendant/appellant.

30. Before we come to the close of the judgment, we may refer to some of the provisions of the Emblems and Names (Prevention of Improper Use) Act, 1950, which prohibits use of emblem or name including any abbreviation of a name included in the schedule to the Act. Item 7 of the schedule says,

> "Any name which may suggest or be calculated to suggest:-
> (i) the patronage of the Government of India or the Government of a State: or connection with any local authority or any corporation or body constituted by the Government under any law for the time being in force."

Human Resources Development is a name given to a Ministry of the Government of India. It has been also included as a name in the Madras University in one of the Degrees, namely Degree of Bachelor of Human Resources Development or diplomas including the diploma in the said name of the Madras University. By a minor change in the name of the Institute and the diploma, in the name of Human Resources Development, both the plaintiff and the defendant have created an impression that their diploma has got to do something with either degree or diploma like that of the Madras University or something which the Central Government has chosen to recognise. We have already noticed that in the syllabus of the Indian Institute of Human Resources Development, it is claimed that "it has submitted the contents of the course and the impact the course may create, to the Ministry of Human Resources Development, Government of India, to consider granting of recognition" and that "the papers are under consideration." In the syllabus issued by the National Institute of Human Resources Development also there are words suggesting that the diploma granted would benefit the diploma-holders in getting jobs in Central Government and State Government services, Central/State Government Undertaking and private organisations. So much so that it is said,

> "P.G.D. H.R.D. Diploma is the formal examination conducted as an external examination by the Institute which is under recognition by the Government of India for the purpose of recruitment to managerial posts and services under the Government of India. This Diploma also specifically covers the provisions of the Labour Welfare Officers Rules of State Governments enabling the candidates for the posts of Labour Welfare Officers."

It may not be a false statement to say that the studies prescribed by them would benefit the students. But it is surely incorrect to suggest that diplomas issued by them would in any manner benefit the students in securing jobs or benefiting

them in their service. We have already taken notice of the existence of the All India Counsil for Technical Education and the role which the Technical Education Council has to play and found that it is teethless. Yet, it may not be out of place to add that the Technical Education Council has been empowered to lay down norms and standards for courses, curricula physical and instructional facilities, staff pattern, staff qualifications, quality instructions, assessment and examinations and to grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned. It is conceded before us that neither the Plaintiff Institute nor the Defendant Institute have the approval of the Technical Education Council for starting their institutions and for courses or programmes of studies introduced by them. They have thus chosen to act against the prohibitions under the Emblems and Names (Prevention of Improper Use) Act, 1950 as well as the All India Council for Technical Education Act, 1987.

31. To say the least thus the appellant and the respondent have acted against the specific prohibition under the Monopolies and Restrictive Trade Practices Act *inasmuch* as they have been indulging in unfair trade practice within the meaning of Sec.26A (1) (ii) (vi) of the Act. They have in this process acted against the public interest particularly the interest of students, who after receiving diplomas, may find that the diplomas were not of much use. They have, if not committed fraud or cheating punishable under the Indian Penal Code, undoubtedly perpetrated a fraud within the language employed in Sec.23 of the Indian Contract Act *in as much* as they have made representation in their syllabus to the students inviting them to pay the demanded fee for studies and finally receiving diplomas in Human Resources Development. In this connection, their representation to the students is against the public policy reflected in the All India Council for Technical Education Act, 1987 and the Emblems and Names (Prevention of Improper Use) Act, 1950. They have thus out-stepped the limitation of their fundamental right under Art.19(g) of the Constitution of India.

32. We do not propose to detain ourselves for finding out our jurisdiction as in L.P.A.No.123 of 1990 Vidya Charan Shukla v. Government of Tamil Nadu Olympic Association by General Secretary and Others, (judgment dated 2.1.1991) Full Bench of this Court has already pronounced that if any source of power of this Court is not traceable in one or the other provision of the law of the land, it can always be traced in Sec.151 of the Code of Civil Procedure and in Arts.215 and 225 of the Constitution of India read with Sec.4 of the Code of Civil Procedure. This Court's power and special jurisdiction thus is the same as that of the King's Bench or Queen's Bench of England and it is inherent in its constitution that it shall make such orders which shall be promoting the ends of justice. We are conscious that we heard an appeal against an order of injunction. We are also conscious that in that sense, our jurisdiction is limited, but then as we have observed earlier, by affirming the impugned order granting injunction, we shall allow the plaintiff to continue their offensive activity and by setting aside the order, we shall permit both the plaintiff and the defendant to continue with their offensive activities, that no Court of law can afford to do. If there is any duty assigned to a Court, it is to undo every wrong and ensure that only lawful activities are allowed.

33. We, for the said reason, have no hesitation in restraining both the plaintiff and the defendant from

(1) issuing diploma in Human Resources Development:

(2) admitting the students on the basis of their respective representations in the syllabus and continuing their activities in the form and manner in which they have conducted their activities until now-until their curricula is approved by the council uner the All Indian Council for Technical Education Act, 1987 and so long it is offending the prohibition under the Monopolies and Resprictive Trade Practices Act and Sec.23 of the Indian Contract Act.

34. We should have disposed of the Appeal with the directions as above, but for our concern that such parties do indulge in such activities because appropriate authorities in the State Government, the University of Madras, the Central Government and the Council of Technical Education constituted under the Act 52 of 1987, have not acted as expected from them. It is high time that they rise to the occasion and take immediate steps, check the establishment and growth of such institutions. Mushroom growth of Engineering, Medical Pharmaceutical, Teachers Training institutions,

etc. prompted several Governments to make laws to prohibit establishment of such institutes and ensure that only genuine institutions were recognised by the Universities and/or Boards or Governments. It appears that the plaintiff and the defendant found that there was no special law prohibiting the establishment of such institutions as theirs and thus indulged in unfair trade practice and acted against public policy. We do not think and cannot think that the Government of Tamil Nadu is not concerned with the establishment and growth of such institutions and that if informations are received in right quarters, it shall not promptly act to forbid any such unfair trade practice in the cause of education. Similarly, we believe that the Central Government shall not ignore existence of such institutions and take necessary action to stop establishment and growth of institutions of this kind. If laws have to be made, they have to be made now. To-day, such institutions may be few. To-morrow, their number will be large. To-day only a few are exploited. To-morrow, a large section of our people shall be subjected to exploitation by such institutions. We for the said reason propose to recommend for appropriate legislation if that be necessary and accordingly recommend to the Central Government and the State Government of Tamil Nadu to take steps for appropriate legislation on this subject.

35. The Commission under the Monopolies and Restrictive Trade Practices Act, we found, has taken notice of the institutions that were granting diplomas like the plaintiff and issued necessary directions prohibiting them from indulging in such practices and for mending their ways. The two Institutes (the plaintiff/respondent and the defendant/appellant) are in our opinion such that they should not have escaped the scrutiny of the Commission. They however appear to have escaped until now. The Commission shall only perform its duties by taking appropriate action and ensure that they do not indulge in the practice leading to the diploma in Human Resource Development.

36. As a result of our conclusion above, we dispose of the appeal on the following terms:

"(1) The plaintiff/respondent as well as the defendant/appellant are restrained from admitting students on the basis of the prospectus syllabus issued by them and awarding diplomas to them-in-short, restrained from indulging in the activities on the basis of their respective prospectus and syllabus;

(2) The Commission under the Monopolies and Restrictive Trade Practices Act, 1969, we observe, should forthwith take cognizance of the activities of the plaintiff/respondent and the defendant/appellant and proceed in accordance with law to ensure that they do not indulge in such activities in future.

(3) The State Government of Tamil Nadu and the Central Government, we observe, may take up the issue at the appropriate level and if necessary maek laws to prohibit establishment of such institutions unless they conform to the rules and regulations made in this behalf by the competent authority."

37. Before we part with our judgment, we record our appreciation to the assistance given to us by Mr.Habibullah Badsha, Senior Advocate and Mr.N.A.K.Sarma, who assisted the Court as Amicus Curiae and Mr.U.N.R.Rao, learned Senior Advocate for the appellant and Mr.T.Chengalvarayan, learned Senior Counsel for the respondent, who have given to us such assistance and co-operation without which we would not have been able to do full justice in the case. We record our indebtedness to them.

38. A further fact, however, which has arisen on the conclusion of our judgment in the Court is that the parties have expressed that they would withdraw from such activities which are offensive if a reasonable time is granted to them. While we do not propose for the said reason to modify our order, we are inclined to fix a time limit and permit the plaintiff and the defendant to withdraw from such activities within such time stipulated so that if actions are taken by the Commission under the Monopolies and Restrictive Trade Practices Act and /or any other competent authority, their institutions can say that they have withdrawn from such offensive activities. A period of one month for the said purpose in our view will be more than enough. Both the plaintiff and the defendant thus can withdraw from such activities and accordingly issue necessary statement to the public through the press and other methods as they had adopted for inviting applications and publishing their syllabus and prospectus. If they do so, we observe, the Commission under the Monopolies and Restrictive Trade Practices Act, in course of any action, may take a lenient view and may not recommend any punishment. Accordingly in case they

withdraw from the activities as above, the State Government/Central Government may take a lenient view and exonerate them.

39. It is a fit case, in our opinion, in which, we should direct that the parties, will bear their own costs and each party will deposit a sum of Rs.2,500 in Court within a period of two weeks from to-day. The amount so deposited shall be paid equally to the two Senior Counsels, namely Mr.Habibullah Badsha and Mr.N.A.K.Sarma by the Court forthwith.

B.S. ---- *Appeal disposed of.*

THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

A.No.353 of 1981 and A.A.O.No.448 of 1984
19th February, 1992.

Pandian Automobiles Private Ltd. ...*Appellant.*
v.
Tirunelveli Sivakasi Hindu Nadar Pothu Abhiviruthi Sangam ...*Respondent.*

(A) Transfer of Property Act (IV of 1882), Sec.111(g), - Notice under - When necessary - Lease otherwise determined - Notice, if necessary.

A notice under Sec.111(g) of the Transfer of Property Act is required only when the tenancy is subsisting. This is because, it cannot be disputed that a tenancy can be determined by issuing a notice in accordance with Sec.106 read with Sec.111(g) of the Transfer of Property Act. A careful reading of Sec.111(g) would suggest that a separate notice under that section is necessary only if the lease had not been otherwise terminated. *[Para 35]*

(B) Tamil Nadu City Tenants' Protection Act (III of 1922) - Absence of provision in, similar to one under Rent Control Act enabling landlord to evict tenant on basis of denial of title - No bar to landlord seeking eviction on that ground - No need for a separate provision.

Once the tenant suffers forfeiture, he loses the character of tenant and consequently the rights/protection afforded under the Act will cease to have any application and therefore, there is no need to provide a separate section under the Act to enable the landlord to evict the tenant on the basis of denial of title. *[Para 36]*

(C) Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.2(4)(ii)(a) - Person who continues in possession of the land after the termination of the tenancy agreement - Tenant continuing in possession of land denying title of landlord and claiming title in himself since landlord had agreed to sell the land to the tenant, if such person - If entitled to the benefits under Act.:

Sec.2 of the City Tenants' Protection Act while giving definitions to certain words appearing in the statute, expressly states that the definition as given in Sec.2 will apply unless there is anything repugnant in the subject or context. Therefore, if the context requires to read the word 'tenant' in a different manner there is nothing wrong in doing so. It cannot be disputed that, if in the context it will be repugnant to hold that a particular person is a 'tenant' as defined in Sec.2(4)(ii)(a) of the Act then the section must be construed in a manner which will be in harmony with the settled principles of law and equity. Sec.2(4)(ii)(a) states that a tenant is said to include a person who continues in possession of the land after the determination of the tenancy agreement. Obviously, it can apply only to cases of determination of the tenancy agreement otherwise than by forfeiture. Under Sec.111(g) of the Transfer of Property Act the tenancy is forfeited. Sec.111 of the Transfer of Property Act deals with various modes of determination of lease. So far as the Transfer of Property Act is concerned, it makes no difference whether a lease is determined under one sub-clause or other. But for purposes of the City Tenants' Protection Act which is a special statute intended to confer benefits on tenants who are continuing in possession in the hope of being able to do so till they pay a fair rent to the landlord, a case of forfeiture of tenancy will be on entirely a different plane. It will be absurd to contemplate that a man who is deprived of his tenancy by reason of forfeiture because of his denial of title, will be entitled to claim that he is retaining the character of a tenant for the purpose of the said Act. Basically, such an interpretation will be against all notions of justice and equity. The Act never intended to confer benefits on such persons who having

entered a land under a tenancy choose to deny the same or set up independent title. Therefore, it is clear that when the section uses the expression' a person is liable to pay rent in respect of such land under a tenancy agreement express or implied including one who continues, in possession of the land after the determination of the tenancy, he is not entitled to any right unless there is a holding over under 116 of the Act. In order that Sec.116 applies, the lessor should accept the rent or otherwise assent to the lessee continuing in possession. There may be several cases in which the lessor may not be willing to accept rent or assent to the lessee's continuing in possession though the lessee may be willing to pay the rent and will be anxious to continue as a tenant and be in possession. It is only to benefit of such persons who are desirous of continuing the relationship of landlord and tenant, the section includes 'the persons who continue in possession after determination of the tenancy agreement'....in the definition of 'tenant'. If a person claims that he has got an agreement for sale in his favour and his possession is under the agreement and he is not liable to pay rent as a tenant, he cannot claim that he is a tenant under Sec.2(4) of the City Tenants' Protection Act. *[Para 37]*

(D) Tamil Nadu City Tenants' Protection Act (III of 1922), Sec.9 - Tenant claiming relief under - Denying title of landlord - Failing to substantiate his claim - If can be granted alternatively a lesser claim of benefits under Act.

The court is unable to share the view of Bellie,J, that a tenant who has denied the title of landlord and ultimately failed to substantiate his claim can be given alternatively a lesser claim of the benefits provided under the Act. For, once by reason of forfeiture, the relationship of landlord and tenant is severed, the question of providing benefits under the Act cannot arise. *[Para 37]*

Cases referred to:

R.Govindaswami v. Bhoopalan, (1977)2 M.L.J. 206; Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46; Damadilal v. Parashram, A.I.R. 1976 S.C. 2229; Veeraswami Naicker v. Alamelu Ammal, (1965)2 M.L.J. 188; Boologanathan v. Govindarajan, (1979)2 M.L.J. 47; Saidapet Handloom Cloth Producers and Sellers Association v. D.Arumugha Nadar, 1985 T.L.N.J. 207; Nachimuthu Mudaliar v. Ponnusamy, (1980)1 M.L.J. 529: 93 L.W. 814; Madhava Rao Naidu v. Sri Gangadeswarar Temple, (1946)2 M.L.J. 285: 59 L.W. 579.

Appeal against the decree of the District Court, Tirunelveli dated 30.8.1980 in O.S.No.101 of 1979 etc.

O.V.Baluswami for *M/s.V.C.Palaniswami, E.Padmanabhan* and *S.C.Palanisamy,* for Appellant.

T.R.Mani, Senior Counsel, for *M/s.K.S.Baburaj* and *S.Elamurugan,* for Respondent.

The Court delivered the following

JUDGMENT:- The appeal and the AAO are by the defendant in the suit O.S.No.101 of 1979 against whom the suit for recovery of arrears of rent and damages, and for possession of the property has been decreed, dismissing his application I.A.No.996 of 1979 under Sec.9 of the Tamil Nadu City Tenants' Protection Act.

2. It is not in dispute that the plaintiff is the owner of the property and the defendant is a tenant therein. On the allegation that there was arrears of rent from 1.12.1974 to 30.8.1977 amounting to Rs.8,800 and has caused damage to the property to the value of Rs.3,000 and the defendant is liable to pay that amount, and the tenancy has been terminated, and the plaintiff wants the defendant to be evicted, and that the defendant has set up title against the plaintiff, the suit has been filed.

3. The defendant company contended that there was an oral agreement to sell the property to it by the plaintiff for a sum of Rs.75,000 in respect of which it paid an advance of Rs.5,000, and after this agreement there is no relationship of landlord and tenant between the parties and therefore it did not pay the rent, and hence the plaintiff is not entitled to evict it. It would further submit that it never set up hostile title in respect of the suit property against the plaintiff. Then the defendant submitted to a decree for arrears of rent of Rs.8,800 and prayed that a decree may be passed for this amount and in respect of other claims by the plaintiff the suit may be dismissed. Then the defendant filed an application I.A.No.996 of 1979 under Sec.9 of the Tamil Nadu City Tenants' Protection Act for direction to the plaintiff to sell the land to it for a price to be fixed by the court.

4. The trial court on the trial of the various issues framed held that apart from the arrears of rent of Rs.8,800 admitted to pay damages to the value of Rs.3,000 and held that the City Tenants' Protection Act has not been extended to Palayamkottai

Municipality wherein the suit property is situate in so far as the non-residential buildings are concerned and therefore the suit property being a non-residential building the tenant is not entitled to the benefits under the City Tenants' Protection Act. On these findings the trial court decreed the suit as prayed for and dismissed the petition filed under Sec.9 of the City Tenants' Protection Act.

5. In the appeal, Mr.O.V.Balusamy, learned counsel for the appellant-defendant contends that the trial court is in error in holding that the Tamil Nadu City Tenants' Protection Act has not been extended to the non-residential buildings in Palayamkottai and on this finding dismissing the petition under Sec.9 of the Act and decreeing the suit for eviction since there is a Notification making the Tamil Nadu City Tenants' Protection Act applicable to non-residential buildings also to Palayamkottai. In this connection he points out G.O.Ms.No.1285, Revenue, dated 31.5.1975 mentioned at page 144 of the Book entitled Tamil Nadu City Tenants' Protection Act, by V.N.Krishna Murthy, It is also mentioned therein that the said G.O. has been published in the Tamil Nadu Government Gazette Part II, Sec.IV, dated, 25.6.1975 at pages 302 and 303. From a reading of this government order it is clear that the City Tenants' Protection Act which had already been extended in respect of residential buildings in Palayamkottai has been extended to non-residential buildings also. Therefore the suit premises comes within the Act and hence as a tenant the defendant will be entitled to the benefits under the Act.

6. However, Mr.T.R.Mani, learned counsel for the respondent-landlord argued that there is no proof that the said Notification has been laid before the Legislative Assembly as required under Sec.1(6) of the Act. But that requirement relates to Notifications issued under Sec.1(2) or 1(4), that this Notification has been issued under Sec.2(1)(i) and therefore there is absolutely no substance in this contention. V.Ramaswamy, J. has also stated so in *R.Govindaswami v. Bhoopalan and others, (1977)2 M.L.J. 206,* when the same point was argued.

7. It is then argued on behalf of the respondent-landlord that the defendant has denied the title of the landlord by contending that there is an agreement to sell the suit property and the landlord has received an advance of Rs.5,000 and therefore the defendant cannot contend that as a tenant it is entitled to the benefits of the Tamil Nadu City Tenants' Protection Act. But it is nowhere stated in the Act that merely because a tenant raises any such contention, even if he is really a tenant, he will not be entitled to the benefits of the Act.

8. However, Mr.T.R.Mani, in support of his contention would rely on a recent Division Bench decision of this Court in *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar and others, (1990)1 L.W. 46,* wherein it is held that a tenant who denies the title of the landlord is not entitled to the benefits of the City Tenants' Protection Act. This judgment was rendered on a reference made by Ratnavel Pandian, J. (as he then was) because of some conflicting decisions according to him on the point. The learned Judge found that there were two Division Bench decisions and a single judge decision holding the view that a tenant who denies the title of the landlord is not entitled to the benefits of the Tamil Nadu City Tenants' Protection Act while one single judge (V.Ramaswami, J.) relying on a Supreme Court decision in *Damadilal v. Parashram, A.I.R. 1976 S.C. 2229,* holding the opposite view which was followed by another single judge (Ratnam, J.) and therefore according to the learned judge it was better the matter was decided by a larger bench. But the matter was not referred to a Full Bench, but observing that the point has already been decided by two Division Benches, the reference also has been decided by another Division Bench consisting of Sathiadev, and Sivasubramaniam, JJ.

9. This Division Bench, to arrive at its conclusion, mainly relied on an earlier Division Bench decision in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* consisting of K.Veeraswamy, J. as he then was and P.Kunhamed Kutti, J. In that case it was argued on behalf of the tenant that even if there was determination of tenancy by forfeiture on account of tenant's denial of landlord's title claiming to be he is the owner, still he comes within the category of 'tenant' in Sec.2(4) of the Act *i.e.*, a tenant continuing in possession of the land after the determination of the tenancy. But this argument was rejected stating that there is no room for a person who continues to be in possession after the termination of tenancy and who claims that he continues to be in possession as an owner of the property, to claim benefits under the provisions of the Act. It is further stated that,

"clearly the Act is not intended to protect such owners, for there is no need for it."

10. In the present case, in the written statement, the defendant has simply stated that there was an oral agreement to sell the property to him and an advance amount had been paid and therefore there was no relationship of landlord and tenant and therefore he did not pay the rent. The question is whether this amounts to denial of title and therefore amounts to forfeiture under Sec.111(g) of the Transfer of Property Act. In the written statement itself the defendant has stated that he never set up any hostile title in respect of the suit property against the plaintiff, which means he never denied the landlord's title.

11. Further, even if it amounts to denial of title, Sec.111(g) requires that the landlord must give notice of his intention to determine the lease. Only when such notice is given there will be determination of tenancy. Such a notice does not appear to have been given in this case. Hence it cannot be said there was termination of lease. Hence, it is not a case of tenant continuing in possession after determination of lease.

12. Even if it is to be held that the tenancy stands terminated or determined by forfeiture due to denial of title, still the question arises whether he can be held to be a tenant coming within the third category of 'tenant' defined in Sec.2(4) of the City Tenants' Protection Act. It will be here convenient to reproduce the relevant portion of Sec.2(4).

"2(4). 'Tenant' in relation to any land--

(i) means a person liable to pay rent in respect of such land under a tenancy agreement express or implied, and

(ii) includes--

(a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement...."

As seen above, the Division Bench in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* appears to be of the view that when a tenant continues to be in possession after the determination of the tenancy and says that he is continuing in possession as owner of the property, there is no room for him to seek protection under the provisions of the Act. But as far as our case is concerned, no doubt, the defendant tenant has stated in the written statement that there was an agreement of sale and it is in possession under the agreement and therefore it did not pay rent. But then it admits the arrears of rent and submits to a decree for that arrears. In the petition filed under Sec.9 of the City Tenants' Protection Act it has stated that the plaintiff is the landlord and it is a tenant as per the definition in the Act and therefore it is entitled to the benefits under the Act. This clearly shows that the defendant does not claim to be the owner. The suit itself has been filed treating the defendant as a tenant. It is strange that in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* from th sentence extracted above from that judgment, appears, according to the Division Bench, o the tenant denying the landlord's title claims he is the owner he really becomes the own there is no need to protect him.

13. Even if the defendant says that it is the owner, in that case it has to be decided whether its claim is true. His word is not the last word, and simply because he claims to be the owner which is not correct, the character as a tenant does not change into the character of an owner. If it is held to be true that he is owner then the defendant becomes entitled to the property and no question of seeking benefits under the provisions of the Act arises. If it is held otherwise, *i.e.*, he is only a tenant, it is but natural that in that case he would pray for the benefits under the provisions of the Act. Thus even if one claims title to the property in himself against the landlord it does not necessarily mean he cannot pray for the alternative or the lesser relief if that claim of his fails. As aforeseen under Sec.2(4) a tenant is a person who is liable to pay rent. It is not in dispute that the defendant has been a tenant. If his claim that under an oral argument he is entitled to purchase the property and as per the terms of the agreement the landlord and tenant relationship has ceased, and if that contention is not sustainable, then it must be held that he continues to be a tenant, and then if it is to be held that by virtue of his claiming that the landlord and tenant relationship has ceased the tenancy is determined, still he must be held to be a tenant coming under the third category of 'tenant' under Sec.2(4). Thus it would appear that the ratio in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* does not appear to be correct, and in any case that will not apply to the facts of our case.

14. The next case that found favour with the

Division Bench in *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46,* is the one decided by Ramaprasada Rao, C.J. In *Bologanathan v. Govindarajan and others, (1979)2 M.L.J. 47,* in which the learned judge has followed the above referred to Division Bench decision in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* and on the reasoning given in that judgment and also referring to the forfeiture clause in Sec.111(g) of the Transfer of Property Act the learned judge held that once there is a denial of the landlord's title the relationship of landlord and tenant gets automatically severed and the latter cannot take advantage of the statutory benefits under the City Tenants' Protection Act. But as stated above, even in the case of denial of title by the tenant there is no question of automatic termination of tenancy, and for that to amount forfeiture and severance of tenancy the landlord must give notice in writing of his intention to determine the lease, and even if there is determination under Sec.111(g) of the Transfer of Property Act the tenant who continues in possession will still be a tenant under Sec.2(4) of the City Tenants' Protection Act.

15. Then the Division Bench has relied on a judgment of S.A.Kader, J. In *Saidapet Handloom Cloth Producers and Sellers Association Saidapet Madras v. D.Arumuga Nadar, 1985 T.L.N.J. 207.* There too the learned judge relied on the Division Bench decision in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* and *Boologanathan v. Govindarajan and others, (1979)2 M.L.J. 47.* On the principle of estoppel also the learned judge has held that the tenant who has denied the title of the landlord cannot claim benefits under the City Tenants' Protection Act. But the learned judge has not referred to any law under which such estoppel arises.

16. While so, Ramaswami, J. in *R.Govindaswamy v. Bhoopalan, (1977)2 M.L.J. 206,* before whom also the decision of the Division Bench in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* was relied on, after referring to a decision of the Supreme Court in *Damadilal v. Parashram, A.I.R. 1976 S.C. 2229,* wherein it has been held that a statutory tenant upon the determination of tenancy depending upon the provisions of the Act under which the right of estate or interest in the premises in contra-distinction to only a personal right is claimed and if the provisions show that the tenant, even after the determination of tenancy is treated on par with those persons who have contractual tenancy in their favour, the right of the person in whose possession after the determination of tenancy is the same as a contractual tenant and that he could not be denied the right of protection under the Act, came to the conclusion that a tenant who is in possession after determination of tenancy by forfeiture on account of denial of title would be a tenant within the meaning of Sec.2(4) and therefore he would be entitled to invoke the provisions of Sec.9 of the Act. This decision of Ramaswami, J. was followed by Ratnam, J. in *Nachimuthu Mudaliar v. Ponnusamy, (1980)1 M.L.J. 529: 93 L.W. 814.*

17. Sec.18 of the City Tenants' Protection Act provides that the Transfer of Property Act, 1882 shall to the extent necessary to give effect to the provisions of this Act be deemed to have been repealed or modified. Since Sec.111 of the Transfer of Property Act provides various modes of determination of tenancy, and the definition of tenant in Sec.2(4) includes a person who continues in possession of the land after the determination of the tenancy agreement, and when there is no provision whatsoever in the City Tenants' Protection Act itself as to how a tenancy is to be determined, it can be held that Sec.111 of the Transfer of Property Act shall not be deemed to have been repealed or modified. But the Division Bench in *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46,* appears to say that in view of Sec.13 of the present Act it is not necessary to discuss about the provisions contained in Sec.111(g) of the Transfer of Property Act. This means they do not seem to hold that by virtue of denial of title of the landlord by forfeiture the tenancy is determined. But they seem to say following the reasoning given in the earlier Division Bench decision in *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* that once a tenant sets up title in himself or third persons there is no scope for him to claim benefits under the provisions of the Act. As I have already stated above this reasoning is fallacious and incorrect. If it may repeat, only because a tenant has denied the title of the landlord or states that there is no landlord and tenant relationship between the parties because of an agreement to sell, he does not cease to be a tenant

particularly when the definition of tenant under the Act includes also a person who continues to be in possession of the property after the determination of the lease. As said above, a tenant may claim a right of absolute title to the property but if he could not prove that claim certainly his possession would be that of a tenant and as such he can claim benefits under the Act. It depends upon what the court will hold on the facts proved.

18. Then the Division Bench in *Bhargavakula Nainargal Sangam v. Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46,* referred to the object of the Act stated in the Bill and the preamble of the Act and also to the definition of 'tenant' in Sec.2(4), and would state that from all these it would appear that the Act will not apply to a tenant who denies tenancy agreement. But with great respect I do not see anything in them to arrive at such a conclusion.

19. For all these reasons, I am of the view that as Ratnavel Pandian, J. himself has desired, the point in question *i.e.*, whether a tenant who has denied the title of the landlord, or as in this case a tenant who has denied the relationship between the parties as landlord and tenant since the landlord has agreed to sell the land to the tenant is entitled to the benefits under the City Tenants' Protection Act, is desirable to be decided by a larger Bench. Hence the appeal may be placed before My Lord the Chief Justice for appropriate orders. After this point is decided the appeal may be posted before me for final disposal.

The judgment of the Court was delivered by *Venkataswami, J.*: These matters are posted before us on a reference by Bellie, J., for a decision by a larger Bench, on the following question:

> "Whether a tenant who has denied the title of the landlord, or, as in this case, a tenant who has denied the relationship between the parties as landlord and tenant, since the landlord has agreed to sell the land to the tenant, is entitled to the benefits under the City Tenants' Protection Act?"

21. Brief facts that are necessary for the disposal of this reference alone are stated hereunder.

22. The respondent herein filed O.S.No.101 of 1979, on the file of the Court of Subordinate Judge, Tirunelveli, for recovery of arrears of rent, damages and for recovery of possession of the suit property, with future damages for use and occupation. It is averred in the plaint that in the earlier suit filed, namely O.S.No.155 of 1972, for recovery of arrears of rent, the defendant (appellant herein) has taken a stand that he was not liable to pay any rent in view of an agreement for sale. The respondent has taken a stand that the appellant has set up a hostile title in respect of the suit property against the plaintiff. Before filing the suit, a registered notice dated 17.4.1973, determining the tenancy of the defendant and calling upon him to vacate the schedule mentioned property and handover vacant possession to the plaintiff on 1.1.1974 was given.

23. In the written statement, the appellant has stated that the written statement filed by him in O.S.No.155 of 1972 and 1 of 1975 be treated as part and parcel of the written statement filed in the present suit. In addition to that, the appellant has stated that the defendant paid Rs.5,000 as advance towards the said sale transaction. After the said sale transaction, there is no relationship of landlord and tenant between the parties. Hence the defendant did not pay the rent. Copies of the earlier written statements filed by the appellant are made available before us in which the defendant has taken a stand as follows:

> "In the written statement in O.S.No.115 of 1972, the appellant has stated there is no subsisting relationship of landlord and tenant as between the plaintiff and the defendant for reasons stated hereinbelow"

Again, at the close of paragraph 10, it is stated as follows:-

> "The relationship of landlord and tenant as already stated, has ceased to exist from the date of agreement of sale."

24. In the written statement filed by the appellant in O.S.No.1 of 1975, the appellant has stated as follows:

> "There is no subsisting relationship of landlord and tenant as between the plaintiff and the defendant for the reasons stated hereinbelow."

Again, in paragraph 9 the appellant has stated as follows:

> "The defendant submits that the suit as framed is not maintainable, in law. There is no relationship of landlord and tenant between the parties. The plaintiff is not also entitled to any damages for use and occupation of the plaint site since the defendant is not at all a trespasser. The only remedy available to the plaintiff is to have the balance sale price from the

defendant."

25. Before the trial court, the defendant filed an application under Sec.9 of the City Tenants' Protection Act. The suit was decreed by the trial court, including for possession. The trial court held that the provisions of the City Tenants' Protection Act were not extended under that Act for non-residential premises in Palayamkottai and, therefore, the defendant cannot claim the benefits under the Act. Consequently, the petition filed under Sec.9 was also dismissed. Aggrieved by the dismissal of the petition filed under Sec.9 of the Act, the appellant has filed C.M.A.No.448 of 1984 and against the decree in favour of the plaintiff, A.S.No.353 of 1981 has been filed.

26. When these matters were posted before Bellie, J., and arguments were addressed, the learned Judge was persuaded by the learned counsel for the appellant to refer the question mentioned above, for the decision of a larger bench.

27. The second part of the question referred to us, in our view, is also one form of denial of title of the landlord.

28. We would like to state at the outset that a reference on a similar question was made by Ratnavel Pandian, J., as he then was, on an earlier occasion and even though the learned single judge suggested the Reference to a larger Bench, the matter was referred to a Division Bench as there were two earlier Division Bench judgments on the same issue, and so, it was again posted before a Division Bench, consisting of Sathiadev and Sivasubramaniam, JJ. The judgment of the Division Bench in *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46.* We may state that there are two more Division Bench judgments, namely, *Madhava Rao Naidu v. Sri Gangadeswarar Temple, (1946)2 M.L.J. 285: 59 L.W. 579,* and *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* taking the same view as that of *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46.* Even so, Bellie, J., was of the view that in the light of different views taken by two learned singlej judge in *R.Govindaswami v. Bhoopalan, (1977)2 M.L.J. 206* and *Nachimuthu Mudaliar v. Ponnusami, 93 L.W. 874: (1980)1 M.L.J. 529,* the matter must again be referred to a larger Bench.

29. We find that in the latest judgment of the Division Bench, namely, *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46,* the learned Judges, while agreeing with the earlier two Division Bench judgments reported in *Madhava Rao Naidu v. Sri Gangadeswarar Temple, (1946)2 M.L.J. 285: 59 L.W. 579* and *Veeraswami Naicker and another v. Alamelu Ammal and others, (1965)2 M.L.J. 188,* (both cited supra), held that they are still good law and lay down the correct position of law. Further, they held that the judgments of the learned single Judges, reported in *R.Govindaswami v. Bhoopalan, (1977)2 M.L.J. 206* and *(1980)1 M.L.J. 529,* (both cited supra) are no longer good law. In the abovesaid recent Division Bench Judgment the learned Judges have dealt with the question of law, namely, "whether a tenant in respect of a vacant site, who denies title of the landlord, is entitled to the benefits of the Madras City Tenants' Protection Act," exhaustively. After carefully going through the recent Division Bench judgment, we are not able to persuade ourselves to take a different view. Therefore, we propose to set out the reasonings of the Division Bench judgment, with which we respectfully concur and thereafter answer the points raised in the Order of reference and also at the time of arguments by the learned counsel before us. At the risk of repetition, we may mention that the recent Division Bench has referred to number of judgments of this Court and also the Supreme Court, to answer the question negatively, and we feel, we need not again refer to the earlier decisions taking the same view, nor any discussion is necessary to hold that the judgments of the learned single Judges, taking a different view, are no longer good law, as the Division Bench judgment is binding on us.

30. In *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46,* the learned judges, after referring to the Objects and Reasons stated in the Bill which preceded the City Tenants' Protection Act, held as follows:

> "Therefore, it is apparent that the legislature to confer certain benefits on the tenants who are put in such helpless condition, Sec.9 of the Act provides for compulsory sale by a landlord of land in the possession of the tenant from which the tenant is sought to be ejected in a suit filed for eviction. Therefore, we have to find out who is entitled to get benefit under Sec.9 of the Act. Sec.9 of the Act, categorically states that the 'tenant' as defined in the Act is entitled

to the benefits conferred under the said provisions. Therefore we have to find out what the term 'tenant' means in the context of the provisions contained in this Act. Tenant in relation to any land means (i) a person liable to pay rent in respect of such land under a tenancy agreement express or implied, and (ii) includes any such person as is referred to in sub-clause (i) who continues in possession of the land after termination of the tenancy agreement. Therefore, the definition clause of tenant postulates three classes of persons as tenants. The first class comprises what may be regarded as direct tenants, *i.e.*, tenants of land liable to pay rent. The second class refers to a person deriving title from the tenant of the first class and the third one contemplates a person who continues in possession notwithstanding the fact that there has been reading of the abovesaid definition makes it amply clear that a person before claiming the benefits of the Act as a tenant of any land must fulfil two requirements: Firstly, he must be a person liable to pay rent in respect of the said land, and

Secondly, such a liability should be under a tenancy agreement express or implied.

"It is only the tenant who answers these requirements would be entitled to the benefits of the Act even though he continues to be in possession of the land after the determination of the tenancy agreement. Though the definition found in Sec.2(4) of the Act is an inclusive definition counched in wide language, a combined reading of the sub-clauses (1) and (2) of the Sections makes it clear that only the person liable to pay rent which determines the question whether a person is tenant or not. It is no doubt true that the liability to pay rent may arise either under an express tenancy agreement or under an implied one. But in any case liability to pay the rent must be made out and agreed to between the parties. It is unnecessary to say that express tenancy agreement will cover cases during the currency of the tenancy agreement and on the other hand implied tenancy agreement will arise in cases subsequent to the determination of the lease. To put it in other words, it will apply to a case where there was relationship of landlord and tenant upto the point of determination of tenancy. It is only in such cases, the statute comes to the rescue of such tenant and confers on him the benefits of the Act. At no stretch of imagination, it will apply to a case where the tenant denies the very agreement itself and claims title in himself.

This question came to be decided by a Division Bench of this Court in *Madhava Rao Naidu v. Sri Gangadeeswarar Temple, (1946)2 M.L.J. 285; 59 L.W. 579,* wherein it was held that the Act defines a tenant as meaning a tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of tenancy and that it is impossible to accept the argument that a person who claims under a person whose tenancy has been determined is a tenant and is entitled to further notice. In that case, the original tenant denied the landlord's title and therefore he was entitled to terminate his tenancy which was done on notice given to the tenant. The appellant's purchase of the right, title and interest of the original tenant took place two years later. Therefore, it was held that if Ponnuswami had in law any right in the land it would have been passed to the appellant but clearly he had none. It was in that context the above decision came to be rendered. When a similar question arose before Kailasam, J. (as he then was) the said Bench decision was relied on by one of the parties. But the learned judge felt that the question involved in the case before him required to be considered by a Bench and therefore, the matter was referred to a Bench. On reference, Veeraswami, J. (as he then was) and Kunhamed Kutti, J. constituting the Bench held in *Veeraswami Naicker v. Alamelu Ammal, (1965)2 M.L.J. 188,* as follows:

"Quite apart from this decision, we are of the view that the lower appellate court took the right view of the scope of Sec.2(4), as it stood before the amendment in 1960. It is true that the third clause in the definition comprehends persons continuing in possession, though the tenancy has come to an end, for. A tenancy may come to an end for a number of reasons as for instance denial of landlord's title. Such a denial under the ordinary law of transfer of property brings about forfeiture. The argument for the appellant before us is that even such a case will be within the actual words of

the third category in the definition. But there is a fallacy in the argument. When a person, who continues, to be in possession after termination of tenancy, claims that he does so, as he is entitled to the property, as his own, it is obvious that there is hardly any room for such an owner to seek protection of his possession under the provisions of the Act. Clearly the Act is not intended to protect such owners, for there is no need for it. We are of the view that such a case will not fall within the third category of persons entitled to protection under the Act. On that view, the second appeal fails and is dismissed with costs."

Ramaprasada Rao, C.J., in *Bologanathan v. Govindarajan, (1979)2 M.L.J. 47,* following the Division Bench decision in *Veeraswami Naicker v. Alamelu Ammal, (1965)2 M.L.J. 188,* held as follows:

"If once a tenant openly denies the title of lessor or pleads *jus tertii* then it automatically follows that he would not be considered as a tenant for any purpose whatsoever, as under Sec.111(g) of the Transfer of Property Act by such open denial of title or by pleading *jus turtii* there is a forfeiture of the tenancy and the relationship of landlord and tenant is snapped thereby. The fact that he remains in possession of the premises and pays, what according to him, is rent or is prepared or willing to pay such rent, could only, in the circumstances, be understood as money paid towards damages for use and occupation. Jurdicial possession, therefore, is the essence for the creation of the relationship of landlord and tenant. Once there is a snapping of the relationship by a voluntary Act of omission or commission on the part of the person in occupation as tenant then, he cannot inconsistently claim such a legal status under any provision of law."

The learned judge answered the question whether the subsequent payment of rent would alter the situation. He has held that such a gesture on the part of the tenant would create the legal relationship of landlord and tenant as between the parties would be nothing but begging the question for the simple reason that a person cannot approbate and reprobate. It was also further held that once, there is such a denial of title, any relationship of landlord and tenant is automatically severed because of the presumption which arises under Sec.111(g) of the Transfer of Property Act which forfeits the lease by reason of such denial of title.

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While considering the present controversy, it is relevant to take note of the language used in Sec.2(4) of the Act. After having stated in sub-clause (i) of the Act that the term 'tenant' means a person liable to pay rent in respect of such land under a tenancy agreement express or implied, the Act says that the said term includes in sub-clause (a) any person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement (*Emphasis Supplied*). The language of sub-clause (ii)(a) makes it amply clear that the benefit conferred under this provision is restricted to a tenant who continues in possession of the land after the determination of the tenancy agreement and not to any other tenant who denies the very agreement of tenancy itself. A combined reading of these two clauses would make it amply clear that a person who does not claim that there was an agreement of tenancy at the relevant point of time is not entitled to claim any benefit under this provision.

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The judgment of Ramaswami, J. (as he then was) and other learned Judges who took a similar view proceeded on the basis that the provision contained in Sec.111 of the Transfer of Property Act would be attracted, where under the circumstances under which the lease can be determined are set out. They were of the view that the denial of title is only one of the modes of determining a lease of immovable property and if there was a forfeiture by denial of title, the person in possession after such determination would also be a tenant within the meaning of Sec.2(4) of the Act and therefore such a tenant would be entitled to all the rights, as if he was a contractual tenant himself, as the definition of tenant in Sec.2(4) of the Act also includes a person, who continues to be in possession of the land after the determination of the tenancy agreement. Their view was mainly based on the decision of the Supreme Court referred to above, where under the Supreme Court considered the position of a statutory tenant and his right to property. In

that case distinction was sought to be made between the rights of a contractual tenant and the rights of the tenant whose contractual tenancy was determined but who is protected against eviction by the statute. As already pointed, the Supreme Court proceeded on the basis that every tenancy has its origin in contract. It is significant to note that the definition of "tenant" refers to a person continuing in possession after the determination of his tenancy and under the Act such a person is treated as a statutory tenant and he is protected from eviction. At this stage, we can have a look at the Tamil Nadu Buildings (Lease and Rent Control) Act. There the definition of 'tenant' is a person by whom or whose account rent is payable for a building and includes the surviving spouses etc. It also includes a person continuing in possession after the determination of the tenancy in his favour but it does not include a sub-tenant and certain other categories of tenant. Sec.10(2)(vii) of the said Act states that a landlord can seek for eviction of his tenant, who has denied the title of the landlord or claim a right of permanent tenancy and that such denial or claim was not *bona fide*. Therefore under that Act if the denial of title is not *bona fide*, the tenant can be straightaway evicted and on the other hand, if the denial of title is *bona fide*, then the Rent Controller cannot have jurisdiction and only a regular suit for eviction can be filed under ordinary law. Therefore, we find that protection is not given to the tenant who denies the title of the landlord. Now, let us recapitulate the preamble of the Act above referred to. The Act in question is intended to give protection against the eviction of tenants who have constructed buildings on others' land so long as they pay fair rent for their lands. Therefore, the basic requirement for invoking the provisions of the Act is that ownership and tenancy rights must vest in different persons. Once a person claims ownership in himself, the question of tenancy does not arise for consideration. We have already referred to the definition of tenant under Sec.2(4) of the Act, wherein it is specifically mentioned that the benefit would accrue only to a tenant whose tenancy agreement is determined. A cumulative effect of the provisions would lead to the inference that protection is available only to the statutory tenants whose possession is protected under the provisions of a statute. We are unable to find any provision in the Act to consider the tenant who has denied the title as a statutory tenant. We have come to the conclusion from the preamble and the definition of "tenant" found in the Act that the benefit is intended to be given only to certain class of tenants who claim right under a tenancy agreement and not to the persons who claim to be owners or set up title on others. In this connection, it is unnecessary to enter into discussion about the provisions contained in Sec.111(g) of the Transfer of Property Act. Sec.13 of the present Act in question speaks in clear terms that the Transfer of Property Act shall to the extent necessary to give effect to the provisions of this Act, be deemed to have been repealed or modified. Therefore, there is no difficulty in construing the word tenant without reference to the provisions of the Transfer of Property Act. It is worthwhile remembering that such Acts are intended to meet the broad needs of the Society and the scope of such Acts cannot be extended beyond the object. Even otherwise, it is highly inequitable to thrust the rights of tenancy on a person who does not want to claim to be a tenant and such a course would be revolting to the canons of justice and fair play. As Kader, J., has rightly pointed out in the decision referred to above, such a person would be estopped from claiming any rights under the Act. There is one another aspect which was not brought out at the time of argument by the learned counsel appearing for both parties in these cases. On a careful consideration we find that there is considerable doubt as to the applicability of the decision in *Damadilal v. Parashram, A.I.R. 1976 S.C. 2229*, in view of the later decision of the Supreme Court differed from the view expressed in two earlier cases. In *Anand Nivas (P.) Ltd. v. Anandji Kalyani Pedhi* and in *J.C. Chatterjee v. S.K. Tandon*, the Supreme Court considered the provisions in Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947 as amended in 1959. In *Anand Nivas (P) Ltd. v. Anandji Kalyani Pedhi's case*, three learned Judges constituting the Bench in the Supreme Court, *viz.*, Sarkar, J., Hidayathullah, J., (as he then was) and Shah, J., (as he then

was) heard the appeal. In that case, Hidayathullah, J. (as he then was) held that a statutory tenant meaning a tenant whose tenancy has determined but who continues in possession has no power of subletting. Sarkar, J. dissented. It was clearly held therein that the personal right of occupation of a statutory tenant is incapable of being transferred or assigned, and he having no interest in the property there is no estate on which sub-letting may operate. In *Damadilal v. Parashram, A.I.R. 1976 S.C. 2229*, the Supreme Court differed from the said view.

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Therefore, we hold that the two decisions rendered by two different Benches of this Court in *Madhava Rao Naidu v. Sri Gangadeswarar Temple*, and *Veeraswami Naicker v. Alamelu Ammal*, are still good law and we are bound by the same. Consequently, we hold that the benefits under the Act can be given only to certain class of tenants who claims right under a tenancy agreement and not to the persons who claim to be the owners of the properties or set up title in others. All the decisions of the learned single Judges, which have taken a different view, are no longer good law." [Paras 14, 15, 16, 17, 22, 24 and 28]

As we respectfully agree with the reasonings and conclusions, we refrain from repeating the same reasons, except to add some more reasons by looking at the issue from different angles.

31. Mr.O.V.Baluswami, learned counsel appearing for the appellant (defendant in the suit), submitted that there is no provision in the City Tenants' Protection Act similar to the one in the Rent Control Act, making denial of title of the landlord by the tenant as a ground for eviction. Therefore, by reason of denial of title, the benefit conferred under the Act cannot be taken away. He also submitted that in any event, in the absence of a notice under Sec.111(g) of the Transfer of Property Act, it cannot be taken that there was determination of tenancy, to enable the landlord to pray for the relief of possession. He also submitted that in view of definition of "tenant" in the City Tenants' Protection Act, particularly, in the light of Sec.2(4)(ii)(a) of the Act, assuming without admitting that there was forfeiture on account of denial of title, still, according to the learned counsel for the appellant, the tenant would continue as a statutory tenant and the benefits conferred on the tenant also would continue to be available to him.

32. Mr.T.R.Mani, learned Senior Counsel appearing for the reason, contending contra, submitted that admittedly notice under Sec.106 read with Sec.111(h) of the Transfer of Property Act has been given, terminating the tenancy and, therefore, there is no need or necessity to issue a separate notice under Sec.111(g) of the Transfer of Property Act. He also submitted that it is not necessary that a separate provision must find a place in the the City Tenants' Protection Act, making denial of title of land as a ground for eviction. He further submitted that on a correct interpretation of Sec.2(4)(ii)(a) of the Act, benefits provided under the City Tenants' Protection Act will not be available to those tenants who suffers forfeiture by reason of denial of title of the landlord.

33. Apart from the above submissions, both sides have cited number of decisions which are referred to in the recent Division Bench judgment. The learned single judge, in the order of Reference, has taken the view that notice under Sec.111(g) of the Transfer of Property Act is necessary, and that the ratios laid down by the earlier two Division Bench judgments and also the recent Division Bench judgment are not correct. With respect, we are unable to share the view of Bellie, J., when the learned says that the ratios laid down by the Division Bench are not correct.

34. Bellie, J., also seems to be of the view that in the light of the language employed in Sec.2(4)(ii)(a) of the Act, notwithstanding the forfeiture suffered by the tenant, he continues to be a tenant, for the purpose of claiming the rights and benefits provided under the Act.

On this aspect, the learned Judge, to a certain extent, has criticised the Division Bench Judgment in *Veeraswami Naicker v. Alamelu Ammal, (1965)2 M.L.J. 188*. To justify the view taken by the learned judge, it has been stated that though a tenant claims title to the property in himself against the landlord, that does not prevent him from getting alternative or lessor relief in the event of his not establishing the title in himself. It also appears that Bellie, J., was of the view that the decisions of the learned single judges reported in *R.Govindaswami v. Bhoopalan, (1977)2 M.L.J. 206*, and *Nachimuthu Mudaliar v. Ponnusamy, 93 L.W. 814*, *Madhava Rao Naidu v. Sri Gangadeswarar*

Temple, (1946)2 M.L.J. 285: 59 L.W. 579, are good law notwithstanding the fact that a Division Bench in *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46*, has expressly held that those two decisions are not good law.

35. We will first dispose of the issue whether a separate notice under Sec.111(g) of the Transfer of Property Act is necessary. We have already seen that in this case, a notice under Sec.106 read with 111(h) of the Transfer of Property Act has been issued, terminating the tenancy. A notice under Sec.111(g) of the Transfer of Property Act is required only when the tenancy is subsisting. This is because, it cannot be disputed that a tenancy can be determined by issuing a notice in accordance with Sec.106 read with Sec.111(g) of the Transfer of Property Act. We can also derive support to our view from the language of Sec.111(g) itself. A careful reading of the said Section would suggest that a separate notice under that section is necessary only if the lease had not been otherwise determined. On this issue, Srinivasan, J., in *Subbaroyan and another v. Devadas Nadar, S.A.No.1459 of 1985 judgment dated 20.9.1990*, has taken the same view as taken by us above. After referring to an earlier judgment, the learned judge has observed as follows:

> "Without a termination of the tenancy, a proceeding for eviction cannot be instituted on the basis of mere denial without a notice under Sec.111(g) of the Transfer of Property Act. But in cases where there is a termination of tenancy by a notice under Sec.111(h) of the Transfer of Property Act, there is no question of issuing a further notice under Sec.111(g) of the Transfer of Property Act."

We hold that above observation lays down the correct position of law.

36. Coming to the other point, namely, that there is no provision in the City Tenants' Protection Act similar to the one under the Rent Control Act, to enable the landlord to evict the tenant on the basis of denial of title, we hold that the argument was based on a misconception. Once he suffers forfeiture, he loses the character of tenant and consequently the rights/protection afforded under the Act will cease to have any application, and therefore, there is no need to provide a separate section under the Act, to enable the landlord to evict the tenant on the basis of denial of title.

37. Now, let us consider the scope of definition of Sec.2(4)(ii)(a) of the City Tenants' Protection Act. Sec.2(4)(ii)(a) of the said Act reads as follows:-

> "2. *Definitions*: In this Act, unless there is anything repugnant in the subject or context:-
> (1) to (3-A) xxx xxx
> (4) 'Tenant' in relation to any land--
> (i) xxxxx
> (ii) includes-----
> (a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement."

Undoubtedly, the earlier Division Bench judgments have consistently taken the view that Sec.2(4)(ii)(a) of the Act will not apply to a tenant who suffers forfeiture. The recent Division Bench has also taken into account the objects and Reasons and also the preamble to the Act before coming to a conclusion that the benefit of Sec.2(4)(ii)(a) of the Act will not be available to a tenant, who suffers forfeiture. In addition to reasons given there, we would like to state the following:

Sec.2 of the City Tenants' Protection Act, while giving definitions to certain words appearing in the statute, expressly states that the definitions as given in Sec.2 will apply unless there is anything repugnant in the subject or context. Therefore, if the context requires to read the word "Tenant" in a different manner, there is nothing wrong in doing so. It cannot be disputed that if in the context it will be repugnant to hold that a particular person is a "tenant", as defined in Sec.2(4)(ii)(a) of the Act, then the Section must be construed in a manner which will be in harmony with the settled principles of law and equity. Sec.2(4)(ii)(a) states that a tenant is said to include a person who continues in possession of the land after the determination of the tenancy agreement. Obviously, it can apply only to cases of determination of the tenancy agreement otherwise than by forfeiture. (*emphasis supplied*). Under Sec.111(g) of the Transfer of Property Act, the tenancy is forfeited. Sec.111 of the Transfer of Property Act deals with various modes of determination of lease. So far as the Transfer of Property Act is concerned, it makes no difference, whether a lease is determined under one sub-clause or other. But, for purposes of the City Tenants' Protection Act, which is a special

Statute intended to confer benefits on tenants who are continuing in possession in the hope of being able to do so till they pay fair rent to the landlord, a case of forfeiture of tenancy will be on entirely a different plane. It will be absurd to contemplate that a man who is deprived of his tenancy by reason of forfeiture because of his denial of title, will be entitled to claim that he is retaining the character of a tenant for the purpose of the said Act. Basically, such an interpretation will be against all notions of justice and equity. The Act never intended to confer benefits on such persons who having entered a land under a tenancy, choose to deny the same or set up independent title. Therefore, it is clear that when the Section uses the expression "a person is liable to pay rent in respect of such land under a tenancy agreement express or implied, including one who continues in possession of the land after the determination of the tenancy agreement, it can only apply to a person who acknowledges his liability to pay the rent and is willing to pay rent even though the landlord may not be willing to accept the same. Under the Transfer of Property Act, if a person continues in possession after the determination of the tenancy, he is not entitled to any right unless there is a holding over under Sec.116 of the Act. In order that Sec.116 applies, the lessor should accept the rent or otherwise assent to the lessee continuing in possession. There may be several cases in which the lessor may not be willing to accept rent or assent to the lessee's continuing in possession, though the lessee may be willing to pay the rent and will be anxious to continue as a tenant and be in possession. It is only to benefit such persons who are desirous of continuing the relationship of landlord and tenant, the Section includes "the persons who continue in possession after determination of the tenancy agreement", in the definition of 'tenant'. If a person claims that he has got an agreement for sale in his favour and his possession is under the agreement and he is not liable to pay rent as a tenant, he cannot claim that he is a 'tenant' under Sec.2(4) of the City Tenants' Protection Act. We may add that the above view expressed is only adding to the reasons already given by the Division Benches with which, we have already expressed, we are in agreement. Therefore, we are unable to share the view of Bellie, J., that Sec.2(4)(ii)(a) of the Act enables the tenant to claim the benefits/rights conferred on the tenants under the Act notwithstanding the denial of title by a tenant setting up title in himself. Likewise, we are unable to share the view of Bellie, J., that a tenant who has denied the title of landlord and ultimately failed to substantiate his claim, can be given alternatively a lesser claim of the benefits provided under the Act. For, once by reason of forfeiture, the relationship of landlord and tenant is severed, the question of providing benefits under the Act cannot arise. It goes without saying that the decisions of the two learned single Judges reported in *R.Govindaswami v. Bhoopalan, (1977)2 M.L.J. 206, Nachimuthu Mudaliar v. Ponnusamy, (1980)1 M.L.J. 529: 93 L.W. 874,* are no longer good law as rightly held in *Bhargavakula Nainargal Sangam, Thiruvannamalai v. Arunachala Udayar, (1990)1 L.W. 46.*

38. In the result, we answer the question referred to us in the negative, holding that a tenant who has denied the title of the landlord, is not entitled to claim the benefits under the City Tenants' Protection Act. The same answer applies to the second part of the Reference as well.

39. In the order of Reference, the learned Judge has directed the Office to post the appeals before him for final disposal. The Office will do accordingly.

These appeals coming on for further hearing in the presence of The Honourable Mr.Justice Bellie, on Monday the 3rd day of February, 1992 upon perusing the order of the Bench, dated 18.11.1991 made herein and having stood over for consideration till this day.

The Court delivered the following

JUDGMENT:- Now the Division Bench upon the reference made by me on the question whether a tenant, who has denied the title of the landlord or as in the case a tenant who has denied the relationship between the parties as landlord and tenant since the landlord has agreed to sell the land to the tenant, is entitled to the benefits under the City Tenants' Protection Act, has held that a tenant who has denied the title of the landlord is not entitled to the benefits of the Act and the tenant in the present case also who has denied the relationship between the parties on the ground that the landlord has agreed to sell the land to the tenant is not entitled to the benefits of the Act. Though, with great respect, I am unable to agree with this finding of the Division Bench, I am bound by that decision. No further consideration arises.

42. The result is, both the appeal and the AAO are dismissed. Considering the circumstances of the case there will be no order as to costs in both of them.

B.S. ---- *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

C.M.A.No.905 of 1986 *22nd October, 1991.*

R.Manonmani ...*Appellant*
v.
Kaliamurthi and others ...*Respondents.*

Motor Vehicles Act (IV of 1939), Sec.110 - Children Act (LX of 1960), Secs.2(g), (j) and 2(1) - Motor accident - Victim, a cyclist aged about 14 years - If a child - Contributory negligence, if can be negatived, on the basis of age.

From the school certificate relating to the deceased, it is clearly established that on the date of the accident, he was nearly 14 years of age. Presumably, on account of this, learned counsel for the appellant was emboldened to rely upon the definition of 'child' occurring in Sec.2(g) of the Children Act. However, this definition would not be of any assistance for that had been enacted for the purpose of the Children Act, the object of which, it to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children. The expressions 'delinquent child' and 'neglected child' have been defined under Secs.2(j) and 2(1) of that Act. From this, it is clear that the definition of a 'child' a 'delinquent child' and a 'neglected child' occurring in the Children Act have been enacted for the purpose of giving effect to the provisions of that Act, providing for the education and rehabilitation, among others of neglected or delinquent children, as defined in that Act. Having regard to the purpose for which the Children Act had been enacted, the definition therein, with reference to a 'child' cannot be pressed into service to claim that the deceased in this case was a child and could not, therefore, be held to have contributed to the accident by his own negligence. Merely on the basis of age, a conclusion regarding the contributory negligence cannot be arrived at, but that would depend upon the facts, circumstances and the evidence available. *[Para 6]*

Cases referred to:

Delhi Transport Corporation v. Kumari Lalitha, A.I.R. 1982 Del. 558: 1983 A.C.J. 253; E.Enjanadevi v. Arumugham, 1983 A.C.J. 625; Srinivasa v. Parasivamurthy, A.I.R. 1976 Karn. 92; Govinda Prasad v. Sujit Chowmick, A.I.R. 1978 Cal. 109; A.R.Gandhi v. A.K.Diwan, A.I.R. 1979 Guj. 14;

Miss V.Sumathi, for Appellant.

K.Ranganathan, for Respondents.

The Court delivered the following

JUDGMENT: This appeal has been preferred by the claimant, against the award of the Motor Accident Claims Tribunal (Sub Court), Tiruvannamalai, in M.C.O.P.No.49 of 1984.

2. On 22.8.1984 at about 9.30 a.m. an accident took place between a bus TNM 6579 belonging to the 2nd respondent, driven by the 1st respondent and insured with the 3rd respondent and a cyclist, Ravi, who was proceeding from Vellore Road, near Periyar statue at Tiruvannamalai. In that accident, the cyclist Ravi sustained injuries in his waist, chest and stomach and died instantaneously. The appellant is the mother of deceased Ravi and, according to her, the accident, resulting in the death of Ravi, took place entirely owing to the rash and negligent driving of the bus TNM 6579 by its driver. The deceased, according to the appellant, was working under a private Doctor and was earning a salary of Rs.150 p.m. besides doing bead work at home, thereby earning another Rs.150 p.m., and was supporting the appellant out of his earnings. Claiming that as a result of the death of her son, Ravi, she had lost the benefit of his earnings and support, the appellant prayed that compensation in a sum of Rs.50,000 should be awarded to her.

3. In the counter filed by the owner of the vehicle, which was adopted by the driver, the rash and negligent driving of the bus was denied and it was stated that deceased Ravi drove the cycle without regard to the rules of the road and attempted to cross the road and got himself involved in the accident, which had taken place only owing to the carelessness of the deceased. The income stated to

have been earned by Ravi, was disputed and the amount of compensation claimed was also characterised as excessive and exorbitant. The 3rd respondent-insurance company disputed that the vehicle involved in the accident, was insured with it and stated that deceased Ravi had driven the cycle negligently and carelessly and lost control and dashed against the rear side of the bus and that had caused the accident. The compensation claimed by the appellant was also stated to be excessive and exorbitant.

4. Before the tribunal, on behalf of the appellant, Exs.A-1 to A-3 were marked and P.Ws.1 to 3 gave evidence, while, on behalf of the respondents, the 1st respondent was examined as R.W.1. On a consideration of the oral as well as the documentary evidence the tribunal found that the accident, resulting in the death of Ravi, was the outcome of the rash and negligent driving of the bus by its driver and the cycle by the cyclist, deceased Ravi and that the negligence had to be apportioned at 50 : 50. Dealing with the compensation awardable to the appellant, the tribunal found that the annual contribution of deceased Ravi to the appellant could be determined at Rs.1,500 and taking into account the age of the appellant at the time of the death of Ravi, it would be appropriate to adopt a multiplier of 25 and on that basis, the compensation awardable to the appellant, was determined at Rs.34,500. Consistent with the finding on negligence, the tribunal halved the amount of compensation determined and passed an award in favour of the appellant for Rs.18,750 together with interest at 12% p.m. from the date of claim petition, against the driver, owner and the insurer of the bus as well as the insurer had not established that the vehicle involved in the accident was not covered by a policy issued by it. In this appeal, the appellant has prayed that the disallowed portion of the compensation should also be awarded.

5. Learned counsel for the appellant contended that at the time of the accident, deceased Ravi was aged about 14 years and was a 'Child' within the meaning of The Children Act, 1960 (hereinafter referred to as 'the Act') and such a person could not be properly held to have contributed to the accident. Reliance in this connection was placed upon Sec.2(e) of the Act and the decision reported in *Delhi Transport Corporation v. Kumari Lalitha, A.I.R. 1982 Del. 558: 1983 A.C.J. 253.* On the other hand, learned counsel for the respondents submitted that though it may be that a distinction requires to be drawn between 'children' and 'adults', when the question of negligence arise, if, on the evidence, it is established that the person involved in the accident, was of such age and understanding, as can reasonably be expected of him to take precautions for his safety, then, contributory negligence could be attributed and it is not an inflexible rule that children could never be held guilty of contributory negligence. Reference in this connection was made by learned counsel to the decision reported in *E.Enjanadevi v. Arumugham, 1983 A.C.J. 625.*

6. Before proceeding to consider the aforesaid, submissions, it would be first necessary to advert to the question whether deceased Ravi could at all be called a child. From Ex.A-3, the School certificate relating to Ravi, it is clearly established that on the date of the accident, he was nearly 14 years of age. Presumably, on account of this, learned counsel for the appellant was emboldened to rely upon the definition of 'Child' occurring in Sec.2(c) of the Act. However, this definition would not be of any assistance, for, that had been enacted for the purposes of the Act, the object of which, is to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children. The expressions 'delinquent child' and 'neglected child' have been defined under Secs.2(j) and 2(l) of the Act. From this, it is clear that the definition of a 'child', a 'delinquent child' and a 'neglected child' occurring in the Act, have been enacted for the purpose of giving effect to the provisions of that act, providing for the education and rehabilitation, among others, of neglected or delinquent children, as defined in that Act. Having regard to the purpose for which the Act had been enacted, the definition therein, with reference to a 'child', cannot be pressed into service, to claim that the deceased in this case was a 'child' and could not, therefore, be held to have contributed to the accident by his own negligence. It would be appropriate at this stage to refer to *Winfield* and *Jolowicz* on Law of Tort (10th Edition, page 111). It has been stated that there is no age below which, as a matter of law, it can be said that a child cannot be guilty of contributory negligence. In Salmos and Heuston on The Law of Torts, 18th Edition, page 488, it has been pointed out that in cases, where contributory negligence is alleged against a child, it is the duty of the trial

Judge to rule, in each particular case, whether the plaintiff, having regard to his age and mental development, may properly be exacted to take some precautions for his own safety and consequently be capable of being guilty of contributory negligence and that would be a question of fact to be determined on evidence, whether he had fallen short of the standard, which might reasonably be expected from him, having regard to his age and development. The position has been summarised in Clerk & Elndsell on Torts, The Common Law Library Number 3 Fifteenth Edition, page 577, by stating that in considering whether a child has taken reasonable care for its own safety, regard must be had to its age, the circumstances of the case and the knowledge of the particular child of the perils to which the defendant's negligence has exposed him and there is no age, below which, as a matter of law, it can be said that a child cannot be guilty of contributory negligence. It would thus appear that merely on the basis of age, a conclusion regarding the contributory negligence, cannot be arrived at, but that would depend upon the facts, circumstances and the evidence available.

7. In this case, regarding the manner in which the accident took place, there is the evidence of P.W.3 stated to be an eye witness to the accident and the driver of the bus, R.W.1. In his evidence P.W.3 stated that, on the date of accident at about 9.30 or 10 O' clock, he had come to put his mother on the bus to Gingee and was standing near Periyar statue and at that time, the bus belonging to the 2nd respondent, came driven very fast from east towards west without sounding the horn and he heard a noise and ran and found that Ravi was caught in the rear wheel of the bus and the cycle was lying by his side. In his cross examination, P.W.3 admitted that he did not remember, in which bus he put his mother and that the accident took place to the east of the periyar statue. A suggestion that he did not witness the accident, was denied by him. In his further cross examination, he admitted that only after hearing the noise, he turned and saw and that the noise came from east of the place, where he was standing and that he could not say whether the boy went and hit against the bus and was caught under the wheel, or, the bus came and dashed against the boy. R.W.1 is the driver of the bus and in his evidence, he stated that the accident took place to the right side of the Periyar statue at the road junction. His further evidence was to the effect that he stopped the bus, in order to enable the passengers waiting at the left side, to board the bus and started it after the conductor gave whistle and at that time, a cyclist dashed against the right side rear wheel of the bus and fell down and he stopped the bus and got down and then gave the complaint to the police. R.W.1 also stated further that the traffic was heavy and that he parked the bus to the left side of the road and when the bus was about to move, the boy came and his and the wheel had not even completed one revolution. In the cross examination, R.W.1 deposed that the accident took place about 20 or 22 feet away from the statue on the right side and that he did not drive the bus at a high speed and without sounding the horn. R.W.1 also stated that no case was registered against him and the accident was not due to his rashness or negligence. The claimant, examined as P.W.1, stated in her evidence, that her son had studied upto the VI Standard and was employed under the Doctor, P.W.2, who had provided him with a cycle and that she did not know whether her son dashed against the rear wheel and her evidence is, therefore, not very helpful at all. It would be necessary to refer to the evidence of the employer of deceased Ravi, examined as P.W.2. He stated that the deceased had been employed under him for about 4 or 5 months prior to his death and the cycle involved in the accident, was his. From the evidence, referred to above, it is seen that deceased Ravi had studied upto VI standard and was aged about 14 years at the time of the accident and had been using the cycle of P.W.2 at atleast for 4 or 5 months prior to the accident. P.W.3 had clearly admitted in his evidence that he cannot say whether the bus hit the cyclist or the cyclist hit the bus and even according to his version, he turned and saw only after hearing the noise from the eastern side. The testimony of P.W.3 had not been believed by the tribunal for two reasons, *viz.*, (1) the improbability of P.W.3 standing near the Periyar statue for the purpose of putting his mother on a bus for Ginges, and (2) the hearing of the noise by P.W.3 and his having turned and seen thereafter. In so far as the first reason is concerned, the tribunal was not quite right, for, it is the evidence of R.W.1 that the bus was stopped to enable the passengers waiting on the left side of the road to board it and that was near the Periyar statue. However, in so far as the

second respondent is concerned, the tribunal was quite right in concluding that P.W.3 could not have actually witnessed the accident, for, even, according to his version, he did not actually see the accident taking place, but only after hearing the noise, he turned a saw. If follows that by the time P.W.3 heard the noise from the eastern side and turned and saw, the accident had happened and in that sense, P.W.3 could not have seen the accident happen so as to speak to the manner in which the accident took place. The evidence of R.W.1 would also show that the bus had not moved very far after picking up the passengers and had just started to move and at that time, the cyclist came on the rear and hit against the bus and that that area was subjected to heavy traffic. Though P.W.3 might not have actually witnessed the accident and R.W.1 had also not seen the accident, for, the cyclist, according to him, came from the rear and hit against the right side of the bus the indisputable fact is that the accident had taken place and the cyclist had lost his life instantaneously. The evidence of P.Ws.1 and 2 referred to earlier, would show that the deceased had been provided with a cycle by P.W.2 and considering the age of the deceased and the experience gained by him in driving a cycle, particularly, in that locality of heavy traffic, it follows that the accident could not have taken place, if the deceased had taken every care and precaution to observe the normal speed as well as the rules of the road, while driving the cycle. Likewise, R.W.1, while starting the stationary bus and moving on the main road, also must have taken care to see that there was no vehicle coming near the bus to its right and it is obvious that R.W.1 also failed to observe care and caution and that had led to the accident.

8. It would be appropriate in this connection to refer to some decisions, which have a bearing on this question. In *Srinivasan v. Parasivamurthy, A.I.R. 1976 Karn. 92*, the question arose, whether a boy of six, injured in an accident, could be guilty of contributory negligence. On the evidence, it was found that when the boy was standing just near a fact-path, the driver of the lorry struck the boy and that constituted a clear case of rash and negligent driving on the part of the owner of the vehicle. That decision cannot, therefore, be taken as laying down that merely because in that case the injured boy was six years old, contributory negligence cannot be attributed to him. In *Govinda Prasad v. Sujit Chowmick, A.I.R. 1978 Cal. 109*, a school going student of about 14 years of age, was found, on the evidence, to have contributed to the accident and the negligence was apportioned between the student and the conductor of the bus in the ratio of 1 : 2. In that case also it was found that the body, aged 14 years, tried to board the bus and just caught hold of the handle of the front door, when the conductor gave the bell and the bus started moving, resulting in the boy losing his hold and falling down and the rear wheel of the bus running over his right leg. In view of that evidence, the Calcutta High Court held, agreeing with the tribunal, that it was due to the negligence of the conductor of the bus and also the contributory negligence of the school boy, the accident had happened and the fixation of the proportion, was also quite justified. This case clearly illustrates that merely on the basis of age, it cannot be held that the contributory negligence should be ruled out. In *A.R.Gandhi v. A.K.Diwan, A.I.R. 1979 Guj. 14*, after referring to some English decisions the resulting position was summarised at page 20 thus:

> "A distinction must be necessarily drawn between children and adults when the question of contributory negligence arises, for, a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be unable to fend for himself or to be naturally ignorant of danger, or where in doing an act which contributed to the accident, he was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence. A child should be found guilty of contributory negligence only if it is established as a matter of fact on the evidence on record that he is of such an age and understanding as reasonably to be expected to take precautions for his own safety and the blame for the accident could be necessarily attached to him. In cases of road accidents, it must be borne in mind that a child is not possessed of the road sense or the experience of elders. Even if it transpires that he was taught road discipline either at home or at school and that, therefore, if he had bestowed some thought, he would have realized that it was his duty to take reasonable care for his own safety, still a normal child would not be held culpable in view of his propensity to forget

altogether what has been taught to him if something else is uppermost in his mind. A normal child is always momentarily forgetful of the perils of crossing and walking on a road, regretfully though, and under such circumstances, if he failed to notice even an on coming vehicle and got hurt by it, he cannot be held guilty of contributory negligence. In such a case, the question of the duty of the driver of the vehicle must be examined with greatest precision and unless the driver is in a position to show on establishment of primary facts that he was driving the vehicle in such a manner that he could have brought it to a standstill in case of emergency and that the accident was inevitable or unavoidable, the inference of his negligence and his alone must be raised almost as a matter of course."

After observing as above, the court proceeded to consider the evidence relating to the manner in which the accident took place and it was found that having regard to the nature of the vehicle, which was involved in the accident, and the fact that it came from behind without even sounding the horn and hit the boy, that was not a case, in which, such a boy can be expected to be careful for his own safety and the only inference that could be drawn was that the negligence was that of the driver of the vehicle alone. It is thus seen that ultimately, the question depends upon the appreciation of evidence relating to the manner, in which the accident took place and whether the victim and the driver of the vehicle, on their part, had taken every reasonable precaution in the matter of driving the vehicles and in observing the rules of the road and even if it is found, on the evidence, the victim boy had not taken every precaution reasonably expected of him, then, there is nothing to preclude the court from holding that he had also contributed to the accident by his own negligence. In the decision reported in *Delhi Transport Corporation v. Kumari Lalitha, A.I.R. 1982 Del. 558: 1983 A.C.J. 253,* strongly relied upon by learned counsel for the appellant, a girl of 8 years, was found by the tribunal to have contributed 20% to the accident, which was, on appeal vacated by a learned single Judge. On further Letters Patent Appeal, the question whether the girl of 8 years, could at all be blamed for the accident, on the ground of contributory negligence, it was pointed out that in considering whether a child had taken reasonable care for its own safety, regard must be had to the age of the child, the circumstances of the case and the knowledge of the particular child of perils to which the defendant's negligence has exposed her and that there is no age, below which, as a matter of law, it can be said that the child cannot be guilty of contributory negligence. The decision further proceeded to agree with the conclusion arrived at by the single Judge on an analysis of the evidence that the eight year old girl was not at all to be blamed for the accident on the ground of contributory negligence. It is also further significant that the girl could not have contributed to the accident, had also been concluded as found in para 10 of that judgment. Thus, the aforesaid decision does not in any manner support the very broad proposition put forward by learned counsel for the appellant that deceased Ravi, who was aged 14 years at the time of the accident, could not at all have contributed to the accident. It now remains to consider the only decision relied on by learned counsel for the respondents, reported in *E.Enjanadevi v. Arumugham, 1983 A.C.J. 625.* In that case, a boy aged about 12 years, was travelling on the carrier of a cycle, when he was knocked down from behind and run over. In the course of the claim proceedings, one of the questions, which arose, was regarding the rash and negligent driving of cycle and the tribunal recorded a finding that though the driver of the car, was rash and negligent in driving the vehicle, the accident was also owing to the contributory negligence on the part of the deceased and in that view, the negligence was apportioned at 70 : 30 between the driver of the car and the cyclist. In considering the propriety of the fixation of the proportion of the negligence and the liability for payment of compensation, it was pointed out on a consideration of the evidence that the cyclist was also negligent and the tribunal was right in the view it took that the car driver and the cyclist should be blamed for the accident, which could be apportioned at 70 : 30. This case also illustrates that the age of the victim cannot be the sole or exclusive guide to determine the question of contributory negligence in relation to an accident. In the light of the principles laid down in the aforesaid decisions and considering the available evidence regarding the manner, in which the accident took place, the tribunal cannot be stated to have committed any error in holding that the rash and negligent driving of the

cyclist Ravi and that of the bus by its driver, had caused the accident and that the negligence has to be apportioned at 50 : 50.

9. Learned counsel for the appellant next contended that the tribunal had fixed the amount of compensation awardable to the appellant at a low and meagre amount. Referring to the evidence of P.Ws.1 and 2, learned counsel submitted that deceased Ravi was earning not less than Rs.300 every month and considering his age at the time of his death and also the age of the claimant, it would be just, proper and fair that compensation, as claimed by the appellant, should be awarded to her. On the other hand, learned counsel for the respondents submitted that the tribunal was justified in awarding to the appellant a sum of Rs.18750 on the basis that the annual contribution of the deceased to the appellant could be determined at Rs.1500 and that too for 25 years and that the award does not deserve to be disturbed.

10. Though deceased Ravi was aged about 14 years at the time of his death, it is seen from the evidence of P.Ws.1 and 2 that he had been earning. According to P.W.1, the deceased had two sources of income, *viz.*, earning from his employment under P.W.2 and by rolling beedies in leisure time. P.W.1 stated that he was earning about Rs.300 in all. In cross-examination, P.W.1 was not able to give the name of the person, under whom, deceased Ravi was stated to have been rolling beedies. A suggested that deceased Ravi did not earn anything at all by rolling beedies, was denied by P.W.1. P.W.2 is a Homeopathic Doctor, under whom, the deceased was employed and according to him, the deceased was working under him for about 4 or 5 months between 8 a.m. and 12.30 p.m. and 4.00 p.m. to 8.30 p.m. and that he had paid him Rs.150 p.m. towards salary. In cross-examination P.W.2 had denied the suggestion that he did not pay to deceased Ravi Rs.150 p.m. by way of salary. Indeed, nothing has been elicited from P.W.2 to discredit his testimony that he was paying to the deceased Rs.150 p.m. In so far as the earnings of deceased Ravi from rolling of beedies are concerned, though P.W.1 was not in a position to name the person, under whom, the deceased was stated to have been rolling beedies, such earnings by the deceased are not improbable or unacceptable, particularly, having regard to the availability of leisure time for the deceased before 8 a.m. and between 12.30 and 4 p.m. and after 8.30 p.m. Though there is no evidence to establish that deceased Ravi was earning Rs.150 p.m. by rolling beedies, yet, having regard to the time that was available at his disposal, it is quite probable that part of it was devoted to the rolling of beedies and in that process, the deceased would have earned at least Rs.2.50 per day or Rs.75 p.m. in addition to the salary he was receiving from P.W.2. In other words, the total monthly earnings of the deceased could be fixed at Rs.225 and deducting one third, out of this, towards his personal expenses, the monthly contribution of the deceased to the appellant could be fairly, justly and reasonably be fixed at Rs.150 or the annual contribution at Rs.1,800. At the time of the death of Ravi, the appellant was aged about 35 years, and at best, the appellant could have expected here deceased son to have supported her for the next 25 years or at any rate upto her 60th year. In other words, the multiplier to be adopted in this case could be fixed at 25 and the loss of contribution to the appellant owing to the sudden death of her son Ravi in the accident, could be fixed at Rs.45,000. In view of the finding on the question of negligence, the amount payable to the appellant by way of compensation could be only one half of this amount, *i.e.*, Rs.22,500. In other words, the appellant would be entitled to recover from the respondents, compensation in a sum of Rs.22,500 together with interest at 12% p.a. on that amount from 15.10.1984 till date of payment, credit being given to payments, if any, made meanwhile. The civil miscellaneous appeal is allowed in part, to the extent indicated and the award of the tribunal will stand modified accordingly. There will be no order as to costs in this appeal.

B.S. ---- *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

C.R.P.No.1828 of 1991 *22nd November, 1991.*

G.Swaminatha Mudaliar and others ...*Petitioners*

v.

The Land Acquisition Officer-cum-Revenue Divisional Officer, Tirunelveli. ..*Respondent.*

(A) Land Acquisition Act (I of 1894), Sec.28 - Land of the petitioner acquired - Whether entitled to get interest on the amount of solatium.

(B) Civil Procedure Code (V of 1908), Secs.151 and 152 - Amendment of the decree - When can be allowed.

As regards the question whether the claimants are entitled to interest on solatium, the Supreme Court in a recent judgment in *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala, A.I.R. 1990 S.C. 2192,* has answered this question in the affirmative. *[Para 5]*

When the claimants are entitled in law to interest on compensation awarded that interest must be directed to be paid to them in the order of the Court. And if there is no such direction that will be indeed an accidental slip or omission. Therefore, it clearly comes within the purview of Sec.152, C.P.C. *[Para 6]*

Even otherwise, if for any reason it is to be held that Sec.152, C.P.C., is not attracted, even then the Court is bound to order payment of interest atleast under Sec.151, C.P.C. *[Para 7]*

Cases referred to:

Periyar and Pareekanni Rubbers Ltd. v. State of Kerala, A.I.R. 1990 S.C. 2192; Jayakrishna Mangaraj Mohapatra v. State of Orissa, A.I.R. 1976 Ori. 203; Nand Ram and others v. State of Punjab, A.I.R. 1982 P. & H. 184; Shree Vijay Cotton and Oil Mills Ltd. v. State of Gujarat, (1991) 1 S.C.C. 262.

P.Peppin Fernando, for Petitioners.

Swaminathan, Assistant Government Pleader, for Respondent.

The Court made the following

ORDER:- This civil revision petition arises out of an order passed by the trial court dismissing an application filed for amendment of the decree.

2. It appears in favour of the petitioners an award was passed by the Collector under the Land Acquisition Act for acquisition of his land. Dissatisfied with the amount granted by the Collector the petitioners filed Land Acquisition Original Petition 46 of 1988 in the Court for enhancement of compensation. The Court passed an order enhancing the compensation. Opposing that order the respondent-Government preferred an appeal to the High Court. Along with that a stay application was also filed. In that stay application the High Court passed a conditional order to the effect that stay is granted on condition of the Government depositing 50% of the enhanced compensation which the claimants will be entitled to receive. The claimants raised an objection stating that the amount deposited by the Government is less than the amount ordered to be deposited stating that the Government is liable to pay interest on the solatium amount also but the Government has not deposited that interest and they must be directed to deposit that amount also. But the Court held that in the decree it is not mentioned that the respondent-Government is liable to pay interest on solatium also and if the claimants are entitled to interest they have to get the decree suitably amended and that can be done only by the original court.

3. Thereupon the claimants filed C.M.P.No.1259 of 1991 in the High Court for modifying the stay order passed by it so as to enable the claimants to file an amendment petition. In that the High Court passed an order stating that the stay granted will not bar the claimants from filing a petition for amendment of the decree. After this modification of the stay order the claimants filed a petition in the original Court I.A.No.174 of 1990 for amendment of the decree. In that application the original Court ordered that the stay has been lifted only for filing a petition for amendment of the decree but the decree cannot be amended without amending the Judgment. It further held that the amendment sought for is not clerical or arithmetical mistake in Judgment and decree or errors arising therein from any accidental slip or omission and therefore the petition filed under Sec.152 cannot be maintained. On these findings the original Court dismissed the petition. As against that this Civil Revision Petition has been preferred.

4. As regards the finding of the original court that the order passed in C.M.P.No.1259 of 1991 is in respect of the amendment of decree only and not the Judgment also, the claimants filed C.M.P.No.11134 of 1991 in the High Court for clarification whether the said order passed in C.M.P.No.1259 of 1991 is for amendment of the Judgment also and the learned Judge has clarified by stating that the order is for amendment of the judgment also. In view of this clarification the finding of the original court that there is stay only with regard to filing of the petition for amendment of decree and not of Judgment has no force. As such in this C.R.P., we are concerned only with the question whether the amendment petition filed

under Sec.152 is not maintainable as held by the trial court.

5. As regards the question whether the claimants are entitled to interest on solatium, the Supreme Court in a recent Judgment in *Periyar and Pareekanni Rubbers Ltd. v. State of Kerala, A.I.R. 1990 S.C. 2192,* has answered this question in the affirmative. It is said as follows:

> "Therefore, we have no hesitation to hold that Sec.25(3) contemplates payment of interests on solatium to recompensate the owner of the land for loss of user of the land from the date of taking possession till date of payment into court. The word compensation has been advisedly used by the legislature. Accordingly we hold that the *appellant is entitled to interest on solatium.*" (*Italicised is mine*)

In view of this authoritive pronouncement of the Supreme Court there is no gainsaying that the claimants are entitled to interest on solatium.

6. Now, taking up the question whether the amendment petition is maintainable under Sec.152, C.P.C., Mr.P.Peppin Fernando, learned counsel for the claimants-petitioners herein submits that when in law the claimants are entitled to interest on solatium non-mention of interest on solatium in the order of the court in only accidental slip or omission and therefore the order can be amended under Sec.152, C.P.C. In support of this contention the learned counsel cites one decision of the Orissa High Court in *Jayakrishna Mangaraj Mohapatra v. State of Orissa and another, A.I.R. 1976 Ori. 203,* and another decision of Punjab and Haryana in *Nand Ram and others v. State of Punjab, A.I.R. 1982 P. & H. 184.* In the first decision it has been held that,

> "Statutory interest provided under Sec.28 of the Land Acquisition Act is an integral part of the decree to be passed by the Court and the Court, while determining compensation under the Act, has to award the same. An omission to award statutory interest is an error which can be cured by the Court in exercise of its power under Sec.152, C.P.C."

In the second case, wherein the decision in the first case has been referred to, it is said that,

> "Interest under Sec.28 is an integral part of compensation which is to be awarded by the Court. Omission in the judgment to award interest on compensation constitutes an accidental slip within the meaning of Sec.152, C.P.C. and can be rectified at any time."

I am in respectful agreement with these decisions. When the claimants are entitled in law to interest on compensation awarded that interest must be directed to be paid to them in the order of the Court. And if there is no such direction that will be indeed an accidental slip or omission. Therefore it clearly comes within the purview of Sec.152, C.P.C.

7. Even otherwise, I may add that if for any reason it is to be held that Sec.152, C.P.C. is not attracted, even then the Court is bound to order payment of interest atleast under Sec.151, C.P.C. In this connection an observation of the Supreme Court in yet another recent decision in "*Shree Vijay Cotton and Oil Mills Ltd. v. State of Gujarat, (1991)1 S.C.C. 262,*" is relevant to note :

> "The costs and interest under the Act if not awarded by the lower court can always be awarded by higher courts in any proceedings under the Act and to any party entitled to the same under the Act. The payment of interest is not dependent on any claim by the person whose land has been acquired. There can be no controversy or any lis between the parties regarding payment of interest. When once Sec.34 is attracted it is obligatory for the Collector to pay the interest. If he fails to do so the same can be claimed from the court in proceedings under Sec.18 of the Act or even from the appellate court/courts thereafter."

From these it is very clear that the claimants can seek for amendment of the decree and the order for directing the Government to pay interest to the claimants on the solatium amount.

8. In this view of the matter the Revision is allowed and the order and decree passed by the trial Court are amended as prayed for. There will be no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *K.S.Bakthavatsalam, J.*

C.R.P.No.242 of 1992 *5th February, 1992.*

S.Rajalakshmi and others *...Petitioners*
v.
Saradamani Kandappan and another *...Respondents.*

(A) Natural Justice - Principles of - Applicability to proceedings in Civil Courts - Order passed behind the back of the petitioner - Sustainability.
(B) Civil Procedure Code (V of 1908), Sec.151 - Dispute as to possession of land - Petitioners instituting suit and filing application praying for interim injunction - Application dismissed - Vacation Judge of High Court directing both sides to maintain status quo - Standing crops not to be harvested by both parties till orders were got from appellate court - First respondent filing petition for police protection - District court granting police protection - Order, if can be sustained.

The first respondent filed three suits against the petitioners on the file of the Original Side of the High Court. They were all dismissed. Appeals from that order are pending before the Appellate Side of the High Court. The petitioners instituted a suit in O.S.No.2291 of 1991 on the file of the District Munsif, Poonamallee and also filed I.A.No.3163 of 1991 praying for interim injunction restraining the respondent from interfering with the petitioner's peaceful possession of the suit lands. That application was dismissed. The petitioners preferred an appeal C.M.A.No.5 of 1992 before the Sub Court at Poonamallee. During Christmas vacation, the petitioners filed C.M.P.No.17240 of 1991 and the learned vacation Judge ordered that *status quo* should be maintained. It was further directed that the standing crops should not be harvested by both the parties till orders were obtained from the appropriate Court. Clarification was sought and on 14.1.1992, the court made it clear that it had not decided about the possession of the property. The first respondent filed I.A.No.30 of 1992 before the District Court, Chengalpattu praying to deploy a minimum of 50 police personnel to give protection to her life and property. The District Judge passed an interim order on 14.1.1992 granting police protection to the 1st respondent. This order was challenged in revision. It was contended that the District Judge had no jurisdiction to pass the impugned order and that it was not valid as it had been passed without serving notice on the petitioners.

Held:- An order passed behind the back of the petitioners, in the view of the court, is in violation of principles of natural justice. The Apex Court of the land has observed that the principles of natural justice will apply equally to the proceedings in the civil court also. *[Para 5]*

If the principles laid down in *G.Krishnan v. Smt.Thulasi Ammal, (1991)1 L.W. 513* are applied, the order passed by the learned District Judge, Chengalpattu in I.A.No.30 of 1992 in O.S.No.2291 of 1991 dated 14.1.1992 is erroneous in law and has to be set aside. *[Para 6]*

Cases referred to:

Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480; Sangram Singh v. Election Tribunal, Kotah, (1955)2 M.L.J. (S.C.) 13: (1955)2 S.C.R. 1: 1955 S.C.J. 431: A.I.R. 1955 S.C. 425; Balakrishna Udayar v. Vasudeva Ayyar, A.I.R. 1917 P.C. 71; T.B.Barret v. African Products Limited, 110 I.C. 299: A.I.R. 1928 P.C. 261; Venkatasubbiah v. Lakshminarasimham, A.I.R. 1925 Mad. 1274; G.Krishnan v. Smt.Thulasi Ammal, (1991)1 L.W. 513; K.G.Gopal v. K.R.Lilybai, (1991)1 L.W. 558; Sri Sambu Films v. M/s.Vijaya Pictures, (1991)1 L.W. 604.

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the District Court, Chingleput, dated 14.1.1992 and made in I.A.No.30 of 1992 in O.S.No.2291 of 1991 Principal District Munsif, Poonamallee.

Dadamirasi, Senior Counsel, for *S.Subbiah,* for Petitioners.

Krishnamurthy, Senior Counsel, for *G.R.Lakshmanan,* for Respondent No.1.

The Court made the following

ORDER:- The civil revision petition is filed against an order of the learned District Judge, Chingleput, passed in I.A.No.30 of 1992 dated 14.1.1992 exercising his powers under Sec.151 of Code of Civil Procedure and ordering police protection in favour of the first respondent herein.

2. The first respondent has filed three suits against the petitioners on the file of the original side of this Court and by a common judgment dated 29.11.1991 in C.S.Nos.95 and 170 of 1984 and 302

of 1989, they were disposed of by Arumugham, J. All the suits filed by the first respondent were dismissed. Subsequent to the said dismissal of the suits, appeals were filed by the first respondent and they are pending on the Appellate side of this Court. The petitioners instituted a suit in O.S.No.2291 of 1991 on the file of the District Munsif, Poonamallee and also filed I.A.No.3163 of 1991 praying for interim injunction restraining the first respondent from interfering with the petitioners' peaceful possession of the suit lands bearing S.Nos.13-16, 18-20 in Saidapet Taluk, Chingleput District. On 18.12.1991, the application praying for interim injunction was dismissed by the learned District Munsif, Poonamallee. Against the said order of the learned District Munsif, the petitioners preferred C.M.A.No.5 of 1992 before the Subordinate Judge at Poonamallee. Originally C.M.P.No.17240 of 1991 was preferred by the petitioners before this Court during Christmas vacation, and by an order dated 26.12.1991 the learned vacation Judge A.R.Lakshmanan, J. after hearing the learned counsel on both sides ordered that *status quo* as on date to be maintained till either or both parties obtain orders from the appellate court against the impugned judgment. The learned Judge has further directed that the standing crops shall not be harvested by both the parties till orders are obtained from the appropriate court and no new crops also shall be raised by the first respondent till then. Clarification was sought for by the first respondent herein by filing C.M.P.No.494 of 1991 and by order dated 14.1.1992, the learned Judge has made it clear that he has not decided about the possession of the property and observed that it is for the appellant in the proposed appeal to move the appellate court for necessary and appropriate order and further directed the Sub Court, Poonamallee to number the appeal filed by the petitioners without insisting upon the production of a certified copy of the decree and number the same, if it is otherwise in order. While matter stood thus, the first respondent herein filed I.A.No.30 of 1992 and made a sworn statement on 13.1.1992 before the District Court, Chingleput as if it is a petition under Sec.151, C.P.C. praying to deploy a minimum of 50 police personnel to give protection to her life and property more fully described in the schedule to the petition. It has been alleged before the learned District Judge, Chengalpattu by the first respondent herein that in view of Pongal holidays the petitioners herein will dispossess her and as such there is some urgency in the matter. It is contended by the first respondent before the learned District Judge, Chengalpattu that the petitioners will use force and expel the first respondent herein from the property. The learned District Judge, Chengalpattu passed an order on 14.1.1992, styling to be an interim order, till the appellate Forum hears the appeal filed by the first respondent herein. By the said order, the learned District Judge, Chengalpattu has granted police protection to the first respondent herein. This order is challenged before me.

3. Mr.Dadamirasi, the learned Senior Counsel appearing for the petitioners contends that the learned District Judge has no jurisdiction to pass such an order which is impugned herein. He further argues that even assuming for a moment, the learned Judge has jurisdiction the order passed by him is not valid since it has been passed without serving notice on the petitioners. It is contended by the learned Senior Counsel for the petitioners that the learned District Judge, Chengalpattu ought not to have entertained the petition without serving notice on petitioners. It is also pointed out by the learned senior Counsel that the petitioners/ having failed in their attempt to obtain an interim injunction, have preferred an appeal and as such the learned District Judge ought not to have entertained a petition praying for an interim injunction filed by the defendant in the suit. It is further pointed out that police is not a party either in the suit or in any of the proceedings. Apart from these contentions, the learned Senior counsel for the petitioners raised the question regarding the possession of the property and traced out the entire history of the earlier litigations between the parties.

4. Mr.R.Krishnamurthy, the learned Senior Counsel appearing for the first respondent contends that under the Civil Court Act, a reading of Secs.12 and 13 confer powers on the learned District Judge to pass interim orders and that considering the facts and circumstances of the case on hand, the order passed by the learned District Judge dated 14.1.1992 is reasonable and the learned District Judge has rendered justice to both the parties. It is also pointed out by the learned Senior Counsel that a learned Judge of this Court in *1939 M.L.J. 419*, has decided that an injunction can be

obtained by defendants in the suit under O.39, Rule 1 and as such it cannot be contended that no injunction can be obtained by defendants in the suit. According to the learned Senior Counsel, the orders of Lakshmanan, J. as well as the judgment passed by Arumugham, J. will clearly show that the first respondent is in possession of the property and as such the learned District Judge is right in granting police protection to the first respondent for a limited period.

5. I have considered the arguments of Mr.Dadamirasi, the learned Senior Counsel for the petitioners and of Mr.R.Krishnamurthy, the learned Senior Counsel appearing for the first respondent. The short question to be decided in this petition is whether the learned District Judge has got jurisdiction to pass orders granting police protection, exercising the power under Sec.151 of the Code of Civil Procedure on the facts of the case on hand. Here is a case where the first respondent has lost her litigation before the original side of this Court and appeals preferred against the said common judgment are pending. While so, the petitioners herein have filed an original suit before the District Munsif, Poonamallee along with an interim application for interim injunction and the interim injunction petition was dismissed and against the same an appeal was filed and it is pending. While it is so, it seems Christmas and Pongal holidays intervened. That is why the petitioners herein have approached this Court during Christmas vacation, and obtained an order from Lakshmanan, J., who was the Vacation Judge at that period. It is also seen that on 13.1.1992 the first respondent herein has sworn to an affidavit and filed before Lakshmanan, J. praying for a clarification of the order of the learned Judge passed on 26.12.1991. On the same day an affidavit was sworn to by the first respondent before the District Judge, Chengalpattu praying for police protection. I am not able to see that any reference is made in the affidavit filed before the learned District Judge, Chengalpattu stating that an application for clarification has been filed before this Court. So apparently when both these proceedings were taken, one before the learned District Judge, Chengalpattu and another before this Court, nothing prevented the first respondent herein from stating before the learned District Judge, Chengalpattu about the filing of a petition before this Court praying for a clarification of the order passed by Lakshmanan, J. dated 26.12.1991. Unfortunately, this has not been done. At the same time, an order giving police protection to the first respondent has been passed by the learned District Judge as mentioned hereinabove, even without giving notice to the petitioners before me, on the basis of a mere endorsement made by the learned counsel for the first respondent herein that the "notice could not be given to the other side as the counsel could not be seen or searched for service". An order passed behind the back of the petitioners, in my view, is in violation of principles of the natural justice. The apex court of the land has observed that the principles of natural justice will apply equally to the proceedings in the Civil Courts also. In *Charan Lal Sahu v. Union of India, A.I.R. 1990 S.C. 1480*, the Supreme Court has observed as follows: [at p.1541]

> "....In this connection, reference may be made to the decision of this Court in *Sangram Singh v. Election Tribunal, Kotah, (1955)2 M.L.J. (S.C.) 13: (1955)2 S.C.R. 1: 1955 S.C.J. 431: A.I.R. 1955 S.C. 425*. The Representation of the People Act, 1951 contains Sec.90 and the procedure of Election Tribunals under the Act was governed by the said provision. Sub-sec.(2) of Sec.90 provides that "subject to the provisions of this Act and of any rule made thereunder, every election petition shall be tried by the tribunal, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits". Justice Bose speaking for the court said that it is procedure, something designed to facilitate justice and further its ends, and cannot be considered as a penal enactment for punishment or penalties; nor a thing designed to trip people up rather than help them. It was reiterated that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that effect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there may be exceptions and where they are clearly defined these must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably

possible, in the light of that principle. At page 9 of the report, Justice Bose observed as under:

"But that a law of natural justice exists in the sense that a party must he heard in a court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar, A.I.R. 1917 P.C. 71* and especially in *T.B.Barret v. African Products Limited, A.I.R. 1928 P.C. 261,* where Lord Buckmaster said "no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence." Also *Hari Visnu's Case,* which have just quoted.

In our opinion, Wallace, J. was right in *Venkatasubbiah v. Lakshminarasimham, A.I.R. 1925 Mad. 1274,* holding that "One cardinal principle to be observed in trials by a court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing", and that "it follows that a party should not be deprived of that right and in fact the Court has no option to refuse that right, unless the Code of Civil Procedure deprives him of it".

"All civilised countries accept the right to be heard as part of the due process of law where questions affecting their rights, privileges or claims are considered or adjudicated....."

So this is a case where the impugned order has been passed without giving notice to the petitioners herein and on this ground, following the principle laid down in the abovementioned case, the impugned order has to be set aside."

6. That apart, Srinivasan, J. has dealt with the question of the power of the civil court under Sec.151, C.P.C. in *G.Krishnan v. Smt. Thulasi Ammal, (1991) 1 L.W. 513,* to give police protection. In that case, the learned Judge has exhaustively dealt with the question as to whether a civil court, in exercise of its inherent powers under Sec.151 of the Code of Civil Procedure, can issue directions to Police. The learned Judge has held that a direction to a police official though purporting to be one under Sec.151 of the Code of Civil Procedure, is really one for a mandatory injunction against the police official directing him to do a particular act and that such a direction cannot be issued by a civil court when the police official is not a party to the suit or proceeding and when he is not claiming under any of the parties to the suit. The learned Judge has further held that if it is only a question of protecting the possession of the party concerned, it is for him to apply to the police officials for necessary safeguards and if they fail to do their duties, he shall approach this Court under Art.226 of the Constitution of India. With respect, I agree with the views of Srinivasan, J. in the abovementioned case and if those principles are applied, I am of the view that the order passed by the learned District Judge, Chengalpattu in I.A.No.30 of 1992 in O.S.No.2291 of 1991 dated 14.1.1992 is erroneous in law and has to be set aside. At the same time, two decisions of Ratnam, J., which are reported in *K.G.Gopal v. K.R.Lilybai, (1991) 1 L.W. 558,* and in *Sri Sambu Films v. M/s.Vijaya Pictures, (1991) 1 L.W. 604,* are referred to me to contend there is a difference in the views expressed by Srinivasan, J. in the abovementioned case. A reading of the decisions of Ratnam, J. and Srinivasan, J. mentioned hereinabove will clearly show that there is no difference of opinion or no contrary views have been expressed. In both the cases decided by Ratnam, J. there was an order of injunction in favour of the petitioners therein and in such circumstances the learned Judge has held that the order of injunction can be enforced with the aid of police as follow up action. As I am deciding the issue mainly on the question of jurisdiction and on a question of law, I am not inclined to enter into the merits of the case and it is not necessary for me to enter into the merits of the case at this stage. So, for the reasons stated above, on the grounds that the learned District Judge has passed the impugned order behind the back of the petitioners and also on the ground that he has no jurisdiction to pass orders under Sec.151, C.P.C. the impugned order is set aside and the civil revision petition will stand allowed. However, it is open to the first respondent to seek police protection, if advised under Sec.145 of the Crl.P.C. However, there will be no order as to costs.

B.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *D.Raju, J.*

W.P.No.12091 of 1991 *6th February, 1992.*

D.Pandi Naicker ...*Petitioner.*

v.

The Collector of Tirunelveli, Kattabomman District and others ...*Respondents.*

(A) Limitation Act (XXXVI of 1963), Sec.5 - Tamil Nadu Minor Mineral Concession Rules, 1959 - Applications under Rules to Collector - Collector not a court - Cannot condone delay in making applications invoking provision of Limitation Act.

(B) Tamil Nadu Minor Mineral Concession Rules (1954), Rule 9(2) (as amended by G.O.Ms.No.764, Industries (K-1) Dept., dated 19.8.1988) - Amendment is not retrospective but prospective - Applications made for renewal after amendment came into force - Renewal will be governed only by amended Rule.

The petitioner was granted a quarry lease for quarrying rough stones in S.Nos.270/1, 391/1 and 1091/1-A of Vikramasingapuram. The lease expired on 30.6.1989. According to Rule 9(2) of the Tamil Nadu Minor Mineral Concession Rules, 1959 the application for renewal of the licence had to be made 60 days prior to the date of expiry of the lease. But the rule was amended by G.O.Ms.No.764 Industries dated 19.8.1988 and an application for renewal of the lease had to be made within three months prior to the date of expiry of the lease. The petitioner made an application for renewal on 17.4.1989. It was rejected as not having been made within three months prior to the date of expiry of the lease. He filed a Writ Petition for quashing the order contending that the Collector should have invoked Sec.5 of the Limitation Act to condone the delay and that the amendment to Rule 9(2) could not be given retrospective effect in the absence of such power specifically conferred on the Government under the Act itself.

Held:- The plea based upon the applicability of Sec.5 of the Limitation Act, 1963 has been specifically considered by a Division Bench of this Court in *Easwaramoorthy and others v. The Government of Tamil Nadu and others, W.P.Nos.8073 to 8077 of 1989*, and repelled by the learned Judges of the Division Bench. It has also been held that since the Collector before whom the application has to be filed is not 'Court', the question of invoking the provisions or applying the Limitation Act, 1963 does not arise at all. The decision of the Division Bench completely answers the issues raised before the Court by the petitioner. *[Para 7]*

The plea that the amendment introduced in G.O.Ms.No.764, Industries (K-1) Department, dated 19.8.1988 published in the Tamil Nadu Government Gazette, dated 21.9.1989 is sought to be given retrospective effect to deprive the petitioner of his vested right is wholly misconceived and does not merit acceptance. The amendment introduced to the rule in question is only prospective and it deals with the time within which an application for renewal of the lease has to be made. The application for renewal of a lease could arise only in respect of a period subsequent to the period for which the original lease has been granted. The lease expired only on 30.6.1989. As per the terms of the rule prior to its amendment, this application should have been made on or before 1.5.1989; but this rule was properly and validly amended as early as on 19.8.1988 and published on 21.9.1988 and inasmuch as the amended rule came into force long before the right to apply for renewal itself accrued to the petitioner, the new rule only shall govern the case on hand. Even assuming that as per the unamended rule, the petitioner could have applied for renewal on 1.5.1989, the amended law which has been brought into existence even long before this date could not be eschewed from consideration or ignored and the petitioner if he wants to have the privilege of renewal must strictly comply with the conditions prescribed therefor. It is not the claim of the petitioner, nor could it be, that there was any promise or any such promise. Could be deemed to have been made at the time of the grant of the original lease that there will be no alteration of the rules in any respect. The old Rule 9(2) of the rules does not survive its amendment and on and from the date of the amendment it is only the new and amended rule that survived and could be said to be in force for prospective application in respect of all cases which come up for consideration thereafter before the statutory authority designated for the purpose. Consequently, the plea based upon the grievance of retrospectivity and alleged

deprivation of rights have no basis in law.

[Paras 8 and 9]

Cases referred to:

State of Madhya Pradesh and others v. Orient Paper Mills Ltd., A.I.R. 1977 S.C. 687: (1977)2 S.C.R. 149: (1977)2 S.C.C. 77; Ramesh Chander v. Veena Kaushal, A.I.R. 1978 S.C. 1807: (1978)4 S.C.C. 70: 1978 S.C.C. (Crl.) 508; Jamandass v. Gokuldass, A.I.R. 1984 Raj. 8; Punjab University v. Subash Chander, A.I.R. 1984 S.C. 1415: (1984)3 S.C.C. 603; State of Tamil Nadu v. Hind Stone, A.I.R. 1981 S.C. 711: (1981)2 S.C.C. 306.

Petition under Art.226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records relating to the proceedings of the 1st respondent in K.Dis.1184 of 1989, dated 3.8.1989 and the orders passed by the 2nd respondent in R.C.No.4647/81/1990, dated 10.3.1990 and the order passed by the 3rd respondent in G.O.(D) 504, dated 6.5.1991 quash the said orders direct the respondents to consider the renewal application filed by the petitioner on merits.

V.Selvaraj, for Petitioner.

V.Raghupathy, Additional Government Pleader, for Respondents.

The Court made the following

ORDER:- The above writ petition has been filed for the issue of a writ of *certiorarified mandamus* to call for the records and quash the proceedings of the first respondent in K.Dis.No.1184 of 1989, dated 3.8.1989 of the second respondent in Rc.No.4647/81/90, dated 10.3.1990 and of the third respondent in G.O.(D) No.504, dated 6.5.1991 and consequently direct the respondents to consider the renewal application filed by the petitioner on merits.

2. The petitioner in the affidavit filed in support of the writ petition claims that he was the successful bidder and consequently he was granted a quarry lease for quarrying rough stones in Survey Nos.270/1, 391/1 and 1090/1A of Vikramasingapuram, Ambasamudram Taluk, Tirunelveli Kattabomman District for faslis 1396, 1397 and 1398, that the lease expired on 30.6.1989, that the terms and conditions of the lease are governed by the confirmation Order as well as the lease deed executed by the parties, that before the expiry of the lease, the petitioner made an application for its renewal on 17.4.1989 agreeing to pay the enhanced rent of 10 per cent over the previous year's rent as provided under Clause 10 of the Confirmation Order and that, while the said application for renewal was pending, the first respondent notified on 16.6.1989 the auction of the quarry fixing the date of auction on 15.11.1989. It is stated that the auction did not take place and got postponed. Aggrieved against the action of the District Collector in bringing the quarry to auction, the petitioner filed W.P.No.8561 of 1989 and by an order dated 13.7.1989, this Court ordered the writ petition by issuing a direction to hold up the auction till the disposal of the application filed by the petitioner for renewal and till such disposal, the petitioner will not be disturbed from carrying on his quarrying operations It appears that the District Collector again notified the quarry for auction on 15.11.1989 and that the petitioner raised objections to the said auctions and it was at that stage by a letter dated 25.1.1990 claimed to have been served on the petitioner on 26.1.1990 it was informed that by an order dated 3.8.1989 the application for renewal was rejected on the ground of delay. The petitioner would claim that the order dated 3.8.1989 was never served on the petitioner, though it was claimed by the authorities to have been sent by Registered Post with Acknowledgment Due. While claiming that the petitioner came to know of all these only on receipt of the letter dated 25.1.1990. It is alleged that the order dated 3.8.1989 should have been brought into existence after 15.11.1989 when the petitioner is said to have objected to the proposed auction.

3. The petitioner further contends in the affidavit that the application was rejected solely on the ground that it was time barred, that originally the rules provided for the filing of the renewal application 60 days prior to the date of the expiry of the lease, that the said rule was so amended subsequently to stipulate that the renewal application shall be filed within three months from the date of expiry of the lease, that the petitioner was not aware of the said amendment, that the delay in filing the application was neither wilful nor wanton but due to the *bona fide* mistakes as stated above, and that as against the order dated 3.8.1989 communicated to the petitioner on 26.1.1990, the petitioner filed an appeal to the second respondent. It was again rejected on 10.3.1990 on the ground that the time prescribed is not only mandatory but also a condition to obtain the renewal

of the lease and consequently, the same cannot be condoned. The Appellate Authority seems to have referred to the decision made in W.A.No.575 of 1989 and thereupon the petitioner filed a further appeal to the third respondent on 9.4.1990 which also came to be rejected on 6.5.1991 on the ground that the application for renewal should have been made before 1.4.1989 and that the order rejecting the renewal was in order.

4. On the above facts and circumstances, the petitioner contends that though Rule 9(2) of the Tamil Nadu Minor Mineral Concession Rules, 1959 had been amended on 19.8.1988, the provision that existed on 28.1.1986 which is the date of the grant of the original lease in favour of the petitioner alone should apply and the application for renewal filed within two months from the date of the expiry of the lease should be treated as having been filed in time and the claim for renewal is to be decided on merits. It is also contended that the amendment to Rule 9(2) of the rule cannot be given retrospective effect so as to take away the existing accrued rights of a longer period of limitation and that the State Government which is the rule making authority under Sec.15 of the Act cannot make a retrospective amendment in the absence of such power specifically conferred under the Act itself. The respondents, according to the petitioner, committed an error in assuming that the period prescribed in Rule 9(2) of the rules is mandatory and the delay cannot be condoned, since according to the petitioner, Sec.5 of the Limitation Act is applicable and condonation of delay is possible, if sufficient cause is shown. It is also contended that the decision relied upon by the Appellate Authority does not apply to the facts of the case and, in any event, that decision requires reconsideration in the light of Sec.5 of the Limitation Act, the applicability of which, it is claimed, has not been considered in that decision.

5. The first respondent has filed a counter affidavit in which the fact relating to the grant of mining lease is admitted, but it is stated in the counter affidavit that the writ petitioner in the appeal before the Government has stated that he was not doing quarrying operation after he took possession of the quarry though he will contend to the contrary in the affidavit filed in the writ petition. It is stated in the counter affidavit that the application dated 17.4.1989 for renewal was received in the Office of the first respondent on 20.4.1989, that in the meantime, the petitioner moved this court in W.P.No.8561 of 1989, that thereafter, the first respondent rejected the renewal application on 3.8.1989 and the copy of the same was sent by Registered Post with Acknowledgment Due on 4.8.1989. It is also claimed that the said registered letter was returned to the first respondent's Office with remarks by the Postal Authorities "left Madras without instructions on 12.8.1989" and that the same indicated only a deliberate evasion to receive the copy and consequently, the allegations that the communication dated 3.8.1989 should have been brought into existence after 15.11.1989 has no basis and is untenable. It is also contended that in the face of an admission by the writ petitioner himself that the renewal application was not preferred in time, the plea that he was not aware of the amendment relating to renewal is untenable since ignorance of law is also no excuse. The statutory requirement stipulated under Rule 9(2) of the rules as per the amendment applies to the case on hand and the plea to the contrary that the rights of parties are to be decided according to the laws which existed as on 28.10.1986 when the lease was granted is not correct and that such a claim cannot be sustained. It is also claimed that the period prescribed in Rule 9(2) is mandatory and that there is no provision for condonation and the plea based on the applicability of the Limitation Act is untenable. The first respondent also states that the petitioner is not continuing in possession and as a matter of fact for the illicit quarrying, a penalty of Rs.1225 was levied by the first respondent by his proceedings dated 1.4.1991 and the writ petitioner remitted the penalty on 15.7.1991. Consequently, it is contended that the writ petition has no merits and deserves to be dismissed.

6. The case law relied upon before me by the learned counsel appearing on either side in support of their submissions will be now taken up for consideration. The decision in *State of Madhya Pradesh and others v. Orient Paper Mills Ltd., A.I.R. 1977 S.C. 687: (1977) 2 S.C.R. 149: (1977) 2 S.C.C. 77,* was one where the Supreme Court. On the terms and conditions of the lease of forest area for cutting of bamboo and salai wood from the leased forest area held that in truth and substance the transaction amounted to a sale. The observations made with reference to the amending bill fastening *de novo* liability made in the said case have no

application to the case on hand. Similarly, the decision in *Ramesh Chander v. Veena Kaushal, A.I.R. 1978 S.C. 1807: (1978)4 S.C.C. 70: 1978 S.C.C. (Crl.) 508,* also had no relevance whatsoever to the point for consideration in this case. The decision in *Jamandass v. Gokuldass, A.I.R. 1984 Raj. 8,* is one where a Division Bench of the Rajasthan High Court has held that the provisions of Sec.6 as amended by the Amending Act 14 of 1976, being not retrospective in operation will not be applicable to suits or proceedings pending when Ordinance 26 of 1945 came into force. The observations in this case are also wholly irrelevant for the case on hand. The decision in *Punjab University v. Subash Chander, A.I.R. 1984 S.C. 1415: (1984)3 S.C.C. 603,* is one wherein the apex Court while considering the case of a candidate who joined M.B.B.S., Course in 1965 but appeared for final examination only in 1974 and the claim of such candidate that the subsequent amendment in 1970 reducing the percentage of grade marks will not apply to him held as hereunder:

> "We do not agree with the learned Judges of the Full Bench of the High Court that there is any element of retrospectivity in the change brought about by the addition of the exception to Rule 1. 1 of the Calendar for the year 1970. "Retrospective" according to the shorter Oxford English Dictionary. Third Edition, in relation to Statutes etc. means "Operative with regard to past time". The change brought about by the addition of the exception to Rule 2.1 does not say that it shall be operative with effect from any earlier date. If is obviously prospective. It is not possible to hold that it is retrospective in operation merely because though introduced in 1970 it was applied to Subash Chander, respondent 1, who appeared for the final examination in 1974, after he had joined the course earlier in 1965. No promise was made out could be deemed to have been made to him at the time of his admission in 1965 that there will be no alteration of the rule or regulation in regard to the percentage of marks required for passing any examination or award relating thereto which were in force at the time of his admission would continue to be applied to him until he finished his whole course." [Para 11]

Again in paragraph 12, it has been held by the learned Judges as follows:

> "Therefore, we are clearly of the opinion that there is no question of the change in the rule made in the year 1970 having retrospective operation merely because it was applied in 1974 to Subash Chander who had joined the M.B.B.S. course in 1965 when the rule regarding award of grace marks was different. In these circumstances, we affirm the view of D.K.Mahajan and P.C.Jain, JJ. expressed in *Sewa Ram v. Kurukshetra University, L.P.A.No.97 of 1967, dt.17-7-1968* and disapprove the view taken by the learned Judges of the Full Bench in the decision under appeal in this case and hold that the University was right in holding that Subash Chander, respondent 1, was not entitled to 16 grace marks under the old rule but was entitled to only 4 grace marks under the new rule and had therefore not passed the examination in Midwifery."

7. The first appellate authority itself has referred to the following two judgments of this Court in *P.Manivannan v. The Commissioner and Secretary to Government Industries Department and another, W.A.No.575 of 1989 dated 19.7.1989* and *A.Easwaramoorthy and others v. The Government of Tamil Nadu and others, W.P.Nos.8073 to 8077 of 1989 dated 19.10.1989,* in support of the stand taken for the respondents. The above two decisions of a Division Bench of this Court are not only directly on point but also are in respect of the very subject matter in issue and the applicability of the very amendment to Rule 9(2) of the Rules to an almost similar case. In the first of the judgments referred to above, it has been held that the prescription relating to the time within which the application for renewal has to be made is mandatory in nature and there is no question of condoning the delay. In the second of the judgments, the Division Bench of this Court held that the prescription of the time within which the application for renewal has to be made is not only mandatory but it is not a period of limitation but only a condition and as such there is no question of condonation from compliance with the condition stipulated. The plea based upon the applicability of Sec.5 of the Limitation Act, 1963 has also been specifically considered and repelled by the learned Judges of the Division Bench. It has also been held that since the Collector before whom the application has to be filed is not "Court", the question of invoking the provisions or applying the

Limitation Act, 1963 does not arise at all. The decision of the Division Bench, in my view, completely answers the issues raised before me against the petitioner. Yet, there is an attempt for the petitioner, to relentlessly pursue by contending that the amendment issued in 1988 could not be applied retrospectively to the case of the petitioner and that it is only the rules as they stood on the date of the grant of the original lease in 1986 that should apply to consider the claim of the petitioner and that the application to the case on hand of the amended Rules takes away the rights of the petitioner for renewal.

8. The plea that the amendment introduced in G.O.Ms.No.764, Industries (K1) Department, dated 19.8.1988 published in the Tamil Nadu Government Gazette, dated 21.9.1988 is sought to be given retrospective effect to deprive the petitioner of his vested right is wholly misconceived and does not merit acceptance. The amendment introduced to the rule in question is only prospective and it deals with the time within which an application for renewal of the lease has to be made. The application for renewal of a lease could arise only in respect of a period subsequent to the period for which the original lease has been granted. The lease expired only on 30.6.1989. As per the terms of the rule prior to its amendment the application could have been made on or before 1.5.1989; but this rule was properly and validly amended as early as on 19.8.1988 and published on 21.9.1988 and inasmuch as the amended rule came into force long before the right to apply for renewal itself accrued to the petitioner, the new rule only shall govern the case on hand. Even assuming that as per the unamended rule the petitioner could have applied for renewal on 1.5.1989, the amended law which has been brought into existence even long before this date could not be eschewed from consideration or ignored and the petitioner, if he wants to have the privilege of renewal must strictly comply with the conditions prescribed therefor. The decision of the Supreme Court reported in *A.I.R. 1984 S.C. 1415*, referred to supra squarely answers the claim of the petitioner, against him.

9. It is not the claim of the petitioner, nor it could be, that there was any promise or any such promise could be deemed to have been made at the time of the grant of the original lease, that there will be no alteration of the rules in any respect. The apex Court in *State of Tamil Nadu v. Hind Stone, A.I.R. 1981 S.C. 711: (1981)2 S.C.C. 306*, while considering the effect and implication of an amendment issued in Rule 8-C of the Rules in respect of applications filed before and even pending on the date of the amendment held that no one has a vested right in matters of the kind and the application has to be considered in the light of the rules in force at the time of consideration. That apart, the apex court, has repeatedly held that when a rule or amendment is given effect only from the date when it was made or promulgated and not from an earlier date, merely because it may effect or govern existing cases or situations, it cannot be said to be on that account retrospective. The old rule 9(2) of the rules does not survive its amendment and on and from the date of its amendment it is only the new and amended rule that survived and could be said to be in force for prospective application in respect of all cases which come up for consideration thereafter, before the statutory authority designated for the purpose. Consequently, the plea based upon a grievance of retrospectivity and alleged deprivation of rights have no basis in law.

10. For all the reasons stated above, in my view, the impugned orders do not suffer any patent error of law or perversity of approach and I see no justification to interfere with the impugned orders. The writ petition, therefore, fails and shall stand dismissed, but in the circumstances, there shall be no order as to costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.Nos.410 and 411 of 1992

19th February, 1992.

Ramachandran ...*Petitioner*

v.

Janardhanam and others ...*Respondents.*

Civil Procedure Code (V of 1908), O.13, Rule 2(1) and O.7, Rule 18 - Documents - Production of - Stage of.

O.13, Rule 2(1) is mandatory and it says that documents shall not be received unless good cause is shown to the satisfaction of the court for the non-production thereof at an early stage. A similar rule is found in O.7, Rule 18, C.P.C. Under that Rule, a document which ought to be produced in court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint and which is not produced or entered accordingly shall not, without the leave of the court, be received in evidence on behalf of the plaintiff at the hearing of the suit. Thus the Code of Civil Procedure compels the party to file a list of documents either along with the plaint or at an early stage within the time prescribed therefor. It is brought to the notice of the court that in spite of the Rules, courts are taking it for granted that as and when documents are produced before the court before the conclusion of the trial, then can be taken on file. The courts should desist from doing so. The courts should keep in mind the mandatory rules of the Code of Civil Procedure and act strictly in accordance therewith. *[Para 3]*

Petitions under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Villupuram, dated 9.1.1992 and made in I.A.Nos.847 of 1991 and 949 of 1991, respectively in O.S.No.145 of 1988.

P.Shanmughant, for Petitioner.

The Court made the following

ORDER:- These two revisions are directed against the orders of the court below granting permission under O.13, Rule 2, C.P.C., to the respondent to file additional list of documents. Learned counsel submits that in C.R.P.No.410 of 1992 an affidavit was filed setting out some reason for the delay in filing the documents. But, sufficient cause is not shown for producing the documents at a late stage. He submits that in C.R.P.No.411 of 1992 the respondent did not even file an affidavit in support of the petition to explain the delay in filing the documents. In the typed set filed by him a copy of the petition is included. The petition refers to an affidavit accompanying the same. The petition is dated 9.10.1991. In the counter-affidavit filed by the petitioner he has categorically stated that no affidavit was filed along with the petition and no affidavit was served on him. Yet, the order of the court below does not consider the question as to whether an affidavit was filed or not.

2. The court below does not seem to have borne in mind the provisions of O.13, Rule 2, Sub-rule (1), C.P.C. The rule reads thus:

> "No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for the non-production thereof, and the court receiving any such evidence shall record the reasons for so doing."

3. The rule is mandatory and it says that documents shall not be received unless good cause is shown to the satisfaction of the court for the non-production thereof at an early stage. A similar rule is found in O.7, Rule 18, C.P.C. Under that Rule a document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the court, be received in evidence on behalf of the plaintiff at the hearing of the suit. Thus the Code of Civil Procedure compels the party to file a list of documents either along with the plaint or at an early stage within the time prescribed therefor. It is brought to my notice that in spite of the Rules courts are taking it for grated that as and when documents are produced before the court before the conclusion of the trial they can be taken on file. The courts should desist from doing so. The courts should keep in mind the mandatory rules of the Code of Civil Procedure and act strictly in accordance therewith.

4. In the present case, the orders of the court below do not disclose the application of mind by the court to the Rules in question. But, I am not inclined to interfere in these revision petitions for the reason that the suit is of the year 1988 and it is already more than three years. Under the proviso to Sec.115(1), C.P.C., the High Court shall not vary or reverse any order made in the course of the suit or other proceedings except where (a) the order if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings, or (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. In view of the said proviso I am dismissing the revision petitions. However, I direct the Subordinate Judge,

Villupuram to follow the Rules prescribed in the Code of Civil Procedure strictly in future.

B.S. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.No.14991 of 1991 *12th February, 1992.*

Dr.Shivram Raghuram Singh ...*Petitioner*

v.

The Director General of Health Services, Government of India and others ...*Respondents.*

Constitution of India (1950), Art.226 - Relief - Court can mould prayer to suit the occasion.

It is settled law though the prayer asked for by the petitioner cannot be given straightaway, to suit the occasion, the court can mould the prayer. *[Para 5]*

Case referred to:

Sadayappan v. The Director General of Health Services, Government of Tamil Nadu, 1990 Writ L.R. 16.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents 1 and 3 herein to admit the petitioner herein in D.C.H. Two years courses (Diploma in Child Health) for the academic year 1991 in any one of the Medical Colleges with residentship and stipend where D.C.H. Course is recognised by the Medical Council of India, as the petitioner having been selected for the D.C.H. Course by the first respondent on merit basis as per order No.U.12020/1/91, M.E.C., dated 2.5.1991.

R.Gandhi, Senior Counsel, for *C.Nelson* and *Thenkodi Nelson,* for Petitioner.

Noorjahan Razack, Additional Central Government Standing Counsel, for Respondent Nos.1 to 3.

The Court made the following :

ORDER:- The prayer in the writ petition is as follows:-

"To issue a writ, order or direction, more particularly in the nature of a writ of *mandamus* or any other appropriate writ directing the respondents 1 to 3 herein to admit the petitioner herein in D.C.H. Two years course (Diploma in Child Health) for the academic year 1991 in any one of the Medical Colleges with residenship and stipend where D.C.H. Course is recognised by the Medical Council of India, as the petitioner having been selected for the D.C.H. Course by the first respondent on merit basis as per order No.U.12020/1/91, M.E.C., dated 2.5.1991."

The petitioner after passing the M.B.B.S. Degree applied for the selection of Post Graduate Course before the second respondent herein and wrote an entrance examination in the month of January 1991. The petitioner applied for (1) M.D.Paediatrics, (2) Diploma in Child Health and (3) M.D.(Anaesthesia) according to order of preference and opted for the courses which are as follows:

1.	N.H.L.	Medical College	Ahmedabad	B-28
2.	G.S.	Medical College	Bombay	B-25
3.	B.J.	Medical College	Pune	B-23
4.	S.M.S.	Medical College	Jaipur	B-15
5.	B.J.	Medical College	Ahmedabad	B-10
6.	M.P.Shah	Medical College	Jamnagar	B-12
7.	Dr.V.M.	Medical College	Sholapur	B-34
8.	M.L.B.	Medical College	Jhansi	B-43

The petitioner was successful in the entrance examination with merit number 811 in the All India basis as per the communication communicated by the second respondent. By an order dated 2.5.1991, the first respondent communicated to the petitioner that he has been selected for admission to Diploma in Child Health (hereinafter referred to as the D.C.H.) at S.M.S. Medical

College, Jaipur directing the petitioner to report before the Principal of the concerned Institution within 3 weeks. The petitioner joined the said course,but however, finding that D.C.H. Course in S.M.S. Medical College, Jaipur is not recognised by the All India Medical Council on 23.5.1991 submitted a representation to the first respondent herein requesting him to admit the petitioner in a recognised Medical College. It is also stated in the affidavit that the Principal of the S.M.S. Medical College, Jaipur have given a certificate stating that, D.C.H. Course of his college has not yet been recognised by the Medical Council of India. It is to be stated here that this fact has not been given in the "Bulletin of Information" given to the candidates. So by communication dated 25.9.1991, a seat was allocated to the petitioner to N.H.L. Medical College, Ahmedabad for D.C.H. Course cancelling the allotment made in S.M.S. Medical College, Jaipur. However, the petitioner found that what is available in the said college is Diploma in paediatrics and not D.C.H. Course, according to the re-allotment order. The petitioner alleges in the affidavit that having obtained Merit No.811, in the All India Selection, he is entitled to get admission in any of the recognised Colleges of his choice and originally he was admitted in unrecognised D.C.H. Course and now the petitioner is being admitted to a different course which is now allotted to him by order dated 25.9.1991. The petitioner also alleged in the affidavit that a similar issue has been issued by a Division Bench of this Court in *Sadayappan v. The Director General of Health Services, Government of Tamil Nadu, 1990 Writ L.R. 16,* wherein it has been stated that admission to students in unrecognised Institutions cannot be given. In the above-mentioned case, the Division Bench of this court has also directed the respondents therein to allot a seat to the petitioner therein in any of the colleges in which he has given option. Now the petitioner before me praying for a writ of Mandamus to direct respondents 1 to 3 to admit him in D.C.H. Course for the academic year 1991 in any of the Medical Colleges with residenship and stipend where D.C.H. Course is recognised by the Medical Council of India as the petitioner having been selected for D.C.H. Course on merit basis. The petitioner also alleges that in Bangalore Medical College there is a vacancy in D.C.H. Course and that even assuming that there is no vacancy, respondents 1 to 3 are duty bound to allot a seat in D.C.H. as per the rank obtained by the petitioner. With these allegations, the petitioner is before me with the prayer as stated supra.

2. A counter affidavit has been filed by the first respondent claiming that as per the directions of the apex Court of the land, the respondent Directorate is to allocate the candidates to the respective Medical Colleges/Institutions on the merit-cum-preference-cum eligibility. It is further claimed in the counter affidavit that every candidate was allowed to fill up a maximum choice of six subjects and eight colleges, that the petitioner has qualified in the All India P.G.Entrance Examination 1991 and secured 811 rank. It is also stated in the Counter Affidavit that the petitioner exercised the choices of Subjects and colleges in his application which run as follows:

	Subject
1.	M.D. (Paediatrics)
2.	D.C.H. (2 Years)
3.	M.D. (Anaesthesia)
4.	D/Anaesthesic (2 years)

	College
1.	N.H.L. M.C., Ahmedabad
2.	G.S.M.C. Bombay
3.	J.B. M.C. Pune
4.	S.M.S. M.C. Jaipur
5.	B.J.M.C. Ahmedabad
6.	H.P.Shah M.C.Jamnagar
7.	Dr.V.M.M.C. Sholapur
8.	M.L.B. M.C. Jhansi

It is also stated in the counter affidavit that in the first list that the petitioner was allotted D.C.H. at S.M.S., M.C. Jaipur on 2.5.1991, and that at the request of the petitioner by communication dated 25.9.1991, he was allotted admission to N.H.L., M.C. Ahmedabad of his first choice. It is also claimed in the counter affidavit that the petitioner has been reallocated as per the request of the petitioner, that the change in choice of subject and college exercised by the petitioner cannot be

allowed in view of the directions of the Supreme Court that a candidate can give only upto six subjects and eight colleges choice. It is pointed out in the counter affidavit that no candidate lower in merit than the petitioner has been allotted any subject in colleges opted by the petitioner overlooking the claim of the petitioner. It is also claimed in the counter affidavit that the petitioner's case cannot be considered for allotment at Bangalore Medical College or in any other college for D.C.H. or M.D. (Paediatrics) for which the petitioner has not given his option in his original application form. It is also pointed out that if there is any consideration of the petitioner's request it will be in contravention of the directions of the apex Court in the matter of the All India P.G.Scheme 1991. It is also pointed out that the petitioner's case has already been reallotted to D.C.H. Course at N.H.L., M.C. Ahmedabad as per his choice.

3. Mr.R.Gandhi, the learned Senior Counsel appearing for the petitioner contends that petitioner was originally allocated to an unrecognised Institution which has been held as not correct by a Division Bench of this Court in *Sadayappan v. The Director General of Health Services, Government of Tamil Nadu, 1990 Writ L.R. 16.* The learned Senior Counsel points out this pointing out this defect a representation was made to the respondents, that he has been allotted in an unrecognised course. The learned Senior Counsel points out that the D.C.H. Course to which the petitioner was allocated originally in S.M.S. Medical College, Jaipur is not a recognised course and as such the petitioner has been given an allotment again by order dated 25.9.1991 which reads as follows:-

> "Dr.Shivram Raghuram Singh bearing Roll No.A130620 Merit No.0811 is hereby reallocated D.C.H. of duration 2 years at N.H.L. Medical College, Ahmedabad. His/her earlier allotment to D.C.M. at S.M.S. Medical College, Jaipur stands cancelled in view of the reallocation made as per his/her own request and the candidate shall have no claim over earlier allotment......"

According to the learned Senior Counsel, there is no D.C.H. Course factually in that college and what is available in that college is Diploma in Paediatrics for which the petitioner has not applied at all. He also contends that the petitioner's choice is not for Diploma in Paediatrics, but M.D. in Paediatrics. The learned Senior Counsel further states that this order has been passed without application of mind and that when the course is not available in the college, the petitioner has been allotted as if the Diploma in Child Health course is available in N.H.L. Medical College, Ahmedabad. He further contends that the academic year has come to an end and that atleast in the coming academic year the petitioner should be allotted a seat in D.C.H. Course in any one of the colleges or for in any one of the courses asked for by the petitioner.

4. Mrs.Nurjehan Razack, the learned Additional Central Government Standing Counsel tries to defend that what has been allocated to the petitioner is Diploma in Paediatrics, that it is equivalent to Diploma in Child Health *i.e.*, D.C.H. and as such there is nothing wrong in the allotment to the college concerned. According to the learned Senior Counsel the petitioner has been given in a recognised institution, the petitioner has asked for D.C.H. and an equivalent to that course has been given to the petitioner and as such this Court should not interfere with the order passed in this case.

5. I have considered the arguments of Mr.R.Gandhi the learned Senior Counsel appearing for the petitioner and of M/s.Nurjehan Razack, the learned Additional Central Government Standing Counsel appearing for respondent. There is no dispute about the fact that the petitioner has been originally allotted to an unrecognised Institution and reallocation has been made in the month of September, 1991, at N.H.R. Medical College, Ahmedabad. As rightly pointed out by the learned Senior Counsel appearing for the petitioner, there is no D.C.H. Course in that College. May be Diploma in Paediatrics is equivalent to that course. But it is not found in the guidelines issued to the candidates like the petitioners. So, even the order of allotment is made, in my mind, in total disregard to the conditions of the guidelines to the candidates when there is no D.C.H. Course in Ahmedabad. I do not see how an order can be passed re-allotting the petitioner to D.C.H. Course. A clarification by Medical Council of India to the first respondent showing that D.C.H. and the Diploma in Paediatrics can be treated as one and the same at par, it cannot be said that what has been allotted to the petitioner is D.C.H. Course. In this case surely, a course has been allotted to the petitioner which he has not asked for. When the

directions of the apex Court of land are with regard to courses and subjects I do not see how the respondents could have allotted a different subject to the petitioner and try to defend that the Diploma in Paediatrics is one and the same as D.C.H. on the basis of instructions by Medical Council of India. The said allotment has been made in the month of September 1991. Even in the counter affidavit it has been clearly stated that the Directorate has reallotted D.C.H. Course as per the request of the petitioner. The said statement made in the counter affidavit is clearly wrong. The petitioner has not been allotted to D.C.H. Course and what has been given to the petitioner is Diploma in Paediatrics. That order passed in the month of September 1991 says that it has been reallotted to the petitioner. So considering the facts and circumstances of the case, I am of the view that the order of the first respondent dated 25.9.1991 shows the total non-application of mind of the first respondent to the case of the petitioner. The petitioner having obtained Merit No.811 and been successful in the All India basis has to wait for another order, in view of the inconsistent orders passed by the first respondent. It is settled law, though the prayer asked for by the petitioner cannot be given straightaway, to suit the occasion this Court can mould the prayer. As such, I am of the view the reallocation order of the first respondent dated 25.9.1991 is set aside and the petitioner has to be re-allocated to any one of the colleges for which he has opted in his application and in any one of the courses to which he has opted for atleast for the academic year 1992. I do hope that the first respondent will bear in mind that the petitioner has lost one precious year. In view of that a writ of mandamus is to issue to the first respondent to allot the petitioner a seat in D.C.H. Course in any one of the colleges given by him in his reference. The first respondent has to take the peculiar facts and circumstances of the case into consideration, the subjects and the colleges the petitioner applied for and he has obtained 811 rank in All India and he has been originally allotted to an unrecognised Institution, which fact is not mentioned in the "Bulletin of Information" and later he has been reallocated to a college where no course asked for by him is offered to him in passing an order. As such, a direction is issued to the first respondent to pass an order in the above terms within a month from the date of receipt of a copy of this order so that the petitioner can prepare himself to joining the course in a recognised Institute in the subjects he opted for. The writ petition is ordered accordingly. However, there will be no order as to costs.

B.S. ---- *Petition ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.No.17193 of 1991 *18th February, 1992.*

K.V.Loganathan ...*Petitioner*

v.

Pallavan Transport Corporation Ltd., represented by its Managing Director ...*Respondent.*

Civil Procedure Code (V of 1908), O.21, Rule 48 - Order of attachment passed against servant of Pallavan Transport Corporation in respect of salary of such servant - Execution petition - Garnishee absent - Attachment made absolute - Corporation if can deny payment of commuted pension to the servant on that ground.

The petitioner who was working as a Traffic Inspector under the Pallavan Transport Corporation gave a petition for voluntary retirement on 21.10.1990. It was accepted by the Corporation. He was informed that he was entitled to commutation of pension amount of Rs.20,206. But it was not paid. He issued a notice through his counsel. He was informed that the amount had been withheld consequent on the receipt of the order of attachment from the IX City Civil Court, Madras in E.P.No.419 of 1990. He filed a writ petition contending that the Corporation had no jurisdiction to withhold the pension amount as the order of the Court had nothing to do with the amount. *Held:-* In the order the decree-holder has asked for only attachment of the salary of the petitioner under O.21 Rule 48, C.P.C. This application has been filed on 12.02.1990 and in the schedule also, the description of the property is given as "salary". When the E.P was called for, the respondent-

Corporation did not appear as garnishee. The order shows that garnishee called absent, attachment made absolute, E.P. Closed. So the court is of the view that the contention raised by the learned counsel for the petitioner has to be accepted that the order of the city civil court in E.P., cannot be pleaded as an excuse by the Corporation for denying the payment of pension made to the petitioner. The order of attachment has nothing to do with the pensionary benefits and the petitioner ought to have been paid the amount as early as November, 1990. *[Para 4]*

Petition Under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to pay the pensionary benefits as computed and quantified Rs.20,206 (Rupees twenty thousand and two hundred and six only) together with interest at 18% p.a. from 2.11.1990.

N.Srivatsamani, for Petitioner.

P.V.Marthandam for *M/s.King and Partridge*, for Respondent.

The Court made the following

ORDER:- The prayer in the writ petition is to issue a writ of *mandamus* directing the respondent to pay pensionary benefits as commuted and quantified at Rs.20,206 together with interest at 18% p.a. from 2.11.1990.

2. The petitioner joined the State Transport Department in 1961 as a Contractor and joined the Corporation and became an employee of the Corporation when it was established in January, 1972. He was working as Traffic Inspector till 21.10.1990 when he gave a petition for voluntary retirement with effect from 21.10.1990. The letter was accepted by the Corporation. On 2.11.1990, he was informed that he was entitled to commutation of pension amount of Rs.20,206. When it was not given to the petitioner, he issued a notice through his counsel in November, 1990. The respondent by its letter dated 27.12.1990 informed the petitioner's counsel that the amount had been withheld consequent upon the receipt of an order of attachment from the IX City Civil Court, Madras in E.P.No.419 of 1990 in O.S.No.5590 of 1983 wherein the petitioner is the judgment-debtor. The petitioner was informed that the amount will be released only after getting further orders from the court. The petitioner applied for a certified copy of the order in E.P.No.419 of 1990 in O.S.No.5590 of 1983 and he found that the prayer in E.P.No.419 of 1990 is only to attach his salary under O.21, Rule 48 and when the Corporation as garnishee did not appear on 16.10.1990, the judgment was made absolute and the E.P. was closed. The petitioner contends that the respondent had no jurisdiction to withhold the commutation of the pension amount of Rs.20,206 based on the order of the City Civil Court. The petitioner alleges in the affidavit that the order of City Civil Court has nothing to do with the pension amount of Rs.20,206 as attachment was only made under O.21, Rule 48 and as a garnishee, the Corporation has been given a notice. With these allegations, the petitioner is before me with the aforesaid prayer.

3. Notice of motion has been ordered by me on 9.2.1991. Though no counter-affidavit is filed, Mr.P.V.Marthandam appears for the Corporation.

4. After hearing Mr.Srivatsamani, learned counsel for the petitioner and after perusing a copy of the order passed by the City Civil Court in E.P.No.419 of 1990, I do not think, there is any justification for the Corporation to delay the payment of pension amount to the petitioner. In the order of attachment, the decree-holder has asked for only attachment of the salary of the petitioner under O.21, Rule 48. This application has been filed on 12.02.1990 and in the Schedule also, the description of the property is given as "salary". When the E.P. was called for, the respondent Corporation did not appear as garnishee. The order shows that garnishee called absent, attachment made absolute, E.P. Closed. So, I am of the view that the contention raised by Mr.Srivatsamani has to be accepted that the order of the city civil court in E.P., cannot be pleaded as an excuse by the Corporation for denying the payment of pension made to the petitioner. In my view, the order of attachment has nothing to do with the pensionary benefits and as I have already stated, the petitioner ought to have been paid the amount as early as November, 1990. Unfortunately, misconstruing the order of the City Civil Court, the respondent Corporation has failed to pay the amount to the petitioner. In my view, a writ of *mandamus* has to issue to the Corporation to pay the amount of Rs.20,206. The contention of the learned counsel for the Corporation is that the

petitioner can move the City Civil Court for raising the attachment. I do not think this can be the attitude of the Corporation. As a modal employer the Corporation is bound to pay the pension to the petitioner and should not direct the petitioner to face a litigation unnecessarily. Since the petitioner has been defined the benefit of Rs.20,206 right from November, 1990, I find it is a fit case where the Corporation should pay interest at the rate of 18% to the petitioner. Accordingly, a direction shall issue to the Corporation to pay the amount of Rs.20,206 together with interest at 18% per annum from 2.11.1990 till the date of payment on or before 22.03.1992.

5. The writ petition is allowed. No order as to costs.

B.S. ------ *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

A.S.No.846 of 1981 *27th February, 1992.*

Sathya Engineering Contractors, Madurai, through the Proprietor Sathappa Singaram ...*Appellant.*
v.
S.Nachammal and another ...*Respondents.*

Civil Procedure Code (V of 1908), O.26, Rule 9 - Report of Commissioner - Acceptance of - Examination of Commissioner, if necessary.

A Commissioner's report can be accepted and acted upon unless it appears to the court that the Commissioner shall be examined. *[Para 12]*

R.Sundaravaradan, Senior Counsel and *Miss S.Mala*, for Appellant.

N.Vijayaraghavan, for Respondents.

The Court delivered the following

JUDGMENT:- Plaintiff is the appellant. The plaintiff was carrying on contract business in the matter of construction of houses. The first defendant is the wife and second defendant is the husband. The first defendant was the owner of the premises bearing Door No.184, North Veli Street, Madurai in T.S.No.752/1, and the second defendant was the owner of premises bearing Door No.12, Goods Shed Street, Madurai.

2. The case of the plaintiff is that on 11.10.1975 the plaintiff agreed to do contract work of constructing a ground floor in Door No.184, North Veli Street, Madurai in T.S.No.732/1 and an agreement Ex.A-1 was entered into containing the terms and conditions thereof. The plaintiff commenced and completed the work of constructing the ground floor on 22.2.1976. Then a second agreement Ex.A-7 was entered into on 18.5.1976 for construction of first and second floors in the same premises. During the subsistence of the second agreement an oral agreement was also entered into between the plaintiff and the second defendant for doing some repair work in Door No.12, Goods Shed Street, Madurai. The work of second agreement in respect of Door No.184, and the work of oral agreement in respect of Door No.12 were also completed. During the work the defendants have paid some amounts to the plaintiff. After the work was completed the plaintiff gave a final Bill Ex.A.8 on 20.9.1976 claiming No.31,314.46. But the amount was not paid and therefore the plaintiff sent a notice Ex.A-11 dated 5.12.1976. For that the defendants sent a reply Ex.A-12 dated 22.12.1976 raising untenable contentions. The plaintiff then sent a rejoinder notice Ex.A-3 on 2.1.1977, but it was of no avail. Therefore the plaintiff has filed the suit.

3. The defendants denied that the suit amount is due to the plaintiff. They contended that they have paid a number of amounts several times to the plaintiff as well as his employee Kannappa Chettiar all totalling to Rs.98,800. Apart from this the defendants have also supplied 960 bags of cement costing Rs.18,082 and also iron materials of the value of Rs.8,796.96 for which the plaintiff is under the agreement liable to give credit. In fact the plaintiff has received from the defendants amounts much more than what he is entitled to for the work done by him.

4. The trial court on consideration of the evidence adduced found that the suit should have been filed for accounts and not specific sum as claimed and therefore the suit is not maintainable. The trial court then on consideration of the evidence held that in fact there is no amount due from the defendant to the plaintiff as claimed by him and on the other hand the defendant has paid them excess amount of Rs.24,022.20. Thus holding the trial court dismissed the suit. Therefore the appeal by

the plaintiff.

5. After the arguments were heard for some time, it was agreed by both sides that the real controversy in the matter is with regard to only two things and one is in respect of a sum of Rs.25,000 alleged to have been paid by the defendants to the plaintiff under receipts Exs.B-26 to B-39 through one Kannappa Chettiar who was an employee of the plaintiff, and the second is as to whether the plaintiff is entitled to any sum in respect of repair work done by the plaintiff to the premises No.12, Goods Shed Street, and if so what amount, and on decision of these points any amounts due to the plaintiff can be determined.

6. Regarding the first point, the trial court has held that the said sum of Rs.25,000 covered by Exs.B-26 to B-39 issued by Kannappa Chettiar to the defendants has been paid to the plaintiff. This finding is questioned in the appeal now.

7. On careful consideration of the evidence on this point I am inclined to agree with the finding of the trial court. It is not in dispute that Kannappa Chettiar was working under the plaintiff. The defendants have examined Kannappa Chettiar as D.W.2 and he has testified that he received the amounts mentioned in Exs.B-26 to B-39 from the defendants and he paid them to the plaintiff. Therefore it is true that Exs.B-26 to B-39 receipts were issued by Kannappa Chettiar. The question arises whether Kannappa Chettiar paid the amounts to the plaintiff. The plaintiff (P.W.1) has stated that to fetch money from the parties he used to send Kannappa Chettiar. He has also stated that Kannappa would pay such amounts received by him to him (plaintiff). The further evidence of the plaintiff is that he has not asked Kannappa anything about the defendants' claim that they have paid the amounts to Kannappa. This is unlikely if really he had not received the amounts from Kannappa.

8. He has further stated that the defendants belong to a well-to-do family. He has also stated that even while the work was being done he would ask defendants for money and they would pay the amounts through cheques. This would show as rightly said by the trial court, that the plaintiff would not have allowed the amounts due to be accumulated to a large extent. This would also indicate that it is probable that the amount should have been paid to Kannappa by the defendants and Kannappa had paid those amounts to the plaintiff. Ex.A-16 account books filed by the plaintiff would show that in fact some amounts had been received by Kannappa and he has issued receipts for them.

9. Kannappa (D.W.2) also has deposed that some time the plaintiff would ask him to remit the money into bank collected from the parties and he would do so, and the pass book of the plaintiff would show this fact. The trial court has pointed out that purposely the plaintiff has withheld his bank pass book. It is the further evidence of Kannappa (D.W.2) that even from 1962 the plaintiff was known to him. Therefore the argument of the learned counsel for the appellant-plaintiff that Kannappa was in the employment of the plaintiff only for eight months and therefore the plaintiff would not have the confidence in him to allow him to collect money from the parties carries no conviction. The plaintiff in the plaintiff has stated that Kannappa has been dismissed from service but in the evidence he would prevaricate and state that Kannappa himself in October, 1976 stopped coming to work, and Kannappa (D.W.2) himself has stated that as he fell ill he stopped going to work. The trial Court had the benefit of seeing the witness and hearing them and therefore any finding of fact of it shall not be interfered with in the appeal unless there is strong ground for that. Considering the entire circumstances in the case it appears to me that it must be true that the defendants have paid the amounts covered by receipts Exs.B-26 to B-39 and that amounts have been paid by Kannappa to the plaintiff.

10. Coming to the second point, it is admitted that the plaintiff did some repair work in the house of second defendant bearing Door No.12, Goods Shed Street, Madurai. Therefore there is no gainsaying that the defendants are liable to pay some amount for that. The question is what amount shall be paid. In the plaint for this work the plaintiff has claimed Rs.3,082.97. Ex.A-8 is a copy of the Bill given to the defendants and therein too this amount has been mentioned. The defence is that this amount is excessive. But the defendants would not say what is the amount they are liable to pay for the said work. Inasmuch as there is no agreement as to what amount shall be paid, a reasonable amount has to be arrived at, as stated by the trial court, under Sec.70 of the Indian Contract Act.

11. For the purpose of fixing reasonable amount in respect of the work for which no rate was agreed,

at the instance of the plaintiff a Commissioner was appointed and he submitted a report Ex.C-1. Therein he has referred to Ex.A-8 Bill and the repair work done at Door No.12, Goods Shed Street, and he has stated that he found that the work had been executed as per the specifications given in Ex.A-8. He has further stated that the rates claimed are quite reasonable. The Commissioner is an Engineer and his report has to be, in the normal course, accepted as correct.

12. The trial court however would not accept it on the ground that the Commissioner has not been examined by the plaintiff and the defendants have not been given a chance to cross-examine him. This approach of the trial Court is indeed wrong. A Commissioner's report can be accepted and acted upon unless it appears to the court that the Commissioner shall be examined. No objection seems to have been filed by the defendants to the Commissioner's report and they have not taken any steps to examine him in the court. In these circumstances the Commissioner's report can be accepted, and on the basis of Ex.A-8 and Commissioner's report the plaintiff's claim of Rs.3,082.97 for the repair work done at Door No.12, Goods Shed Street, can be taken to be correct.

13. In the result, the plaintiff would be entitled to the said amount of Rs.3,082.97 in respect of the repair work done to the house at Door No.12, Goods Shed Street, Madurai. To this extent the appeal stands allowed and there will be a decree accordingly. In other respects the appeal is dismissed. There will be no order as to costs throughout.

B.S. ---- *Appeal allowed partly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami, J.*

C.R.P.No.1117 of 1988 *11th December, 1990.*

K.J.Bastian Carrying Business at No.23, Vaniar Street, Madurai-1 ...*Petitioner*

v.

A.Nazarali and Sons Registered Partnership firm Carrying Business at No.157, Linghi Chetty Street, Madras-1 ...*Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.11(1) - Application for fixation of fair rent filed by landlord - Fair rent fixed - Tenant depositing difference between fair rent and monthly rent - Appeal against order also disposed of - Petition for eviction of tenant also disposed of - Rent Controller if can Order payment out of the deposit made by tenant to landlord - Portion of the amount not recoverable even on date of deposit by reason of bar of limitation - If can be ordered to be paid out by Rent Controller.

The petitioner is a tenant under the respondent. The respondent filed an application for fixation of fair rent on 24.2.1976. The Rent Controller fixed the fair rent at Rs.946 per month. Both the petitioner and the respondent filed appeals which were, however, dismissed. A revision filed before the High Court also failed. Meanwhile, the respondent called upon the petitioner to pay the difference in payment of monthly rents between the agreed rent and the fair rent. The petitioner took the stand that he was liable to pay the fair rent only from the date of the order and not from the date of application. The respondent filed R.C.O.P.No.827 of 1982 for eviction of the petitioner on the ground of wilful default in payment of rents. The respondent also filed a petition under Sec.11 of the Act for a direction to the petitioner to deposit all arrears of rent. The petitioner deposited Rs.42,000 with an endorsement that he was depositing it to show his *bona fides*. The petition was eventually dismissed. The respondent filed M.P.No.526 of 1986 for payment out of the amount of Rs.42,000, in deposit. It was ordered. The petitioner filed a Civil revision petition against that order contending that as the Rent Controller became *functus officio* after he passed

the order in the R.C.O.P., he had no jurisdiction to order payment out of the deposit and that on the date of order of payment out, the entire claim was barred by limitation.

Held:- It is common ground that the tenant has agreed to pay the fair rent from the date of order. Pending that R.C.O.P., the tenant-petitioner deposited the difference including time-barred claim to enable him to continue and contest the R.C.O.P., of course, under a mistaken impression that R.C.O.P.No.827 of 1982 was maintainable. Strictly speaking, applying the ratio in the decision of this Court reported in *C.Ranganatham v. M.Suri, 100 L.W..708*, the petition was not maintainable. By depositing the amount as mentioned above, the respondent/landlord was made to believe that in the event of his succeeding in his claim that the tenant is liable to pay fair rent from the date of application, he can withdraw the amount. It is not now open to the petitioner/tenant to contend that the payment out application is barred by limitation. Be it noted that the contention of the petitioner/tenant was that he was liable to pay the fair rent only from the date of the final decision fixing the fair rent and not from the date of the application. Be it also noted that when depositing the amount the tenant never raised any objection stating that the claim was barred by limitation. His objection was to the effect that the deposit was without prejudice to his contention namely that his liability to pay the fair rent as fixed will commence from the date of the final decision fixing the fair rent. In the circumstances and having regard to the ratio laid down by the Supreme Court in *Khadi Gram Udhyog Trust v. Ram Chandraji Virajman Mandir, Sarasiya Ghat, Kanpur, (1978)1 S.C.C. 44*, the petitioner-tenant cannot be heard to say that respondent-landlord cannot withdraw the amount already deposited under Sec.11(1) of the Act. The Supreme Court in the abovesaid decision has held that in such circumstances that though the remedy is barred, the debt is not extinguished. the contention that after passing orders in R.C.O.P., the Rent Controller became *functus officio* and therefore he has no right to order payment out is not well-founded. Sec.11(5) enables the Rent Controller to pass consequential orders regarding the amounts deposited under Sec.11(1) of the Act. *[Paras 12 and 13]*

Cases referred to:

Messrs. India Automobiles and Company v. Life Insurance Corporation of India, Madras, 91 L.W. 272; C.Ranganatham v. M.Suri, 100 L.W. 708; The Collector of Madras, Accommodation Wing, Madras v. A.N.Gajendran, 102 L.W. 49; The State of Tamil Nadu, represented by the Accommodation Controller v. K.N.Dhanasekaran, 93 L.W. 207; Manganlal Chhotabhai Desai v. Chandrakant Motilal, A.I.R. 1969 S.C. 37; M.Paul Verghese and Company Limited v. G.A.Dhanaliwald, (1960)1 M.L.J. 288; M/s.Raval and Company v. K.G.K.G.Ramachandran, A.I.R. 1974 S.C. 818; S.E.Mohamad Abdulla and Sons, Madurai, through its Managing Partner, M.S.Mohammed Ghani v. T.K.Dorai Arasu, (1956)1 M.L.J. 184; Khadi Gram Udhyog Trust v. Ram Chandraji Virajman Mandir, Sarosiya Ghat, Kanpur, (1978)1 S.C.C. 44; Bombay Dyeing and Manufacturing Co. Ltd. v. The State of Bombay, A.I.R. 1958 Bom. 328; Ram Nandan Sharma v. Mt.Maya devi, A.I.R. 1975 Pat. 283; First National Bank v. Sant Lal, A.I.R. 1959 Punjab 328.

Petition under Art.226 of the Constitution of India praying the High Court to revise the Order of the XII Judge, Court of Small Causes, Madras, dated 6.3.1987 and made in M.P.No.926 of 1986 in R.C.O.P.No.827 of 1982.

Miss.O.K.Sridevi, for Petitioner.

K.C.Kathirvelu, for Respondent.

The Court made the following

ORDER:- An interesting question of law arises for consideration in this civil revision petition filed under Art.227 of the Constitution of India by a tenant in rent control proceedings.

2. The question is whether the Rent Controller is right in ordering payment out of the amount deposited by the tenant under Sec.11(1) of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 (hereinafter called 'the Act') after the disposal of the R.C.O.P. and the appeal filed against that order. A subsidiary question that also arises for consideration is whether the Rent Controller, in any event, was right in ordering payment out of the entire amount deposited when a portion of it was not recoverable by the landlord even on the date of deposit by reason of bar of limitation.

3. Let us now look into the facts leading to the filing of this revision petition.

4. The petitioner is a tenant under the respondent. The respondent filed an application for fixation of fair rent under Sec.4 of the Act on 24.2.1976. The rent controller fixed the fair rent at Rs.946 per month. Aggrieved by that fixation of fair rent both

the petitioner and the respondent preferred appeals to the Appellate Authority, the Appellate Authority by a common order fixed the fair rent preferred a revision to this Court and the revision petition was dismissed by this Court on 17.11.1981. Meanwhile, the respondent called upon the petitioner to pay the difference in payment of monthly rents between the agreed rent and the rent as fixed in rent control proceedings. The petitioner took up a stand stating that he was liable to pay the fair rent as fixed from the date of the order and not from the date of the application as claimed by the respondent. In view of the above stand taken by the petitioner the respondent filed R.C.O.P.No.827 of 1982 for eviction of the petitioner on the ground of wilful default in payment of rents. Pending disposal of that application the respondent also filed a miscellaneous petition under Sec.11 of the Act for a direction to the petitioner to deposit all arrears of rent due in respect of the building up the payment or deposit. Though the petitioner initially resisted that application ultimately deposited a sum of Rs.42, 000 with the following endorsement "I deposited the amount only to show my *bona fides* and to prevent an adverse inference being drawn against me." R.C.O.P.No.827 of 1982 was ultimately dismissed on 4.3.1986 on the ground that there was no wilfulness on non-payment of difference in contractual rent and fair rent fixed in rent control proceedings and in any event the differential amount having been deposited under Sec.11 there was no case for ordering eviction, Aggrieved by that order of the learned Rent controller the respondent preferred R.C.A.No.598 of 1986 to the Appellate Authority, the Appellate Authority also concurred with a view taken by the learned Rent Controller and dismissed the appeal on 26.11.1986. Thereafter the respondent filed M.P.No.926 of 1986 for payment out of the amount of Rs.42,000 deposited by the petitioner to the credit of R.C.O.P.No.827 of 1982. That application for payment out was resisted by the petitioner *inter alia* contending that the Rent Controller after disposal of the R.C.O.P. became *functus officio* and as such could not order payment out, that R.C.O.P. and also appeal filed against that having been dismissed, there is no question of payment out to the Landlord, that the claim was barred by limitation and that the Rent Controller is not an Authority for collecting rents.

5. The Rent Controller overruling the objections raised by the petitioner/tenant ordered payment out. Aggrieved by that order of payment out the petitioner/tenant has filed this revision petition.

6. Miss O.K.Sridevi, learned counsel appearing from the petitioner contended that the order of the Rent Controller is totally without jurisdiction is as much as he had become *functus officio* after he passed the order in R.C.O.P. which was confirmed by the Appellate Authority. The right if any of the landlord/respondent was only to file a suit subject to the law of limitation to recover the difference in payment of rent between agreed rent and rent fixed in rent control proceedings. On the date of order of payment out the entire claim was barred by limitation and therefore the Rent Controller ought not have ordered payment out. According to the learned counsel by ordering payment out the vested right of the petitioner to raise the plea of limitation has been taken away.

7. In support of the above contentions the learned counsel for the petitioner placed reliance on the following judgments. *Messrs. India Automobiles and Company v. Life Insurance Corporation of India, Madras, 91 L.W. 272, C.Ranganatham v. M.Suri, 100 L.W. 708, The Collector of Madras, Accommodation Wing, Madras v. A.N.Gajendran, 102 L.W. 49, The State of Tamil Nadu, represented by the Accommodation Controller v. K.N.Dhanasekaran, 93 L.W. 207, Manganlal Chhotabhai Desai v. Chandrakant Motilal, A.I.R. 1969 S.C. 37, M.Paul Verghese and Company Limited v. G.A.Dhanaliwald, (1960)1 M.L.J. 288, M/s.Raval and Company v. K.G.K.G.Ramachandran, A.I.R. 1974 S.C. 818, S.E.Mohamad Abdulla and Sons, Madurai, through its Managing Partner, M.S.Mohammed Ghani v. T.K.Dorai Arasu, (1956)1 M.L.J. 184.*

8. Mr.K.C.Kathirvelu, learned counsel appearing for the respondent/learned contending contra submitted that the order of the learned Rent Controller was quite in accordance with a decision of the Supreme Court reported in *Khadi Gram Udhyog Trust v. Ram Chandraji Virajman Mandir, Sarasiya Ghat, Kanpur, (1978)1 S.C.C. 44,* the learned counsel further submitted that the petitioner by depositing the amount under Sec.11 of the Act made the respondent to believe that there was no need to file a separate suit to recover the amount. The liability to pay fair rent as fixed by the Rent Controller from the date of the

application was well settled by several decisions of this Court, nevertheless, the petitioner deliberately took a stand that he was not liable to pay the fair rent from the date of application, but liable to pay only from the date of final order fixing the fair rent. He also submitted that the petitioner does not deserve any indulgence while exercising revisional jurisdiction under Art.227 of the Constitution of India from this Court.

9. I shall now consider the rival submission with reference to the cases cited by counsel on both sides. In *Messrs.India Automobiles and Company v. Life Insurance Corporation of India, Madras, 91 L.W. 272.*

"A Division Bench of this Court speaking through Ramaprasada Rao, J. (as he then was) in clear and unequivocal terms held that fair rent orders are effective from the date of application. It was further held therein that it cannot be contended that the order fixing fair rent under the Act is effective only from the date of order of the statutory tribunal.

In *C.Ranganatham v. M.Suri, 100 L.W. 708,* M.N.Chandurkar, CJ. While considering a case of non-payment of difference between earlier accepted rent and fair rent by the tenant and the consequences thereof after elaborately noticing the relevant provisions held as follows: "Now, it is true that once fair rent is fixed under Sec.4 of the Rent Control Act, the liability to pay the fair rent accrues from the date on which the fair rent is fixed. Even though the liability to pay fair rent dates back to the date of the application, the liability itself gets determined only on the date on which the fair rent is fixed. Until the fair rent is so fixed on an application made by the landlord, during the pendency of such an application the only statutory obligation of the tenant is to pay the 'agreed' rent. It is undoubtedly true that where fair rent has been fixed at a figure higher than the agreed rent, the tenant will become liable to pay a higher rent from the date of the application and when agreed rent is paid during the pendency of the application, the landlord will be entitled to claim the difference between the fair rent and the agreed rent for the period covered by the pendency of the application under Sec.4. However, since the fair rent itself has been fixed at a future date, there is no question of the tenant paying the fair rent either within fifteen days after the expiry of the time fixed in the agreement of tenancy or by the last day of the month next following the month for which rent in payable during the period of the pendency of the application for fixation of fair rent. In such a case, the tenant cannot be said to incur the liability of being adjudged a 'defaulter' if he has not paid the difference between the fair rent and the agreed rent. Though it is true that any default in the payment of fair rent after the date on which the fair rent has been fixed would attract the provisions of Sec.10(7)(i) of the Rent Control Act, that provision cannot be availed of by the landlord for the period prior to the date on which the fair rent is fixed. Sec.10(2)(i) and the Explanation is the default contemplated by Sec.10(2)(i). Therefore, unless the landlord is entitled to avail of the provision in Sec.10(2)(i), there is no occasion for the Rent Controller to apply his mind to the question whether the default is wilful and consequently the artificial rule of evidence contemplated in the Explanation will also not be attracted to a case to which the substantive provision in Sec.10(2)(i) will not be attracted. Therefore, in a case where a certain amount becomes due from the tenant as a result of the fair rent being fixed at a higher figure than the agreed rent, the failure to pay the difference between the fair rent and the agreed rent will not attract the provisions of Sec.10(2)(i) at all. Consequently, the landlord in the instant case was not entitled to invoke the provisions of Sec.10(2)(i) of the Rent Control Act, and the petition filed by him was therefore clearly not maintainable. Consequently, further the provision in Sec.11(4) cannot be attracted in the instant case. The Appellate Authority was, therefore, right in allowing the appeals filed by the tenant and dismissing the petition for eviction. The revision petitions are therefore dismissed. No costs."

In *The Collector of Madras, Accommodation Wing, Madras v. A.N.Gajendran, 102 L.W. 49,* again M.N.Chandurkar, C.J. after referring to the judgment in *The State of Tamil Nadu, represented by the Accommodation Controller v. K.N.Dhanasekaran, 93 L.W. 207,* held the fair rent will be payable from the date of allotment subject to Law of Limitation. In *The State of Tamil Nadu, represented by the Accommodation Controller v. K.N.Dhanasekaran,*

93 L.W. 207, a Division Bench of this Court speaking through Padmanabhan, J. has held that payment of fair rent is payable in cases falling under Sec.3 of the Act from the date of allotment order but subject to Law of Limitation.

In *Manganlal Chhotabhai Desai v. Chandrakant Motilal, A.I.R. 1969 S.C. 37*, their Lordship of Supreme Court held that recovery of over paid rents by a tenant was subject to law of limitation. *M.Paul Verghese and Company Limited v. G.A.Dhanaliwald, (1969)1 M.L.J. 288, S.E.Mohamad Abdulla and Sons, Madurai, through its Managing Partner, M.S.Mohammed Ghani v. T.K.Dorai Arasu, (1956)1 M.L.J. 184* and *M/s.Raval and Company v. K.G.K.G.Ramachandran, A.I.R. 1974 S.C. 818*, are not quite relevant for our present purpose.

10. Now coming to the decisions cited by the learned counsel for the respondent namely *Khadi Gram Udhyog Trust v. Ram Chandraji Virajman Mandir, Sarasiya Ghat, Kanpur, (1978)1 S.C.C. 44*, their Lordships of the Supreme Court while considering a case more or less similar to this case held as follows:

"It will be seen that under Sec.(2) of the Act, the landlord gets a cause of action for evicting the tenant when the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. If the tenant pays the entire arrears of rent due at the first hearing of the suit the Court may relieve the tenant against eviction even though he had not complied with Sec.20(2). The tenant can take advantage of the benefit conferred by Sec.20(4) only when he pays the entire amount of rent due as required under Sec.20(4). The question that arises for consideration in this appeal is whether the entire amount of rent due would include even rent which cannot be recovered as having been time barred. There is ample authority for the proposition that though a debt is time barred, it will be a debt due though not recoverable, the relief being barred by limitation. In *Halsbury's Law of England (Third Ed.) Vol.24 at p.205, Art.369*, it is stated "except in th cases previously mentioned, the Limitation Act, 1939 only takes away the remedies by action or by set-off; it leaves the right otherwise untouched and if a creditor whose debt is statute-barred has any means of enforcing his claim other than by action or set off, the Act does not prevent him from recovering by those means." The Court of Appeal in Curwen v. Milburn', Cotton, L.J. said:

Statutes-barred debts are dues, though payment of them cannot be enforced by action.

The same view was expressed by the Supreme Court in *Bombay Dyeing and Manufacturing Co., Ltd. v. The State of Bombay, A.I.R. 1958 Bom. 328*, where it held that the statute limitation only bars the remedy but does not extinguish the debt, except in cases provided for by Sec.28 of the Limitation Act, which does not apply to a debt. Under Sec.25(3) of the Contract Act a barred debt is good consideration for a fresh promise to pay the amount. Sec.60 of the Contract Act provides that when a debtor makes a payment without any directions to how it is to be appropriated; the creditor has the right to appropriate it towards a barred debt. In a Full Bench decision of the Patna High Court--

Ram Nandan Sharma v. Mt.Maya Devi, A.I.R. 1975 Pat. 283, Untwalia, C.J. as he then was, has stated

"There is a catena of decisions in support of what has been said by Tek Chand, J. in *First National Bank v. Sant Lal, A.I.R. 1959 Punjab 328*, that the Limitation Act with regard to personal actions, bars the remedy without extinguishing the right." The law is well-settled that though the remedy is barred the debt is not extinguished. On consideration of the scheme of the Act, it is clear that the statute has conferred a benefit on the tenant to avoid a decree for eviction by complying with the requirement of Sec.20(4). If he fails to avail himself of the opportunity and has not paid the rent for not less than four months and within one month from the date of service upon him of a notice of demand, the landlord under Sec.20(2) would be entitled to an order of eviction. Still the tenant can avail himself of the protection by complying with the requirements of Sec.20(4). As he has not deposited the entire amount due the protection is no more available. We agree with the view taken by the trial court and the High Court of Allahabad that the words "entire amount of rent due" would include rent which has become time-barred."

11. From the portions extracted above from various decisions of this court and of the Supreme Court the following propositions can be deduced.

(a) Under Sec.4 of the Act the liability to pay fair rent will arise from the date of fair rent application entertained by the Rent Controller.

(b) The right to recover difference between the agreed rent and in cases of higher fair rent fixed in proceedings under Sec.4 is by means of a separate suit subject to law of limitation.

(c) Non-payment of higher fair rent fixed in proceedings under Sec.4 of the Act for the period between the date of the application and the date of final decision on that application will not enable the Landlord to invoke Sec.10(2)(i) of the Act.

(d) Consequently the question of deposit under Sec.11(1) in such cases in the event of a petition filed under Sec.10(2)(i) will not arise.

(e) Deposits under Sec.11(1) will include the arrears of rent which have become time barred as well.

12. Bearing the above propositions in mind let us now proceed to decide the controversy that arises in this case. We have noticed that the respondent/landlord filed R.C.O.P.No.827 of 1982 under Sec.10(2)(i) of the Act on the ground of failure of the petitioner/tenant to pay the difference between the agreed rent and the fair rent fixed by the Rent Controller as confirmed by this Court in the revisional proceedings for the period between the date of application and the date of the order. It is common ground that the tenant has agreed to pay the fair rent from the date of the order. Pending that R.C.O.P. the tenant/petitioner deposited the difference including time barred claim to enable him to continue and contest the R.C.O.P. Of course under a mistaken impression that R.C.O.P.No.827 of 1982 was maintainable. Strictly speaking applying the ratio in the decision of this court reported in *C.Ranganatham v. M.Suri, 100 L.W. 708,* the petition was not maintainable. By depositing the amount as mentioned above the respondent/landlord was made to believe that in the event of his succeeding in his claim that the tenant is liable to pay fair rent from the date of application he can withdraw the amount. It is not now open to the petitioner/tenant to contend that the payment out application is barred by limitation. Be it noted that the contention of the petitioner/tenant was that he was liable to pay the fair rent only from the date of the final decision fixing the fair rent and not from the date of the application. Be it also noted that when depositing the amount the tenant never raised any objections stating that the claim was barred by limitation. His objection was to the effect that the deposit was without prejudice to his contention namely that his liability to pay the fair rent as fixed will commence from the date of final decision fixing the fair rent. In the circumstances and having regard to the ratio laid down by the Supreme Court in *Khadi Gram Udhyog Trust v. Ram Chandraji Virajman Mandir, Sarasiya Ghat, Kanpur, (1978)1 S.C.C. 44.* I am of the view that the petitioner/tenant cannot be heard to say that the respondent/landlord cannot withdraw the amount already deposited under Sec.11(1) of the Act. The Supreme Court in the above said decision has held that in such circumstances that though the remedy is barred the debt is not extinguished.

13. The contention of the learned counsel for the petitioner that after passing orders in R.C.O.P. the Rent Controller becomes *functus officio* and therefore he has no right to order payment out is not well founded. Sec.11(5) enables the Rent Controller to pass consequential orders regarding the amounts deposited under Sec.11(1) of the Act.

14. In the result, I do not find any ground to set aside the order of the Rent Controller and consequently confirm the order though for different reasons. The civil revision petition fails and it is dismissed. However, there will be no order as to costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Somasundaram, J.*

W.P.No.5646 of 1988 *1st October, 1991.*

A.Periasamy ...*Petitioner*

v.

The State of Tamil Nadu and others ...*Respondents.*

(A) Tamil Nadu Recognised Private Schools (Regulation) Rules (1974), Rule 15(4)(ii) - Special Rules for the Tamil Nadu Higher Secondary Educational Rules, Rule 2(b)(ii) - Appointment of Post Graduate Assistant in Tamil in private aided school - Rule to be followed for.

(B) Special Rules for the Tamil Nadu Higher Secondary Educational Rules, Rule 2(b)(ii) - Vacancy in post of Post Graduate Assistant in Tamil in private aided school - To be filled by direct recruitment - Person claiming to be appointed by promotion - Order rejecting claim held not violative of principle of natural justice.

(C) Constitution of India (1950), Art.226 - Writ of mandamus under, if can be issued to enforce an illegal order.

The petitioner is working as a Tamil Pandit in the 4th respondent High School. In 1978, the school was allowed to open Higher Secondary Course. As there was no vacancy of P.G.Assistant in Tamil, the petitioner was not promoted. An additional post of P.G.Assistant in Tamil was sanctioned for 1979-80. The petitioner was promoted to that post and he held the post from 5.7.1979 to 31.10.1979. He was not allowed to hold that post after 31.10.1979 as he did not possess the M.A.Degree in Tamil. On 8.2.1980, the 5th respondent was appointed on P.G.Assistant by direct recruitment. Though he was having the M.A.Degree in Tamil, he did not possess the B.Ed., Degree. He acquired the B.Ed., Degree on 13.12.1981. In the meanwhile the petitioner became fully qualified on 30.9.1981. The 5th respondent's appointment was not approved by the District Educational Officer. The Director of School Education dismissed the appeal by the 4th respondent, The Government, however, regularised the appointment of the 5th respondent. The petitioner challenged that order by a writ petition. He contended that Rule 15(4) of the Tamil Nadu Recognished Private Schools (Regulation) Rules, 1974 was the relevant rule which the respondent should have followed while filling up the post sanctioned by the Chief Educational Officer and that the order by the Government regularising the appointment of the 5th respondent was liable to be set aside as it was contrary to Rule 15(4) and was also opposed to principles of natural justice. On the other hand, the respondent contended that the Special Rules for the Tamil Nadu Higher Secondary Schools should be deemed to have come into force. On 1.7.1978, that it was made applicable to Private Schools also till the 1974 Rules were amended and made applicable to Higher Secondary Schools by G.O.Ms.No.1502, dated 23.9.1988 and that the order passed by the Government was in accordance with Rule 2(b)(ii) of the Special Rules.

Held:- Admittedly the provisions of the Tamil Nadu Recognished Private Schools (Regulation) Act, was made applicable to the Higher Secondary Schools by the Act of XXXIV of 1987 with effect from 7.11.1987. Similarly, the 1974 Rules were made applicable to the Higher Secondary Schools by G.O.Ms.No.1502 with effect from 23.9.1988. By G.O.Ms.No.720, Education, dated 28.4.1981, the Government in exercise of the powers conferred under Art.309 of the Constitution made the Special Rules for the Tamil Nadu Higher Secondary Educational Service. Para 2 of the G.O.Ms.No.720, dated 25.4.1981 provides that the qualifications and other service conditions prescribed in the appended notification for the posts of Headmaster, teachers of Higher Secondary Standards and Physical Directors in the Government Higher Secondary Schools will *mutatis mutandis* be followed also by the aided Schools, Schools run by local bodies pending issue of amendment to the relevant Rules. The decision of a Division Bench of this Court in *The Secretary-Cum-Correspondent, Z.K.M. Higher Secondary School, Bodinaickanur, Madurai District v. R.Kandaraj, W.A. Nos.640 and 669 of 1985* goes to show that the Special Rules should be followed even by the managements of private schools in making appointments for the Higher Secondary Course pending amendment to the relevant rules. The contention of the learned counsel for the petitioner that Rule 15(4) of 1974 Rules was amended by G.O.Ms.No.1376, dated 6.7.1981 thereafter the Special Rules in the

G.O.Ms.No.720 are not applicable to the Private aided schools cannot be accepted because, the Act itself was made applicable to Higher Secondary Schools by Act XXXIX of 1987 with effect from 7.11.1987 and the 1974 Rules were made applicable to the Higher Secondary Schools by G.O.Ms.No.1502, dated 23.9.1988. The expressions "pending issue of amendments to the relevant rules" in para 2 of G.O.No.720, in the context in which they are used only mean pending issue of amendments to the 1974 Rules making them applicable to the Higher Secondary Schools. Only by G.O.No.1502, dated 23.9.1988, the 1974 Rules were made applicable to the Higher Secondary Schools. No doubt, G.O.Ms.No.1376, dated 6.7.1981 amended Rule 15(4) of the 1974 Rules, but the said amendment does not make 1974 Rules applicable to Higher Secondary Schools. Even Rule 15(4) as amended by G.O.No.1376 will not apply to Higher Secondary Schools, because 1974 Rules were made applicable to the Higher Secondary Schools for the first time ever by G.O.Ms.No.1502, dated 23.9.1988. Further, when the Act itself was made applicable to the Higher Secondary Schools only with effect from 7.11.1987 by the Act XXXIX of 1987, it cannot be said that the 1974 Rules as amended by G.O.No.1376 was made applicable to the Higher Secondary Schools with effect from 6.7.1981 itself particularly when there is nothing in G.O.No.1376 to indicate that 1974 Rules were made applicable to the Higher Secondary Schools by the said G.O. The relevant Rules *viz.*, 1974 Rules were amended suitably making them applicable to Higher Secondary Schools only by G.O.Ms.No.1502, dated 23.9.1988. Under these circumstances, it has to be held that in view of para 2 of G.O.Ms.No.720, dated 28.4.1981 the qualifications and other service conditions prescribed in the Special Rules for the posts of Headmasters and teachers of Higher Secondary Schools have to be followed by private aided Schools also during the period from 1.7.1978 when G.O.Ms.No.720 is deemed to have come into force till 23.9.1988 when G.O.Ms.No.1502 came into force amending the 1974 Rules making them applicable to the Higher Secondary Schools. *[Paras 5, 6 and 7]*

Rule 2(b)(ii) of the Special Rules states that 50 per cent of the substantive vacancies in classes II and III of the service shall be filled or reserved to be filled by direct recruitment. Thus as per Rule 2(b)(ii) of the Special Rules, 50 per cent of the substantive vacancies in Class II have to be filed only by direct recruitment. When the Higher Secondary Scheme was introduced in the 4th respondent-school in 1978-79, one post of the Tamil Pandit was inducted from the High School section to the Higher Secondary Section and one Thiru Velu, Tamil Pandit was promoted as P.G.Assistant in the said vacancy. In view of Rule 2(4)(i) of the Special Rules, the next vacancy created by the order of the Chief Educational Officer, Salem, dated 5.7.1979 has to be filled by direct recruitment. Admittedly, the petitioner has not claimed the post on the ground that he is also a direct recruit. Therefore, the petitioner cannot contend that he should be promoted to the available post of the P.G.Assistant which is reserved to be filled by direct recruitment by virtue of Rule 2(4)(ii) of the Special Rules. Further, such a claim made by the petitioner runs counter to Rule 2(4)(ii) of the Special Rules. Inasmuch as the existing post of P.G.Assistant has to go to a direct recruit, the petitioner is not eligible to be considered for the same as he claims the post only by way of promotion. As the petitioner is not eligible to be considered for the post in question, it cannot be said that he is in any way aggrieved by the impugned order passed by the first respondent. Therefore, the contention of the learned counsel for the petitioner that the impugned order is violative of the principles of natural justice and is liable to be set aside cannot be countenanced. The petitioner is not entitled to notice before the first respondent passed the impugned order, because the petitioner cannot be considered for the post in question which has to be filled by direct recruitment. *[Para 8]*

The writ of *mandamus* which is an extraordinary and discretionary remedy cannot be issued to enforce an illegal order. *[Para 10]*

Cases referred to:

Senthil Nathan v. The Chief Educational Officer, South Arcot District, 1985 Writ L.R. 533; Kalvi Pani (P) Ltd. v. The Director of School Education, 1991 Writ L.R. 103.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified mandamus* calling for the records from the file of the first respondent in G.O.Ms.No.534, dated 4.4.1988 and to quash the

same and directing the 4th respondent to give effect to the order of the 3rd respondent passed in Mu.Mu.No.371308/(SE/E3/G8/82), dated 29.10.1983.

A.S.Narasimhan, for Petitioner.

R.Ponnuswamy, Government Advocate, for Respondent Nos.1 to 3.

O.V.Baluswamy, for *B.R.Ramesh Babu,* for Respondent No.5.

K.Govindarajan, for Respondent No.4.

The Court made the following

ORDER:- The prayer in the writ petition is as follows:

> "For the reasons stated in the accompanying affidavit, it is prayed that this Hon'ble Court may be pleased to issue a writ of *certiorarified mandamus* or any other appropriate writ, order or direction in the nature of a writ of *certiorarified mandamus* by calling for the records from the file of the first respondent in G.O.Ms.No.534, dated 4.4.1988 and to quash the same and directing the 4th respondent to give effect to the order of the 3rd respondent passed in Mu.Mu.No.371308/(SE/E3/G8/82, dated 29.10.1983 and pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice."

2. The case of the petitioner is as follows:- The petitioner is working as a Tamil Pandit in the 4th respondent-school which was a High School and when the Higher Secondary pattern of education was introduced in the State of Tamil Nadu in the year 1978, the 4th respondent-school was allowed to open Higher Secondary course. In 1978 after the introduction of the Higher Secondary course in the 4th respondent-school, the petitioner was not promoted as Post Graduate Assistant in Tamil to take classes for the Higher Secondary course for want of vacancy. For the academic year 1979-80 the additional post of P.G.Assistant in Tamil was sanctioned by the Chief Educational Officer, Salem by his order dated 5.7.1979 for the 4th respondent-school. Then the management of the 4th respondent-school promoted the petitioner as P.G.Assistant in Tamil and the petitioner held that post from 5.7.1979 to 31.10.1979. After 31.10.1979 the petitioner was not allowed to continue in the Higher Secondary section as P.G.Assistant as he did not possess the necessary qualification to hold the post of P.G.Assistant *viz.* M.A.Degree in Tamil. The qualifications prescribed for the P.G.Assistant for the Higher Secondary course are M.A.Degree in Tamil with B.Ed. degree. On 8.2.1980 the management of the 4th respondent-school appointed the 5th respondent as P.G.Assistant in Tamil directly from the open market. On 8.2.1980 the 5th respondent also did not possess the prescribed qualification. Though he was having P.G.Degree in Tamil he was not having the B.Ed. degree and the 5th respondent acquired the B.Ed. Degree on 13.12.1981. On 30.5.1981 the petitioner became fully qualified for the post of P.G.Assistant by acquiring M.A. Degree in Tamil. The management of the 4th respondent-school after appointing the 5th respondent-as P.G.Assistant for the Higher Secondary Course on 8.2.1980 applied to the District Educational Officer for approval of the appointment of the 5th respondent. This request of the 4th respondent was rejected by the District Educational Officer on 11.8.1980. Again, the management of the 4th respondent applied to the District Educational Officer, Sankagiri for approving the appointment of the 5th respondent as P.G.Assistant in the 4th respondent-school on 31.10.1981 and the same was also rejected by the District Educational Officer on 7.12.1981. The 5th respondent acquired the B.Ed. Degree on 13.12.1981 and thereafter in 1982, the management of the 4th respondent school again moved the District Educational Officer, for approving the appointment of the 5th respondent and the third request of the management of the 4th respondent-school was also rejected by the District Educational Officer, Sankagiri on 8.9.1982. Against the said order dated 8.9.1982 the management of the 4th respondent-school filed an appeal before the Director of School Education. The Director of School Education dismissed the appeal filed by the management of the 4th respondent-school on 1.10.1983. Against the order of the Director of School Education dated 1.10.1983 a further appeal was filed by the management of the 4th respondent-school before the first respondent on 3.11.1983. The first respondent by the order dated 4.4.1988 allowed the appeal filed by the management of the 4th respondent-school and regularised the appointment of the 5th respondent as P.G.Assistant in the 4th respondent-school. The order of the first respondent dated 4.4.1988 is challenged in the present writ petition. In the meantime the

petitioner acquired the Post-graduate qualification in Tamil on 30.5.1981 and he gave a representation on 30.11.1981 to the management of the 4th respondent-school requesting the management to promote the petitioner as P.G.Assistant in Tamil in the post sanctioned by the order of the Chief Educational Officer, Salem dated 5.7.1979. The application of the petitioner dated 30.11.1981 was rejected by the management of the 4th respondent-school and against the said order of rejection the petitioner filed an appeal on 1.1.1983 before the Joint Director of School Education. On 29.10.1983 the Joint Director of School Education allowed the appeal filed by the petitioner and directed the management of the 4th respondent-school to promote the petitioner to the post of P.G.Assistant in the place of the 5th respondent within 15 days from the date of receipt of the order.

3. Mr.A.S.Narasimhan, learned counsel for the petitioner contended as follows: The 4th respondent-school was allowed to open the Higher Secondary course when the Higher Secondary pattern of education was introduced in the year 1978. When the post of P.G.Assistant in Tamil was sanctioned by the Chief Educational Officer, Salem on 5.7.1989 the petitioner was not qualified to hold the post as he did not possess the P.G.Degree in Tamil. Subsequently on 30.5.1981 the petitioner became fully qualified to hold the post of P.G.Assistant in Tamil. On 8.2.1980 the management of the 4th respondent-school directly appointed the 5th respondent as the P.G.Assistant. Though the 5th respondent was having the M.A.Degree in Tamil he was not having the B.Ed. Degree on the date of his appointment. The petitioner submitted an application on 30.11.1981 requesting the management of the 4th respondent to promote him as P.G.Assistant as he was fully qualified to hold the post with effect from 30.5.1981. When the management of the 4th respondent rejected his application, he filed an appeal before the Joint Director by the order dated 29.10.1983 the Joint Director of School Education allowed the appeal and directed the management of the 4th respondent-school to promote the petitioner to the post of P.G.Assistant in Tamil in the place of the 5th respondent and the said order has become final. By the impugned order dated 4.4.1988 the first respondent approved the appointment of the 5th respondent as P.G.Assistant in Tamil in the 4th respondent-school without giving any notice to the petitioner, who was also claiming the said post and without giving him an opportunity to state his case, and, therefore, the impugned order is violative of the principles of natural justice and liable to be set aside. In support of his contention the learned counsel relied on the decision in *Kalvi Pani (P) Ltd. v. The Director of School Education, 1991 Writ L.R. 103.* The learned counsel for the petitioner further contended that Rule 15(4) of the Tamil Nadu Recognised Private Schools (Regulation) Rules, 1974, hereinafter called the 1974 Rules, is the relevant rule which the respondents should have followed while filling up the post sanctioned by the Chief Educational Officer, Salem in his order dated 5.7.1979. Rule 15(4)(ii) of the 1974 Rules provides that appointment to the various categories of teachers would be made by promoting the qualified teachers in the schools and only if no qualified and suitable candidate is available in the school for promotion the post can be filled up by direct recruitment. The learned counsel also contended that in this case when the petitioner got himself fully qualified on 30.5.1981, the management of the 4th respondent-school ought to have promoted the petitioner as P.G.Assistant in the place of the 5th respondent. The further contention of the learned counsel for the petitioner is that the impugned order of the first respondent approving the appointment of the 5th respondent as P.G.Assistant is invalid, because, it contravenes Rule 15(4)(ii) of the 1974 Rules and, therefore, the impugned order dated 4.4.1988 is liable to be set aside.

4. On the other hand, Mr.R.Krishnamurthi, learned senior counsel for the 4th respondent submitted that the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973, hereinafter called the Act, was made applicable to the Higher Secondary Schools by the Tamil Nadu Act 39 of 1987 with effect from 7.11.1987; The 1974 Rules were made applicable to the Higher Secondary Schools by G.O.Ms.No.1502, dated 23.9.1988; By G.O.Ms.No.720, Education, dated 28.4.1981 the Government in exercise of the powers conferred by the proviso to Art.309 of the Constitution of India made special rules for the Tamil Nadu Higher Secondary Educational Rules. Though G.O.Ms.No.720 is dated 28.4.1981 it is stated in the G.O. itself that the special rules made in the said G.O. shall be deemed to have come into force

on 1.7.1978. The special Rules contained in G.O.Ms.No.720 were applicable to private aided schools like the 4th respondent-school till the 1974 Rules were suitably amended and made applicable to the Higher Secondary Schools by G.O.Ms.No.1502, dated 23.9.1988; Till 23.9.1988 Rule 15(4)(ii) of the 1974 Rules have no application to the aided schools and only the Special Rules will have to be applied to such private aided schools. To impugned-order passed by the first respondent is in accordance with Rule 2(h)(ii) of the Special Rules and, therefore, the impugned order is valid and it is not liable to be set aside.

5. In view of the above contentions of the counsel for the parties, the main question we have to decide in the case is; what is the relevant Rule which should be followed in filling up the post of P.G.Assistant in Tamil sanctioned by the Chief Educational Officer, Salem by the order dated 5.7.1979. Whether Rule 15(4)(ii) of the 1974 Rules as contended by the learned counsel for the petitioner or Rule 2(b)(ii) of the Special Rules as contended by the learned counsel for the respondents. Admittedly the provisions of the Act was made applicable to the Higher Secondary schools by the Act 39 of 1987 with effect from 7.11.1987. Similarly the 1974 Rules were made applicable to the Higher Secondary Schools by G.O.Ms.No.1502 with effect from 23.9.1988. By G.O.Ms.No.720, Education, dated 28.4.1981; the Government in exercise of the powers conferred under Art.309 of the Constitution made the Special Rules for the Tamil Nadu Higher Secondary Educational Service. Para 2 of the G.O.Ms.No.720, dated 28.4.1981 provides that the qualifications and other service conditions prescribed in the appended notification for the posts of Headmasters, teachers of Higher Secondary Standards and Physical Directors in the Government Higher Secondary schools will *mutatis mutandis* be followed also by the aided schools, Schools run by local bodies etc., Pending issue of amendment to the relevant Rules. A Division Bench of this Court in *The Secretary-Cum-Correspondent, Z.K.M. Higher Secondary School, Bodinaickanur, Madurai District v. R.Kandaraj, W.A.Nos.640 and 669 of 1985,* by judgment dated 24.6.1986, while holding that appointment of a Headmaster of a private school should be made having regard to the Special Rules for Tamil Nadu Higher Secondary Educational Service contained in G.O.Ms.No.720, dated 28.4.1981 has observed as follows:

> "The position as it, therefore, emerges today is that there are recruitment rules for the Government Higher Secondary Schools with regulate the appointment of Headmasters. The qualifications for the post of Head Masters are also laid down. Though these recruitment rules will not in terms apply in the case of private schools and the appointment will have to be made in accordance with the provisions of Sec.18(i)(b) of the Act, reference must be made to para 2 of the Government Order containing the recruitment rules. That Government Order specifically refers to the qualifications and other service conditions prescribed in the recruitment rules for the posts of Headmasters, teachers of Higher Secondary Standards and Physical Directors in Government Higher Secondary Schools to be followed *mutatis mutandis* in aided Schools and Schools run by local bodies (Municipalities and Corporation etc.,) This paragraph reads as follows:
>
> "The qualifications and other service conditions prescribed in the appended notification for the posts of Headmasters, teachers of Higher Secondary Standards and Physical Directors in Government Higher Secondary Schools will *mutatis mutandis* be followed also in Aided schools, schools run by Local Bodies (Municipalities and Corporation etc.) and Government schools under the Adi Dravidar and Tribal Welfare and Backward Classes Departments, pending issue of amendments to the relevant rules."
>
> In view of this provision the School Committee will have to make the appointment of the Headmaster having regard to the qualifications prescribed in the recruitment rules."

In that case the Division Bench directed the School Committee of the Private Schools to consider the claims of persons qualified to be appointed as Headmasters of Higher Secondary School in accordance with the merit-cum-seniority Rule contained in Rule 2(c) of the Special Rules. The above decision goes to show that the Special Rules should be followed even by the management of the private schools in making appointments for the Higher Secondary course pending amendment to the relevant Rules.

6. Mr.A.S.Narasimhan, learned counsel for the petitioner contended that the Act and the 1974

Rules were applicable to the Higher Secondary Schools irrespective of the Tamil Nadu Act 39 of 1987 extending the provisions of the Act to Higher Secondary Schools and G.O.Ms.No.1502 extending the 1974 rules to Higher Secondary Schools with effect from 23.9.1988 and, therefore, only Rule 15(4) of the 1974 Rules should be followed in filling up the vacancies in the Higher Secondary Schools. In support of this contention, the learned counsel relied on the decisions in *Senthilnathan v. The Chief Educational Officer, South Arcot District, 1985 Writ L.R. 533,* and *S.K.V.Selvaraj, Secretary, S.K.V.Higher Secondary School Committee v. The District Educational Officer, Cuddalore and others, W.A.No.392 of 1981 and W.P.No.6925 of 1981 order dated 17.3.1982.* The learned counsel further contended that as per para 2 of G.O.Ms.No.720, dated 28.4.1981 the Special Rules contained in G.O.Ms.No.720 are applicable to the private aided schools also pending issue of amendment to the relevant Rules Rule 15(4) of the 1974 Rules was amended by G.O.Ms.No.1376, dated 6.7.1981 providing that appointment to all the categories of teachers shall be made firstly by promotion from among the qualified teachers in that School and only if qualified teachers are not available the vacancies can be filled by direct recruitment. The learned counsel for the petitioner also contended that after 6.7.1981 *viz.*, the date of G.O.No.1376 which amended Rule 15(4) of the 1974 Rules, only Rule 15(4) of the 1974 Rules should be followed for filling up the vacancies in the Higher Secondary Schools and the Special Rules contained in G.O.Ms.No.720; On 30.5.1981 the petitioner was fully qualified to hold the post of P.G.Assistant and, therefore, he is entitled to be promoted as P.G.Assistant in the 4th respondent-school in the place of the 5th respondent and in these circumstances, the petitioner was entitled to be heard by the first respondent before the first respondent passed the impugned order dated 4.4.1988. I am unable to accept the contention of the learned counsel for the petitioner that as Rule 15(4) of 1974 Rules was amended by G.O.Ms.No.1376, dated 6.7.1981 thereafter the Special Rules in the G.O.No.720 are not applicable to the private aided schools because, the Act itself was made applicable to Higher Secondary Schools by Act 39 of 1987 with effect from 7.11.1987 and the 1974 Rules were made applicable to the Higher Secondary Schools by G.O.No.1502, dated 23.9.1988. The expressions "pending issue of amendments to the relevant rules" in para 2 of G.O.No.720, in the context in which they are used only mean pending issue of amendments to the 1974 Rules making them applicable to the Higher Secondary Schools. Only by G.O.No.1502, dated 23.9.1988, the 1974 Rules were made applicable to the Higher Secondary Schools. No doubt, G.O.Ms.No.1376, dated 6.7.1981 amended Rule 15(4) of the 1974 Rules, but, the said amendment does not make 1974 Rules applicable to Higher Secondary Schools. Even Rule 15(4) as amended by G.O.No.1376 will not apply to Higher Secondary Schools, because, 1974 Rules were made applicable to the Higher Secondary Schools for the first time only by G.O.No.1502, dated 23.9.1988. Further, as already pointed out, when the Act itself was made applicable to the Higher Secondary Schools only with effect from 7.11.1987 by the Act 39 of 1987, it cannot be said that the 1974 Rules as amended by G.O.No.1376 was made applicable to the Higher Secondary Schools with effect from 6.7.1981 itself particularly when there is nothing in G.O.No.1376 to indicate that 1974 Rules were made applicable to the Higher Secondary Schools by the said G.O.

7. As rightly contended by the learned counsel for the respondents the relevant Rules *viz.*, 1974 Rules were amended suitably making them applicable to Higher Secondary Schools only by G.O.No.1502, dated 23.9.1988. Under these circumstances, it has to be held that in view of para 2 of G.O.Ms.No.720, dated 28.4.1981 the qualifications and other service conditions prescribed in the Special Rules for the posts of Headmasters and teachers of Higher Secondary Schools have to be followed by private aided Schools also during the period from 1.7.1978 when G.O.Ms.No.720 is deemed to have come into force till 23.9.1988 when G.O.Ms.No.1502 came into force amending the 1974 Rules making them applicable to the Higher Secondary Schools. The decisions of this Court in *Senthilnathan v. The Chief Educational Officer, South Arcot District, 1985 Writ L.R. 533* and *S.K.V.Selvaraj, Secretary, S.K.V.Higher Secondary School Committee v. The District Educational Officer, Cuddalore and others, W.A.No.392 of 1981 and W.P.No.6925 of 1981* are not helpful to the petitioner because, this Court while disposing of those cases has not considered the effect of the statutory special rules contained in G.O.No.720 particularly para 2 of the said G.O. Further in the above decisions this Court has no

occasion to consider the effect of the amendment of the Act by the Tamil Nadu Act 39 of 1987 extending the provisions of the Act to Higher Secondary Schools and G.O.No.1592 extending the 1974 Rules to the Higher Secondary Schools, for the obvious reason that they came into existence long after the decisions were rendered in the above cases by this Court. From the above discussion it follows that the Special rules have to be followed in the present case in filling the post of P.G.Assistant sanctioned by the Chief Educational Officer, Salem by order dated 5.7.1979.

8. Admittedly the Higher Secondary Scheme was introduced in the Tamil Nadu in the year 1978. When the Higher Secondary Scheme was introduced in the 4th respondent-schools one Velu, the Senior-most teacher in Tamil working in the 4th respondent-school was promoted as P.G.Assistant to the only available post of P.G.Assistant in Tamil. On 5.7.1979 the Chief Educational Officer, Salem sanctioned one more post of P.G.Assistant in Tamil. On 5.7.1979 the petitioner was not qualified to hold the post of P.G.Assistant and he became fully qualified to hold the post only on 30.5.1981. Even before the petitioner qualified himself for the post, the management of the 4th respondent appointed the 5th respondent as P.G.Assistant directly from the open market on 8.2.1980. On 30.11.1981 the petitioner submitted an application to the management of the 4th respondent-school to promote him as P.G.Assistant in the place of the 5th respondent. By G.O.Ms.No.720, Education, dated 28.4.1981 the Government in exercise of the power under Art.309 of the Constitution made the Special Rules for the Tamil Nadu Higher Secondary Educational Service. The Special Rules were deemed to have come into force with effect from 1.7.1978. Rule 2(a) of the Special Rules deals with appointments. The relevant portion of Rule 2(a) runs as follows:

> "*Appoint*:-(a) Appointment to several classes and categories of the service shall be made as follows: Class and category Method of recruitment.
>
> 2. Teachers in Languages (i) Direct recruitment or
> (ii) Recruitment by transfer from the Tamil Nadu Educational Subordinate Service; or
> (iii) If no qualified and suitable candidates are available for appointment by method (ii) above, by recruitment by transfer from any other service."

Rule 2(b)(ii) of the Special Rules states that 50 per cent of the substantive vacancies in classes II and III of the service shall be filled or reserved to be filled by direct recruitment. Thus as per Rule 2(b)(ii) of the Special Rules, fifty per cent of the substantive vacancies in Class II have to be filed only by direct recruitment. As already pointed out, when the Higher Secondary Scheme was introduced in the 4th respondent-school in 1978-79, one post of the Tamil Pandit was inducted from the High School section to the Higher Secondary Section and one Thiru Velu, Tamil Pandit was promoted as P.G.Assistant in the said vacancy. In view of Rule 2(b)(ii) of the Special Rules the next vacancy created by the order of the Chief Educational Officer, Salem, dated 5.7.1979, has to be filled by direct recruitment. Admittedly, the petitioner has not claimed the post on the ground that he is also a direct recruit. Therefore, the petitioner cannot contend that he should be promoted to the available post of the P.G.Assistant which is reserved to be filled by direct recruitment by Virtue of Rule 2(b)(ii) of the Special Rules. Further, such a claim made by the petitioner runs counter to Rule 2(b)(ii) of the Special Rules. Inasmuch as the existing post of P.G.Assistant has to go to a direct recruit, the petitioner is not eligible to be considered for the same as he claims the post only by way of promotion. As the petitioner is not eligible to be considered for the post in question, to cannot be said that he is in any way aggrieved by the impugned order passed by the first respondent. Therefore, the contention of the learned counsel for the petitioner that the impugned order is violative of the principles of natural justice and is liable to be set aside cannot be countenanced. As rightly contended by the learned counsel for the respondents, the petitioner is not entitled to notice before the first respondent passed the impugned order, because the petitioner cannot be considered for the post in question which has to be filled by direct recruitment. It has to be pointed out that as the post of P.G.Assistant in question has to go to a direct recruit as per Rule 2(b)(ii) of the Special Rules the management of the 4th

respondent-school appointed the 5th respondent directly as P.G.Assistant. When the request of the management of the 4th respondent-school for approving the appointment of the 5th respondent was rejected by the Joint Director of School Education filed an appeal before the first respondent. The first respondent while passing the impugned order rightly held as follows:

> "Again according to G.O.Ms.No.720, Education, dated 28.4.1981 the recruitment to the post of Post Graduate Teacher by direct recruitment and recruitment by transfer should be in the ratio of 1 : 1 *i.e.*, one by direct recruit and the other by transfer. The previous vacancy was filled up by promoting Thiru M.Velu, Tamil Pandit and this vacancy has to be filled by direct recruitment."

In these circumstances, it has to be held that the impugned order of the first respondent is in accordance with the Special Rules and it cannot be said that the first respondent has violated the relevant rule and procedure prescribed for recruitment. There is no infirmity in the order challenged in this writ petition. The principles laid down in *Kalvi Pani (P) Ltd. v. The Director of School Education, 1991 Writ L.R. 103,* relied on by the learned counsel for the petitioner will not apply to the facts of the present case.

9. It is also admitted that during the pendency of the writ petition Velu, who was promoted to the post of P.G.Assistant in Tamil when the Higher Secondary Scheme was introduced, retired from service and the petitioner was promoted as P.G.Assistant in the vacancy caused by the retirement of the said Velu.

10. No doubt, the order dated 29.10.1983 passed by the Joint Director of School Education directing the management of the 4th respondent to promote the petitioner as P.G.Assistant in the place of the 5th respondent has become final. But, it has to be pointed out that by the said order the Joint Director directed the management of the 4th respondent school to promote the petitioner to the post reserved for direct recruit as per Rule 2(b) of the Special Rules and, therefore, the said order is illegal as it contravenes the said Rule 2(b)(ii) of the Special Rules. The writ of *mandamus*, which is an extraordinary and discretionary remedy, cannot be issued to enforce an illegal order. Further as against the order of the management of the 4th respondent--school refusing to promote the petitioner to the post of P.G.Assistant the petitioner has no right of appeal to the Joint Director and the order of the Joint Director of School Education, dated 29.10.1983 is not an order passed in any statutory appeal and, therefore, the order dated 29.10.1983 is only an administrative order and as already pointed out, it is bad, because, it contravenes Rule 2(b)(ii) of the Special Rules. In these circumstances, the petitioner is not entitled to any relief in this writ petition. There is no merit in the writ petition and the same is liable to be dismissed. Accordingly, the writ petition is dismissed. No costs.

B.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:-*Nainar Sundaram* and *Thanikkachalam, JJ.*

L.P.A.No.21 of 1991 *4th March, 1991.*

Greaves Cotton and Company, Madras. ...*Appellant*

v.

J.Jamal Mohammed Abdulla ...*Respondent.*

Benami Transactions (Prohibition) Act (XLV of 1988), Sec.4 - Expression 'on behalf of a person claiming to be the real owner of such property' - Whether excludes a decree-holder alleging that properties though not standing in the name of the judgment-debtor are only his.

The appellant is the decree-holder and in execution proceedings wanted to proceed against properties standing in the name of the respondent, but advancing a case that the real owner of the properties was the judgment-debtor. The respondent preferred a claim regarding the properties. The trial court dismissed the claim petition, holding that the respondent is only a benamidar for the judgment-debtor and that the real owner was the Judgment-debtor. An appeal was preferred to the High Court. While the said appeal was pending, the Benami Transactions (Prohibition) Act XLV of 1988, came into effect. A learned single Judge who heard the appeal held that it was not possible to countenance the claim of the decree-holder

(the appellant) that the respondent was only a benamidar for the judgment-debtor. The appeal was allowed. The appellant preferred a Letters Patent Appeal against that judgment and contended that Sec.4 of that Act prohibited only a suit, claim or action by or on behalf of the person claiming to be the real owner and that the appellant was not a person claiming to be the real owner.

The pronouncement of the Supreme Court in *Mithilesh Kumari v. Prem Behari Khare, (1989)2 S.C.C. 95,* has exhaustively assessed the scope, purport and intendment of the Act and in spite of that, this court, will not be in order to construe the set of expressions "on behalf of a person claiming to be the real owner of such a property" occurring in Sec.4 as excluding from its ambit and purview, a decree-holder who has no other case except to say that the properties though not standing in the name of the judgment-debtors are only his, so as to be available for being proceeded against in execution. The decree-holder puts forth a case that the judgment-debtor is the real owner of the properties. That is the basis for proceeding in execution against the properties. The court can only view that as a case on behalf of and projecting a claim of a person, namely, the judgment-debtor as the real owner of the properties. The decree-holder indirectly confers the benefit of ownership on the judgment debtor and wants to proceed against the properties in discharge of decree-debts of the judgment-debtor so as to exonerate him therefrom. It is significant to note here that the judgment-debtor was not made a party to the proceedings and was never called upon to make his say on the question. It is only the voice of the decree-holder, the appellant herein, which spoke and that voice was only to say that the real owner is the judgment-debtor and not the respondent herein, in whose name the properties stood. The present case, will certainly come within the mischief of Sec.4. On facts, the court is not prepared to accept the construction put forth by the learned counsel for the appellant on the provisions of Sec.4.

[Para 3]

Cases referred to:

Mithilesh Kumari v. Prem Behari Khare, (1989)2 S.C.C. 95; Minor Habib Rahman and others v. Ramu Pandaram, (1990)2 L.W. 337.

Appeal under Clause 15 of the Letters Patent against the order of Raju, J., dated 29.11.1990 and made in the exercise of the Appellate Side Jurisdiction of the High Court in C.M.A.No.610 of 1983 preferred against the order of the court of the Subordinate Judge, Thanjavur, dated 5.8.1983 made in E.A.No.236 of 1980 in E.P.No.104 of 1979 in O.S.No.160 of 1976.

B.Kumar, for Appellant.

The Judgment of the Court was delivered by

Nainar Sundaram, J.:- The appellant in this Letters Patent Appeal is the decree-holder and in execution proceedings the appellant wanted to proceed against properties standing in the name of the respondent, but advancing a case that the real owner of the properties is the judgment-debtor Jamal Mohideen Papa, who is none else than the father of the respondent. In substance, the appellant wanted to say that the respondent is only a benamidar for his father Jamal Mohideen Papa, the judgment-debtor. The respondent preferred a claim regarding the properties. The first court dismissed the claim petition, holding that the respondent is only a benamidar for the judgment-debtor and that the real owner is only the judgment-debtor. The order of the first court is dated 5.8.1983. The matter was taken to this court by way of an appeal C.M.A.No.610 of 1983. While the said appeal was pending, the Benami Transactions (Prohibition) Act 45 of 1988, hereinafter referred to as the Act came into effect. One of the questions that relevantly arose for consideration, on being urged on behalf of the respondent herein, before the learned single Judge who dealt with the appeal C.M.A.No.610 of 1983 was as to whether the decree-holder, the appellant herein, could proceed against the properties on the basis that the respondent held and holds the properties only benami for the judgment-debtor and the real owner is only the judgment-debtor. The learned single Judge took note of the pronouncement of the highest court in the land, after the Act came into force, speaking on the subject which we shall presently refer to, and also after adverting to the scope, purport and intendment of the Act, held that it is not possible to countenance the claim of the decree-holder, the appellant herein, that the respondent herein is only a benamidar for the judgment-debtor. The learned single Judge has also gone into the factual questions as to whether the judgment-debtor is the real owner of the properties and the respondent herein is only a benamidar for the judgment-debtor, and answered

them against the appellant herein. As a result, the learned single Judge allowed the appeal and set aside the order of the first court. This Letters Patent Appeal is directed against the judgment of the learned single Judge.

2. In *Mithilesh Kumari v. Prem Behari Khare, (1989)2 S.C.C. 95,* it has been countenanced that the provisions of the Act are retrospective in operation and they will apply to appeals arising out of suits, claims or actions, since appeals are only continuation of such proceedings. The pronouncement of the Supreme Court has been taken note of by one of us (Nainar Sundaram, J.) in *Minor Habib Rahman and others v. Ramu Pandaram, (1990)2 L.W. 337.* That was a case of the application of the law as per the Act, which came into effect subsequently at the stage of a second appeal.

3. However, what Mr.B.Kumar, learned counsel for the decree-holder, the appellant herein, urges is that Sec.4 brings in only a prohibition with reference to suit, claim or action by or on behalf of the person claiming to be the real owner and in the present case the decree-holder, the appellant herein, is not a person claiming to be the real owner and he cannot also be said to be prosecuting a suit, claim or action on behalf of a person claiming to be the real owner, namely, judgment-debtor, and hence the provisions of the Act cannot be invoked to inhibit the prosecution of the execution proceedings against the properties, treating the judgment-debtor as the real owner thereof. This contention has been repelled by the learned Single Judge, and in our view, rightly also. The very pronouncement of the Supreme Court, referred to above, has exhaustively assessed the scope, purport and intendment of the Act and inspite of that, we will not be in order to construe the set of expressions" on behalf of a person claiming to be the real owner of such a property" occurring in Sec.4 as excluding from its ambit and purview, a decree-holder who has no other case except to say that the properties though not standing in the name of the judgment-debtor are only his, so as to be available for being proceeded against in execution. The decree-holder puts forth a case that the judgment-debtor is the real owner of the properties. That is the basis for proceeding in execution against the properties. We can only view that as a case on behalf and projecting a claim of a person, namely, the judgment-debtor as the real owner of the properties. The decree-holder indirectly confers the benefit of ownership on the judgment debtor and wants to proceed against the properties in discharge of decree-debts of the judgment-debtor so as to exonerate him therefrom. Mr.B.Kumar, learned counsel for the decree-holder, the appellant herein, read some passages from Maxwell on the Interpretation of Statutes 12th Edition. But, on going through them, we do not find any direct relevancy in them to the present question. It is significant to note here that the judgment-debtor was not made a party to the proceedings and was never called upon to make his say on the question. It is only the voice of the decree-holder, the appellant herein, which spoke and that voice was only to say that the real owner is the judgment-debtor and not the respondent herein, in whose name the properties stood. The present case, in our view, will certainly come within the mischief of Sec.4. On facts, we are not prepared to accept the construction put forth by the learned counsel for the appellant on the provisions of Sec.4.

4. Even otherwise, the learned single Judge has elaborately gone into the factual question as to whether the findings of the first court that the judgment-debtor is the real owner and not the respondent herein could be accepted as tenable. The discussion by the learned single Judge of this question is found in paragraph 9 of his judgment, which runs as follows:

> "That apart, even on the evidence, I am of the view that the findings of the court below on the issue of benami are vitiated by perversity of approach and total misdirection to the relevant legal aspects of the case. The Court below though formulated the legal requirements of the concept of benami, miserably failed and misdirected itself in analysing the material on record. In my view, the court below erroneously placed the burden upon the appellant and proceeded to sustain the pleas of benami since in its view, the appellant could not substantiate that he is the real owner and not benamidar. Indisputably, the property stood purchased in the name of the appellant and that as an ostensible and real owner, he has also mortgaged the said properties with Tanjore Land Development Bank. In the light of such materials on record, it is rather surprising that the court below tried to draw inferences in surmises and relying upon merely the oral

evidence of D.W.1. A reading of the evidence of P.W.1 does not militate against his stand that he is the real owner and he purchased the property from and out of the funds at his disposal. Likewise the oral evidence of D.W.1 does not contain any clinching evidence on the relevant and vital aspects and necessary ingredients of the concept of benami and does not in any way militate against the case of the appellant. The oral evidence of D.W.1 does not contain any other concrete material to substantiate the plea that the consideration for the purchase of the property was from and out of the funds of the judgment-debtor. Not only the court below embarked upon a superficial consideration of the oral evidence, but seems to have rested its conclusion on mere conjectures, surmises and suspicion, which may not be sufficient in law to deprive the appellant, who is the ostensible purchaser of his beneficial interest in the property. The court below appears to have also proceeded on a confusion as though it was considering a transaction which is either fictitious or fraudulent, and in my view went astray from the relevant legal considerations. Except the oral evidence of D.W.1, the respondent has not chosen to cause the production of any documentary evidence in support of his case. The oral evidence of D.W.1 is also not supported by any documentary evidence. In the shapes of cultivation accounts, or extracts from the other village accounts on records in support of the case pleaded by the respondent. Consequently, I am of the view that the evidence on record are not legally sufficient to justify the finding that the appellant is only a benami in respect of the properties in question and not the real owner. On this ground also, I am not persuaded to accept the submission of the learned counsel for the respondent".

We fully endorse the reasonings of the learned single Judge and the ultimate decision rendered by him on the factual question also.

5. The result of our above discussion is that this Letters Patent Appeal does not deserve being entertained for investigating into any question further. Accordingly, this Letters Patent Appeal is dismissed.

B.S. ---- Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.No.6082 of 1991 *12th November, 1991.*

N.Subramaniam and others *...Petitioners*

v.

State of Tamil Nadu and another *...Respondents.*

Land Acquisition Act (I of 1894), Secs.3(aa) and 6 - Tamil Nadu Town and Country Planning Act (XXXV of 1972), Secs.37(2), 39 and 65(2) - Acquisition of Land for a local authority for purpose of constructing a bus stand - Entire cost of the land acquisition cannot come from public revenue - Declaration under Sec.6 showing that entire compensation of acquisition is paid out of public revenue - Declaration, if can be sustained.

A reading of Secs.39 and 65(2) of the Tamil Nadu Town and Country Planning Act XXXV of 1972 and Secs.3(aa) and 6 of the Land Acquisition Act, clearly shows that the acquisition in this case is for local authority, even though Chapter IV of the Town and Country Planning Act, 1971 is invoked for requiring the lands for the purpose of constructing a bus-stand. But the declaration made under Sec.6 of the Land Acquisition Act clearly shows that the entire compensation of the acquisition is paid out of the public revenue. As rightly pointed out by the learned counsel for the writ petitioners, on this ground alone, the declaration made under Sec.6 of the Land Acquisition Act is bad in law. *[Para 10]*

Cases referred to:

Narayana Rajoo v. The State of Tamil Nadu, (1991) 1 L.W. 476; Valjibhai v. State of Bombay, A.I.R. 1963 S.C. 1890.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent, relating to its order made in G.O.Ms.No.977, Housing and Urban Development Department, dated 17.8.1990, published in the Tamil Nadu Government Gazette, dated 12.9.1990 in No.36-A, Part II, Sec.2 (Supplement) at pages 16 and 17 and quash the same Notification issued under

Sec.37(2) of the Town and Country Planning Act 1971, in so far as the petitioners are concerned in respect of their lands comprised in Survey Nos.107 and 136, No.156, Mamallapuram Village, Chingleput Taluk, Chengai-Anna District.

N.Ganapathy, for *S.M.Kalyanasundaram* and *K.A.Ravindran,* for Petitioners.

N.G.Kalaiselvi, Government Advocate, for Respondents.

The Court made the following

ORDER:- The petitioners challenge G.O.Ms.No.977, Housing and Urban Development Department, dated 17.8.1990, published in the Tamil Nadu Government Gazette, dated 12.9.1990 and quash the publication issued under Sec.37(2) of the Town and Country Planning Act 1971, in so far as the petitioners are concerned in respect of their lands comprised in Survey Nos.107 and 136 in No.156, in Mamallapuram Village, Chingleput Taluk, Chengai-Anna District.

2. The short facts which lead to the filing of the writ petition are as follows:

The subject matter of the lands are situate in Mamallapuram village and Mamallapuram is a celebrated port-town, drawing a large number of tourists and pilgrims. The growth of population and the influx of tourists were considered by the New Town Development Authority, Mamallapuram, the second respondent herein and since the existing bus-stand is a small one the second respondent suggested that the lands in S.Nos.107 and 136 are suitable for constructing a new bus-stand. The New Town Development Authority, acting in accordance with the provisions of the Tamil Nadu Town and Planning Act, 1971 prepared a New Town Development Plan and submitted the same to the Government. Sec.49 of the Tamil Nadu Town and Country Planning Act, 1971 provides for the enforcement of the plan so prepared from the date of consent accorded by the Government to the Plan. When the Member Secretary, Mamallapuram New Town Development Authority requested the Government for acquiring the above mentioned lands for construction of Bus Stand, the New Town Development Plan for Mamallapuram New Town was consented by Government under sub-sec.(2) of Sec.24 of the Town and Country Planning Act in G.O.Ms.No.968, Housing and Urban Development, dated 29.9.1989, and it was published in the Tamil Nadu Government Gazette on 15.11.1989 as required under Sec.26 of the Town and Country Planning Act, 1971. The two survey numbers in question have been reserved for Bus Stand in the above said New Town Development Plan. This was selected by the Task Force, chaired by the Chief Secretary to Government on 21.3.1988. The Committee of Town and Country Planning Board has sanctioned a sum of Rs.12.11 lakhs for the acquisition of land for the Bus Stand. In view of the provisions under Sec.37(1) of the Town and Country Planning Act, a proposal was sent by the Director of Town and Country Planning to the Government for acquiring the above mentioned lands under Sec.37(2) of the Town and Country Planning Act. After verifying the facts as to whether the provisions of the Act have been complied with, a draft declaration under Sec.37(2) has been approved by the Government by the impugned Government Order. The declaration as published in the Gazette reads as follows:

".....No.II(2)HOU/4461/90-Whereas, a notice was published with Mamallapuram New Town Development Authority Notification No.VI(1) 1964 of 1989, dated the 30th September, 1989, at page 597 of Part VI-Sec.1 of the Tamil Nadu Government Gazette, dated the 15th November, 1989 of preparation of a New Town Development Plan for Mamallapuram New Town under Sec.26 of the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu Act 35 of 1972) and the Government of Tamil Nadu having been satisfied that the lands specified in the schedule below have to be acquired for a public purpose, *viz.*, for formation of a bus-stand, and it having already been decided that the entire amount of compensation to be awarded for the lands is to be paid out of the public revenues, the following declaration is issued under Sub-sec.(2) of Sec.37 of the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu 35 of 1972):

DECLARATION

Under Sub-sec.(2) of Sec.3 of the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu Act 35 of 1972), the Governor of Tamil Nadu hereby declares that the lands specified in the schedule below and measuring 3.09 0 hectares, be the same, a little more or less, are needed for a public purpose, to wit, for construction of a bus-stand as required in the New Town Development Plan of Mamallapuram by

the New Town Development Authority, Mamallapuram, Chengalpattu Taluk, Chengai Anna District. A plan of the lands is kept at the District Collector's Office, Kancheepuram and may be inspected at any time during office hours......"

It is alleged in the affidavit that the exact location of the proposed bus-stand from the main tourist attraction spots like shore temple and other monuments will be about 6 to 7 kms. It is further alleged that the tourist interest will be seriously affected if the new acquisition of lands took place, that there are other more convenient and vacant sites situate on the left side of the shore temple road as well as at the very entrance of the village *viz.*, poramboke land and other lands. It is also alleged in the affidavit that the proposal to locate the new bus stand in the lands to be acquired is incorrect, and that the public interest will be greatly affected if the proposed new bus-stand is put up in the lands to be acquired. It is also stated that when there is a draft report pending consideration, the Government cannot invoke the provisions of the Land Acquisition Act and that the impugned notice purporting to be the one issued under Sec.37(2) of the Tamil Nadu 37 of 1972, is illegal. It is further stated in the affidavit filed in support of the writ petition that when a draft proposal is pending and that draft contains a proposal to locate a new bus-stand in a particular survey number before the draft has become final cannot be done and that the notification under Sec.37(2) cannot be treated as a final one. It is also stated that if the lands are to be acquired under the Land Acquisition Act, there are certain procedures to be followed *viz.*, notification under Sec.4(1) of the Act and the enquiry under Sec.5-A of the Act, that such a course of action is not contemplated under Sec.37 of the Town and Country Planning Act, 1971 and that therefore Sec.37 of the Act is arbitrary. It is also stated that the impugned notification is bad in law on the ground that there is a colourable exercise of power. It is also stated that principles of natural justice are violated and that the lands are taken over without considering the objections of the petitioners and that it is an infringement of Art.300-A of the Constitution of India.

3. Notice of motion has been ordered by me on 23.4.1991.

4. A counter-affidavit has been filed by the respondents 1 and 2. The counter affidavit says that the New Town Development Authority, acting in accordance with the provisions of the Tamil Nadu Town and Country Planning Act, 1971, under which it was constituted, prepared a New Town Development Plan and submitted the same to the Government. Sec.49 of the Tamil Nadu Town and Country Planning Act, 1971 has been referred to in the counter affidavit. It is further claimed in the counter affidavit that a bus stand will have be located as to allow free entry of the buses from all directions, not to pollute areas around monuments, prohibit criss-crossing of buses and other heavy vehicles in the monument zone. It is further stated that Sec.36 of the Tamil Nadu Town and Country Planning Act provides that any site required, reserved or designated in the Plan prepared under the said Act shall be deemed to be land needed for public purposes within the meaning of the Land Acquisition Act.1894 and provides for the acquisition of the said lands as modified in the Tamil Nadu Town and Country Planning Act, 1971, and as such declaration under the act has been issued by the Government in G.O.Ms.No.977, Housing and Urban Development Department, dated 17.8.1990, which is impugned in this writ petition. It is also claimed in the counter-affidavit that the petitioners themselves wanted to dispossess the lands comprised in S.Nos.107 and 136 in No.156, Mamallapuram Village and that the petitioners cannot contend that the lands in question cannot be acquired. It is further claimed in the counter-affidavit that the distance between the site selected and the fartherest monument is less than one kilometre and that the said distance can be travelled by foot by anyone and that the petitioners' contention to the contrary is not correct. It is further claimed that objections were called for and that the views of the public were taken note of before finalising the site for the bus stand. It is further claimed that the interest of the tourists will never be affected if the New Town Development Authority locates the bus stand in those lands mentioned above and that the alternate site suggested by the petitioners are not suitable for the location of the bus stand. It is further stated that the notice of preparation of a New Town Development Plan for Mamallapuram was published on 15.11.1989 and a notification under Sec.37 of the New Town Development Plan for Mamallapuram was published on 15.11.1989. It is further stated that Sec.37 of the Tamil Nadu Town and

Country Planning Act, 1971 provides consent of the Government for preparation of plan and that in the instant case the preparation of the plan was sanctioned by the Government and that all formalities have been complied with by the Government. It is also stated that the objections and suggestions of the public who are affected under Sec.27 of the Act were considered and that they have been processed before the Committee on 19.3.1990.

5. Though many points are taken in the affidavit, Mr.N.Ganapathy, the learned counsel appearing for the petitioners after referring to various provisions of the Act, restricted his arguments only to two points, the first being that no opportunity has been given to the petitioners and that there was no publication made. The learned counsel points out that the acquisition is being for local authority under Sec.3(aa) of the Land Acquisition Act, 1894, the entire cost of the land acquisition cannot come from public revenue. The learned counsel also points out the declaration made under Sec.6 of the Land Acquisition Act and contends that funds cannot come from public revenue as separate funds are provided under the Tamil Nadu Town and Country Planning Act, in this case. The learned counsel relies upon the decision of Kanakaraj, J. in *Narayana Rajoo v. The State of Tamil Nadu (1991)1 L.W. 476*, wherein the learned Judge has followed earlier decisions with regard to the validity of declaration made under Sec.6 of the Land Acquisition Act for the purpose of acquisition of lands for the Housing Board. The learned counsel further contends that the declaration made in this case has to be set aside purely on this ground alone.

6. *Per contra*, Mrs.N.Kalaiselvi, the learned Government Advocate appearing for the respondents contends that the provisions of the land acquisition act have been fully complied with and that the publication in the newspapers has also been made. It is further stated that under Sec.26 of the Act, publication has been made in Tamil daily 'Makkal Kural' and in English daily 'in 'The Hindu', and that wide publicity has also been given to the notification in the notice board of the authority, District Collector, the Township Committee office etc. It is further stated that in response to the advertisement made, the petitioners have submitted applications seeking declaration of their lands as residential instead of public purpose and that they have been duly considered. It is also stated by the learned counsel for the respondents that a careful reading of Secs.36 and 37 of Town and Country Planning Act, 1971 will prove that the acquisition can be resorted to within three years from the date of notification under Sec.26 of the Act and that in this case the land acquisition proceedings have been initiated once publication has been published in the Tamil Nadu Gazette.

7. I have considered the arguments of Mr.N.Ganapathy, the learned counsel appearing for the petitioners and of Mrs.N.Kalaiselvi, the learned Government Advocate appearing for the respondents. Sec.26 of the Tamil Nadu Town and Country Planning Act, 1971 (hereinafter referred to as the 'Act', 1971') provides notice of the preparation of the regional plan, the master plan or the new town development plan, and it reads as follows:

> "......(1) As soon as may be, after the appropriate planning authority has received the consent of the Government under sub-sec.(2) of Sec.24 to the publication of the notice, the appropriate planning authority shall publish the notice in the Tamil Nadu Government Gazette and in leading daily newspapers of the region of the preparation of the regional plan, the master plan or the new town development plan, as the case may be, and the place or places where copies of the same may be inspected, inviting objections and suggestions in writing from any person in respect of the said plan within such period as may be specified in the notice;
>
> Provided that such period shall not be less than two months from the date of the publication of the notice in the Tamil Nadu Government Gazette.
>
> 2. After the expiry of the period mentioned in Sub-sec.(1), the appropriate planning authority shall allow a reasonable opportunity of being heard to any person including representatives of Government departments and authorities, who have made a request for being so heard and make such amendments to the regional plan, the master plan or the new town development plan, as the case may be, as considers proper and shall submit the said plan with or without modifications to the Government....."

Sec.27 of the Act, 1971 provides the notice of the

preparation of the detailed development plan which reads as follows:

"....(1) As soon as may be, after the local planning authority has received the consent of the Director under sub-sec.(2) of Sec.25 to the publication of the notice, the local planning authority shall publish the notice in the Tamil Nadu Government Gazette, and in leading daily newspapers of the region of the preparation of the detailed development plan and the place or places where copies of the same may be inspected, inviting objections, and suggestions in writing from any person in respect of the said plan within such period as may be specified in the notice;

Provided that such period shall not be less than two months from the date of the publication of the notice in the Tamil Nadu Government Gazette.

(2) After the expiry of the period mentioned in sub-sec.(1), the local planning authority shall allow a reasonable opportunity of being heard to any person including representatives of Government departments and authorities, who have made a request for being so heard and make such amendments to the detailed development plan as it considers proper and shall submit the said plan with or without modifications to the Director....."

Sec.28 of the Act, 1971 provides for approval of the Government and Sec.30 speaks of coming into operation of regional plan, master plan and new town development plan.

8. Chapter IV of the Act 1971 provides the power to acquire land under the Land Acquisition Act and Sec.36 of the Act reads as follows:

".....Any land required, reserved or designated in a regional plan, master plan, detailed development plan or a new town development plan, as the case may be, shall be deemed to be land needed for a public purpose within the meaning of the Land Acquisition Act, 1894 (Central Act I of 1894) and may be acquired under the said Act as modified in the manner provided in this Act....."

Sec.37 of the Act 1971 gives power to purchase or acquire lands specified in the development plan which reads as follows:

"....(1) Where after the publication of the notice in the Tamil Nadu Government Gazette of preparation of a regional plan, master plan, as the case may be, any land is required, reserved or designated in such plan, the appropriate planning authority may, either enter into agreement with any person for the acquisition from him by purchase of any land which may be acquired under Sec.36 or make an application to the Government for acquiring such land under the Land Acquisition Act, 1894 (Central Act I of 1894);

Provided that if the value of such land exceeds fifty thousand rupees, the appropriate planning authority shall not enter into such agreement without the previous approval of the Government.

(2) On receipt of an application made under sub-sec.(1), if the Government are satisfied that the land specified in the application is needed for the public purpose specified therein, they may make a declaration to that effect in the Tamil Nadu Government Gazette, in the manner provided in Sec.6 of the Land Acquisition Act, 1894 (Central Act I of 1894), in respect of the said land. The declaration so published shall notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said Sec.6 of the said Act;

Provided that no such declaration in respect of any particular land covered by a notice under Sec.26 or Sec.27 shall be made after the expiry of three years from the date of such notice.

(3) On the publication of such declaration, the Collector of the district within whose jurisdiction the land is situate shall proceed to take order for the acquisition of such land under the said Act, and the provisions of that Act shall, so far as may be, apply to the acquisition of the said land with the modification that the market value of the land shall be the market value prevailing on the date of the publication of the notice in the Tamil Nadu Government Gazette under Sec.26 or Sec.27, as the case may be....."

9. With regard to the contention raised by the learned counsel appearing for the petitioner that no opportunity has been given to the petitioner, I am not able to agree with the said contention of the learned counsel for the petitioner. In my view, the provisions of the Act 5 of 1971 have been strictly complied with. A careful reading of Sec.37 of the Act, extracted above, will prove that the

acquisition can be resorted within three years from the date of notification of the Sec.26 of the Act, 1971 after the notice of the preparation of the Regional Plan, Master Plan or New Town Development Plan and after it received the consent of the Government. On the facts of the case on hand, it is seen that the petitioners have also given their objections against the acquisition and they have been duly considered. As such, I am not able to accept the arguments of the learned counsel for the petitioner on the ground that no opportunity has been given to the petitioners. The argument of the learned counsel for the petitioners, on this ground, falls to the ground.

10. With regard to another ground raised by the learned counsel for the petitioners, it is necessary to refer certain provisions of the Act. Sec.39 of the Act gives the right to compensation. Chapter VIII provides for finance and the State Town and Country Planning and Development Fund is created. Sec.65 of the Act states that every planning authority shall maintain a separate Fund called "The Planning and Development Fund Account". Sub-sec.(2) of Sec.65 of the Act reads as follows:

> "The Fund account may be initially established by the planning authorities with the grants, advances or loans obtained from the Government or from the State Town and Country Planning and Development Fund......"

From a reading of the provisions mentioned above, it is clear that the Government is empowered to acquire lands under the provisions of the Act, Act 37/72, and that the provisions of the Land Acquisition Act need not be followed. Chapter IV of the Act provides for acquisition. However, if an acquisition is made by enforcing Chapter IV of the act, it is the acquisition for the local authorities as defined under Sec.3(aa) of the Land Acquisition Act. Sec.3(aa) of the Land Acquisition Act, 1894 reads as follows:

> "......The expression 'local authority" includes a town planning authority by (whatever name called) set up under any law for the time being in force...."

The relevant portion of Sec.6 of the Land Acquisition Act, 1894 with which we are concerned, reads as follows:

> "6. *Declaration that land is required for a public purpose*:- (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Sec.5-A, sub-sec.(2) that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary, to such Government or of some officer duly authorised to certify its orders (and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Sec.4, sub-sec.(1), irrespective of whether one report or different reports has or have been made (whenever required) under Sec.5-A, sub-sec.(2);
>
> ....
>
> ....
>
> Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority....."

A reading of the abovementioned sections clearly shows that the acquisition in this case is for local authority, even though Chapter IV of the Town and Country Planning Act, 1971 is invoked for acquiring the lands for the purpose of constructing a bus-stand. But the declaration made under Sec.6 of the Land Acquisition Act, which has been extracted in the earlier portion of this order, clearly shows that the entire compensation of the acquisition is paid out of the public revenue. As rightly pointed out by Mr.N.Ganapathy, learned counsel for the writ petitioners, on this ground alone, the declaration made under Sec.6 of the Land Acquisition Act is bad in law. In a batch of writ petitions in *Madan Sundararaj v. The Government of Tamil Nadu, represented by the Commissioner and Secretary to Housing and Urban Development Department, Madras-9 and others, W.P.Nos.1326 of 1982 etc.* Mohan, J., (as he then was) held as follows:

> "......It is no consolation to say that public revenue would mean either the revenue of the State of the revenue of a local authority. Such an argument ignores the well-settled position in law that a local authority is a local self-government being the creature of statute having its own seal and perpetual succession. In other words, the State revenues cannot be equated to the revenues of the local authority. That is why the Parliament in its wisdom created a sub-division in the case of an acquisition

under Part II and categorically stated (i) wholly or partly out of public revenue and (ii) or some fund controlled or managed by a local authority. If the argument of the learned Advocate General is accepted, it will render the second limb of the second Proviso to Sec.6(1) of the Act, namely, or some fund controlled or managed by a local authority' otiose. In other words, such an unwisdom cannot be attributed to the Parliament."

The learned Judge has further held as follows:

"......If, in law there is a clear distinction between the revenues of the State as opposed to the revenue of a local authority, it is that which should form part of the declaration in view of the legal requirement under the second proviso to Sec.6(1) of the Act. That certainly is not the position here and, therefore, the declaration is not in accordance with the proviso to Sec.6(1) of the Act....."

This has been followed by Kanakaraj, J. in *Narayana Rajoo v. The State of Tamil Nadu (1991)1 L.W. 476.* In *Madan Sundararaj v. The Government of Tamil Nadu, represented by the Commissioner and Secretary to Housing and Urban Development Department, Madras-9 and others, W.P.Nos.1326 of 1982 etc.* Mohan, J., (as he then was) has followed the decision in *Valjibhai v. State of Bombay, A.I.R. 1963 S.C. 1890.*

In that case it is held that even assuming that the funds of the Corporation consist only of the moneys which have been provided by the State of Bombay it is difficult to appreciate how they could be regarded as part of the public revenue. In my view, money coming out of public revenue whether invested, loaned or granted to the second respondent herein would change their original character and become the funds or assets of the second respondent herein. As such, the terms of proviso are not satisfied in this case, because under the impugned declaration, the entire amount of compensation has to be paid out of public revenue. As I have already stated, the second respondent has got separate funds under Chapter VIII of the Act, 1971. In view of that, I am not able to accept the contention of the learned Government Advocate appearing for the State that Sec.43 of the Act, 1971 provides for making advance to the New Town Development Authority and as such in this case the amount is advanced to the second respondent by the Government and that the declaration is not bad in law, with respect following the judgment of this Court on this issue by Mohan, J., (as he then was) in *Madan Sundararaj v. The Government of Tamil Nadu, represented by the Commissioner and Secretary to Housing and Urban Development Department, Madras-9 and others, W.P.Nos.1326 of 1982 etc.,* and agreeing with Kanakaraj, J. in *Narayana Rajoo v. The State of Tamil Nadu (1991)1 L.W. 476,* the impugned declaration in this case is set aside as no other point is argued before me. The writ petition will stand allowed. It may be open to the State to take proceedings afresh rectifying the defects. There will be no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

A.A.O.No.419 of 1985 and C.M.P.No.12502 of 1991 *7th November, 1991.*

M.Venkataswamy ...*Appellant*

v.

Marudapurshpam and others ...*Respondents.*

(A) Civil Procedure Code (V of 1908), Sec.20(b) - Suit originally filed in Original Side of High Court, later on transferred to City Civil Court, Madras - Leave to sue - Could be granted only by City Civil Court.

(B) Civil Procedure Code (V of 1908), Sec.20(b) - 'Carrying on business' - Partnership firm carrying on business - Partner not excluded from taking part in business, nor is he sleeping partner - Carrying on of the business by the firm amounts to that partner carrying on business - Business carried on through power of attorney agent - If also carrying on business.

(C) Civil Procedure Code (V of 1908), Sec.20(b) - Letters Patent (Madras), Clause 12 - Distinction between Joint liability and joint and several liability - Difference not significant in the context of Sec.20(b), Civil Procedure Code.

One Kailasa Gounder borrowed Rs.30,000 on 18.6.1975 from Muthu Goundar, the appellant's father and executed a promissory note. He again

borrowed Rs.17,000 from Muthu Gounder on another promissory note dated 9.7.1975. Kailasa Gounder paid Rs.3,300 in respect of the first promissory note and Rs.1,700 in respect of the second promissory note on 9.7.1975. He died on 19.2.1976 leaving behind the present respondents as his heirs. On 25.11.1976 Muthu Gounder transferred all his rights in the two promissory notes to the appellant, for consideration. The debts were received by Kailasa Gounder for banking business which is a joint family trade of himself and the respondents. The appellant filed a suit for the recovery of a sum of Rs.63,650 together with interest from the respondents personally and against the estate of Kailasa Goundar. On the Original Side of the High Court. Necessary leave to sue was granted to him under clause 12 of Letters Patent and the suit was numbered as C.S.No.451 of 1977. Consequently on the raising of the pecuniary jurisdiction of the City Civil Court, the suit was transferred to that Court. The respondents contended that the appellant had no cause of action to sue the respondents at Madras. The City Civil Court held that neither the High Court nor the City Civil Court had jurisdiction to try the suit. The plaint was, therefore, returned for presentation to the proper court. The appellant filed an appeal. It was contended by the respondents (1) that since the suit was originally filed on the Original Side of the High Court, Clause 12 of the Letters Patent alone should be taken into account and not Sec.20(b), Civil Procedure Code, (2) That in view of the business being carried on by the firm Madras Financiers in which the 1st respondent was a partner, it could not be said that she was carrying on business within the meaning of Sec.20(b) Civil Procedure Code, and (3) that the suit liability was a joint liability and not joint and several liability; that therefore the cause of action was against all the defendants together jointly and the cause of action took place only in Erode.

Held: The contention that since the suit was originally filed on the Original Side of the High Court, Clause 12 of the Letters Patent alone should be taken into account and not Sec.20(b) of the Code of Civil Procedure for granting the leave cannot be accepted. No doubt, initially when the suit was filed in this Court, leave was granted in 1977. But subsequently, the suit was transferred to the City Civil Court in about 1981 and the said Court alone has tried the suit. So only Sec.20(b) of the Civil Procedure Code will be the relevant provision applicable in considering whether leave could be granted or not. *[Para 15]*

Under Ex.B-2 partnership deed of the firm, Madras Financiers, and Commission Agents, there is no exclusion of the 1st respondent from taking part in the business of the said firm nor has she been described therein as sleeping partner only. On the other hand, it states that the parties therein *viz.*, all the partners (including the 1st respondent 'hereby become partners to carry on the business of financiers and commission agents'. Therefore the carrying on of the business of the firm in which the 1st respondent was also a partner will amount to 1st respondent carrying on business. In *Shiv Bhagwan v. Onkarmal, A.I.R. 1952 Bom. 365,* it has been observed that it has been laid down that a person in order to carry on the business need not do it personally. He can also do it through an agent duly authorised in that behalf. In the present case, it is admitted in the Written Statement itself that the abovesaid firm gave a power of attorney to Muthukumaraswami to carry on the business of the firm and it was also admitted in evidence that Muthukumaraswami was looking after the affairs of the said business and the account of the firm was operated from Madras since the said Muthukumaraswami was residing at Madras. *[Para 16]*

No doubt in the context of Clause 12 of the Letters Patent and particularly the word 'defendant' used therein, some Courts made a distinction between 'joint liability' and 'joint and several liability'. But, the court is concerned here not with the said Clause 12 but only with Sec.20(b) of the Civil Procedure Code wherein the term 'defendant' in singular has not been used but the expression used is 'any of the defendants where there are more than one. Hence the contention that the suit liability is a joint liability and not joint and several liability will not have any significance. *[Para 18]*

Cases referred to:

Govindarajulu Naidu v. Secretary of State, 58 M.L.J. 356: 195 I.C. 576: A.I.R. 1927 Mad. 689; Pachaimmal v. Hindustan, C.I. Society, (1940)2 M.L.J. 688: I.L.R. 1941 Mad. 109: A.I.R. 1941 Mad. 270; Shiv Bhagwan v. Onkarmal, A.I.R. 1952 Bom. 365; Narayanappa v. Bhaskara Krishnappa, (1966)2 M.L.J. (S.C.) 60: (1966)2 An.W.R. (S.C.) 60: (1966)2 S.C.J. 490: A.I.R. 1966 S.C. 1300; Bengal A. and I., Corporation v. Corporation of Calcutta, A.I.R. 1960

Cal. 123; Azizuddin and Company v. Union of India (1955)1 M.L.J. 316; I.L.R. 1955 Mad. 912: 1955 M.W.N. 91: A.I.R. 1955 Mad. 345; Hadjee Ismail v. Hadjee Mahommed, (1874)13 B.L.R. 91; P.H.Parameswara Pattar v. Vivathan Mahadevi, 1922 M.W.N. 841; Manoramabal v. Ibrahim Khan, A.I.R. 1969 Bom. 366; Narayan Shankar v. Secretary of State in India in Council, (1906) I.L.R. 30 Bom. 570; Dwarka Das v. Hanumandas, A.I.R. 1961 Raj. 187; Krishnan Nair v. Ghouse Basha, (1987)4 S.C.C. 404; D.N.Sanghavi and Sons v. Ambalal Tribhuvan Das, A.I.R. 1974 S.C. 1026: (1974)1 S.C.C. 708; Firm Rajniklal and Company v. Vithal Pandurang, A.I.R. 1952 Nagpur 312; Kulsumbai Mulla Jeewajee v. Madras Marine P. Ltd., (1984)1 M.L.J. 399.

Appeal against the Order of the City Civil Court (XI Additional Judge), Madras, dated 10.4.1985 and made in O.S.No.7259 of 1981. etc.

V.Srinivasan, for Appellant.

T.K.Seshadri, for Respondents.

The Judgment of the Court was delivered by

Abdul Hadi, J.:- This civil miscellaneous appeal by the plaintiff is against the judgment dated 10.4.1984 in O.S.No.7259 of 1981 on the file of XI Additional Judge, City Civil Court, Madras, directing the plaint to be returned for presentation before proper court, on the ground that the said Court or High Court, in which the said suit was originally instituted as C.S.No.451 of 1977, has no jurisdiction to try the said suit.

2. The suit is for recovery of a sum of Rs.63,650 together with interest, from the respondents personally and against the estate of the deceased Kailasa Gounder whose legal representatives are the said respondents. According to the plaintiff, the 1st defendant is the widow, defendants 2, 3 and 5 are the sons and the 4th defendant is the daughter of the said Kailasa Gounder. The deceased Kailasa Gounder borrowed Rs.33,000 on 18.6.1975 from A.Muthu Goundar, the plaintiff's father and executed a promissory note in favour of Muthu Gounder promising to repay the amount with interest. Kailasa Gounder borrowed another sum of Rs.17,000 from Muthu Gounder and executed a promissory note on 9.7.1975 in favour of Muthu Gounder, promising to repay the same with interest. In respect of the first promissory note dated 18.6.1975 Kailasa Gounder made payment to the extent of Rs.3,300 and in respect of the 2nd promissory note. He made a payment of Rs.1,700, both on 9.7.1975, and the endorsements, of the said payments find a place in the respective promissory notes. Kailasa Gounder died on 19.2.1976, leving behind the defendants-respondents as his heirs. On 25.11.1976 for valuable consideration, Muthu Goundar transferred all his rights by endorsing the promissory notes in favour of the plaintiff and thus, the plaintiff is entitled to recover the amount due under the two promissory notes from the estate of the deceased Kailasa Gounder. The debts covered by the promissory notes were received by Kailasa Gounder for banking business, which is a joint family trade of himself and the defendants. The defendants had the benefit of the amounts borrowed and they are liable to pay the amount.

3. Further, according to the plaintiff, the promissory notes were executed at Erode and were duly endorsed in favour of the plaintiff and defendants 1 to 3 carry on business permanently under the name and style of "Madras Financiers Commission Agents", Madras-18 and personally work for gain within the city of Madras, where the firm is situate and defendants 2 and 3 also carry on business and are Directors of the International General Agencies, Madras.

4. On the abovesaid allegations, the plaintiff filed the suit in this Court. The plaintiff also applied for leave to sue and the leave was granted under Clause 12 of the Letters Patent in Application No.3851 of 1977 on 8.12.1977 and the suit was numbered as C.S.No.451 of 1977 on the file of this Court.

5. But, the suit was transferred to the City Civil Court consequent on the raising of the pecuniary jurisdiction of the City Civil Court and the written statement was filed by the defendants in the City Civil Court.

6. The averments in the written statement are briefly as follows: The suit claim is unsustainable. The business of Madras Financiers and Commission Agents were not carried on at No.10, Kasthuri Ranga Iyengar Road, Madras on the date of the institution of the suit *viz.*, December, 1977 and the said premises was sold by the partners thereof and defendants 2 and 3 on 25.10.1977. The business of Madras Financiers and Commission Agents was not carried on at No.10, Kasthuri Ranga Iyengar Road, Madras-18. The defendants are the permanent residents of Erode and they reside only at Erode. The mere fact that the 1st defendant happened to be a partner of Madras Financiers

and Commission Agents and that it had at some point of time carried on business at No.10, Kasthuri Ranga Iyengar Road, Madras-18 could not confer jurisdiction in respect of the suit against the 1st defendant for the purpose of suit claim. The partners of Madras Financiers and Commission Agents are: (1) Mrs.M.Kanthimathi, (2) Mrs.L.Rathinambal, (3) Mrs.R.Annapirai, (4) Mrs.K.Marudhapushpam (1st defendant). The partners of the said firm gave a power of attorney to V.P.Muthukuaraswamy to carry on their business and hence the 1st defendant is not carrying on and has not carried on business at No.10, Kasthuri Ranga Iyengar Road, Madras on the date of institution of the suit. Therefore, the City Civil Court has no jurisdiction and no part of the cause of action arises or arose within the jurisdiction of the City Civil Court.

7. The execution of the two promissory notes and the alleged payments and endorsements are denied. The allegation that the amounts were borrowed by Kailasa Gounder for joint family business is also denied. The International General Agencies Ltd., Madras, is a limited company and that the mere fact that defendants 2 and 3 happened to be the Directors, could not give any cause of action for the plaintiff to sue the defendants at Madras. The plaintiff will have to find cause of action against each of the defendants. The plaintiff is not entitled to a personal decree against the defendants.

> "8. On the above pleadings, the following issues were framed for trial:
>
> (1) Whether there is no jurisdiction to file the suit in this Court?
>
> (2) Whether the suit promissory notes were executed by V.M.Kailasa gounder and whether he received the amounts thereunder?
>
> (3) Whether the suit promissory notes were assigned to the plaintiffs for consideration?
>
> (4) Whether the plaintiff is entitled to the suit claim?
>
> (5) To what relief?

9. On issue Nos.(2) and (3), the finding of the trial Court is that the said Kailasa Gounder borrowed the amounts under the abovesaid promissory notes *viz.*, Exs.A-1 and A-2 from Muthu Goundar, the father of the plaintiff and that subsequently Muthu Gounder had assigned the said promissory notes in favour of the plaintiff. Therefore, the said issue Nos.(2) and (3) were found in favour of the plaintiff. On issue No.(4), therefore, it was held that the plaintiff was entitled to the suit claim. However, on issue No.(1), the trial Court held that the contention raised by the defendants that the suit ought not to have been filed in the High Court and the High Court had no jurisdiction, had to be accepted. Therefore, as stated above, the plaint was directed to be returned to be presented in the proper court.

10. The learned counsel for the appellant mainly stressed before us, that even as per the written statement, the 1st defendant was admittedly the partner of the abovesaid firm Madras Financiers and Commission Agents, that the said firm had carried on business at No.10, Kasthuri Ranga Iyengar Road, Madras, that the partners of the said firm gave power of attorney to one V.P.Muthukumarasamy and that the premises No.10, Kasthuri Ranga Iyengar Road, Madras belonged to the said firm and defendants 2 and 3. He also pointed out that though the said premises had been sold on 25.10.1977 under Exs.B-1, B-6 and B-7 sale seeds, the written statement did not say that the abovesaid business at Madras was closed, nor any partner of the abovesaid firm was examined regarding the alleged closure of the business or otherwise. Only the 2nd defendant, who was admittedly not a partner of the firm was examined as D.W.1. He deposed that the 1st defendant was hale and healthy. Yet the 1st defendant was not examined. D.W.1 further admitted thus:

> "One Muthukumaraswami, husband of Mrs.Gandhimathi as General Power of Attorney was looking after the affairs of the said firm. The accounts of the Madras Financiers and Commission Agents were operated from Madras, since Mr.Muthukumaraswamy was residing at Madras."

Further, the said power of attorney also has not been examined. Further, there is also no proof that the said agency has been revoked. Even though the abovesaid property had been sold on 25.10.1977, by that alone, it cannot be concluded that the business carried on at Madras, was closed.

11. On the other hand, the learned counsel for the respondents has argued that the liability in the present case is that of the estate of the abovesaid Kailasa Goundar and hence is joint liability and not joint and several liability and, therefore, the cause of action is against all of the defendants

together jointly, that it is clear from evidence that the entire cause, of action in the suit took place only in Erode, that even the suit notice Ex.A-3 dated 29.10.1977 was issued to all the defendants only to their Erode address, that the defendants 4 and 5 were not associated with any of the concerns referred to in the plaint and that the fact the defendants 2 and 3 were Directors of the said International General Agencies Limited, Madras, a company having separate legal entity, could not confer jurisdiction to the Court at Madras. He also cited the decisions in *Govindarajulu Naidu v. Secretary of State, 58 M.L.J. 356: 195 I.C. 576: A.I.R. 1927 Mad. 689, Pachaimmal v. Hindustan, C.I. Society, (1940)2 M.L.J. 688: I.L.R. 1941 Mad. 109: A.I.R. 1941 Mad. 270, Shiv Bhagwan v. Onkarmal, A.I.R. 1952 Bom. 365, Narayanappa v. Bhaskara Krishnappa, (1966)2 M.L.J. (S.C.) 60: (1966)2 An.W.R. (S.C.) 60: (1966)2 S.C.J. 490: A.I.R. 1966 S.C. 1300, Bengal A. and I., Corporation v. Corporation of Calcutta, A.I.R. 1960 Cal. 123* and *Azizuddin and Company v. Union of India (1955)1 M.L.J. 316: I.L.R. 1955 Mad. 912: 1955 M.W.N. 91: A.I.R. 1955 Mad. 345,* and certain other decisions.

12. But, in view of the fact that the appellant has now filed C.M.P.No.12502 of 1991 under Sec.20(b) of the Civil Procedure Code, seeking leave to institute the suit, in the City Civil Court on the footing that such leave could be granted even after the institution of the suit and that too at the appellant stage, we have to examine whether the said petition could be ordered as prayed for and if we come to the decision that it could be so ordered, there is no necessity for us to consider the above rival arguments submitted before us to see whether the leave granted by this Court under Clause 12 of the Letters Patent at the time when the suit was instituted in this Court originally, we properly granted or not. In other words, if the leave sought for under the abovesaid civil miscellaneous petition could be granted now, then the City Civil Court, which has tried the suit, cannot be said to have no jurisdiction to try the suit. So, we now propose the deal with the said civil miscellaneous petition. Clause 12 of the Letters Patent which applies to this Court on its original side *inter alia* states that if the "defendant" at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits of the ordinary original jurisdiction of this Court, the suit could be laid in this Court on its original side. The term "defendant" used in the abovesaid Clause 12 has also been held to mean all the defendants, where the suit is against more than one defendant. *vide: Hadjee Ismail v. Hadjee Mahommed, (1874)13 B.L.R. 91,* and the view of one of the Judges of the Division Bench in *P.H.Parameswara Pattar v. Vivathan Mahadevi, 1922 M.W.N. 841.* In such a situation, on the Original Side of this Court, there is no scope for granting any leave since the abovesaid portion of Clause 12 does not give any room for the Court granting leave. Only in the other portion of the said Clause 12, it is stipulated that where part of the cause of action arises within the original jurisdiction of this Court, leave could be granted by this Court. But Sec.20(b) of the Civil Procedure Code, which is no doubt not applicable to the original side of this Court in view of Sec.120 thereof, but which is the provision applicable to the City Civil Court and other subordinate Courts, says *inter alia* that where any of the defendants, at the time of the commencement of the suit, carries on business within the local limits of the jurisdiction of any Court, the suit could be laid in that Court, provided that in such a case, the leave of the Court is given for the same. Only in that context, it was held in *Manoramabal v. Ibrahim Khan, A.I.R. 1969 Bom. 366,* relying on *Narayan Shankar v. Secretary of State in India in Council, (1906) I.L.R. 30 Bom. 570,* that such leave under Sec.20(b) could be granted even by the appellate Court. It was also held in *Dwarka Das v. Hanumandas, A.I.R. 1961 Raj. 187,* that leave to sue non-resident defendants under Sec.20(b) could be granted by the appellate court in appropriate cases even after the plaint is ordered to be returned by the trial Court. On the above footing, the abovesaid C.M.P.No.12502 of 1991 has been filed. No decision contra was cited by the learned counsel for the respondents stating that such leave could not be granted after the institution of the suit and that too by the appellate Court. So we also affirm the abovesaid view expressed by the Bombay High Court and Rajasthan High Court.

13. In paragraph 7 of the affidavit filed in support of the abovesaid civil miscellaneous petition, *inter alia,* it is averred as follows:

> "......it is now clear that the first respondent (1st defendant) it a partner of "Madras Financiers and Commission Agents" under the Partnership Deed dated 17.8.1973 (Ex.B-2) under

the Partnership Deed, the firm may also authorise any person or persons as its lawful attorney to carry out any of its duty or duties in this partnership business. In para 3 of the written statement it is clearly admitted that; The partners of Madras Financiers and Commission Agents gave a Power of Attorney to Shri V.P.Muthuswamy to carry on the business for their benefits.

....

the partnership business is the business of the first defendant and whether she carries on the business personally or through an agent, she is only carrying on the said business. The power given by the partners is in full force and it had never been cancelled. It was also admitted in evidence that Muthukumaraswami was looking after the affairs of the said business and the accounts of the firm were operated from Madras, since Mr.Muthukumaraswamy was residing at Madras, In view of this clear admission, Mr.Muthukumaraswamy, the Power Agent was at Madras, at all relevant times including the date of filing of the suit and there was no evidence that the Branch was closed at a particular day and after that date, the accounts, which were operated from Madras were shifted to a different place."

In paragraph 8 of the said affidavit, it is averred as follows:

"It was stated on behalf of all the defendants that the property at Kasthuri Ranga Iyengar Road, where the firm was carrying on business, was sold and hence the business ceased to be carried on from 25.11.1977. This is not correct. The mere fact that a particular property, where business was carried on was sold does not mean that the branch was closed in Madras. It is respectfully submitted that no documentary evidence was produced to show that the Branch of the "firm was closed at Madras on 25.11.1977. None of the partners nor their agent, who was available was examined. I humbly submit that the business was carried on at all time and it was never closed on 25.11.1977 or subsequently."

In Paragraph 11 thereof, it is averred as follows:

"As one of the defendants is admittedly carrying on business at Madras, the suit could be filed in the City Civil Court with the leave of this Hon'ble Court.....If now the suit plaint is ordered to be filed in another Court, I will be greatly prejudiced and affected."

14. With reference to the above referred to allegation in paragraph 7 of the affidavit, particularly stating that there was no evidence that the abovesaid branch was closed at a particular date after that date, there is no denial in the Counter affidavit filed by the respondents. Further, the same allegation is reiterated in paragraph 8 of the supporting affidavit stating that no documentary evidence was produced to show that the branch of the firm was closed at Madras on 25.11.1977 and that it was never closed on 25.11.1977 or subsequently. To this also, there is no specific denial in the counter affidavit. In fact the counter affidavit did not at all say that the business was closed on 25.11.1977. But it only vaguely stated as follows:

"I deny the allegation that the Madras Financiers and Commissioners Agents carried on business at all several times and the first respondent was carrying a business at Madras."

Having admitted that the said firm was carrying on business at Madras, it is for the defendants to prove that the said business was closed before the institution of the suit. Admittedly, there is no such evidence. Therefore, it is only to be taken that despite the selling away of the abovesaid Madras property at Kasthuri Ranga Iyengar Road, the business of the abovesaid firm was not closed on 25.11.1977 or subsequently.

15. However, the learned counsel for the respondents submitted that since the suit was originally filed on the Original side of this Court, Clause 12 of the Letters Patent alone should be taken into account and not Sec.20(b), Civil Procedure Code for granting the leave as on the date of original filing of the suit in this Court. But we cannot accept this contention of the learned counsel. No doubt, initially when the suit was filed in this Court, leave was granted in 1977. But, subsequently, the suit was transferred to the City Civil Court in about 1981 and the said Court alone has tried the suit. So, only Sec.20(b) of the Civil Procedure Code will be the relevant provision applicable in considering whether leave could be granted or not. In this connection, the following passage in the above referred to *Shiv Bhagwan v. Onkarmal, A.I.R. 1952 Bom. 365,* consisting of Chagla, C.J., and Bhagwati, J., (as he then was) may be usefully quoted:

"Now; I think it may be stated as a general

principle that no party has a vested right to a particular proceeding or to a particular forum, and it is also well settled talk all procedural laws are retrospective unless the Legislature expressly states to the contrary. Therefore, procedural laws in force must be applied at the date when a suit or proceeding comes on for trial or disposal.....This Court was bound to take notice of the change in the Law and was bound to administer the law as it was when the suit came on for hearing. Therefore, if the Court had jurisdiction to try the suit when it came on for disposal, it could not refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted."

16. Regarding the said counsel's contention that in view of the business carried on by the abovesaid firm, in which the 1st defendant-1st respondent was a partner, it could not be said that he was "carrying on business" within the meaning of that expression in Sec.20(b) of the Civil Procedure Code, was say we cannot accept this proposition also in *Krishnan Nair v. Ghouse Basha, (1987)4 S.C.C. 404,* it was held that unless the partner in question had been excluded from the management of the firm in which he was a partner and that he was only a sleeping partner, the carrying on of the business of the firm would amount to partner himself carrying on the said business also. The Supreme Court, in the abovesaid decision, after referring to its earlier decision reported in *D.N.Sanghavi and Sons v. Ambalal Tribhuvan Das, A.I.R. 1974 S.C. 1026: (1974)1 S.C.C. 708,* observed as follows:

"The court observed that if the deed of partnership had excluded the son expressly or impliedly from the management of the firm of business and had made him a sleeping partner it could not be held that the accommodation was needed directly and substantially for his occupation by way of his business. The firm is carrying on the business in the premises in respect of which the eviction was asked for the said firm. But here there is no evidence that the sons were sleeping partners. On the contrary, there is evidence that they were in the leather business and had carried on the business previously before shifting to the premises in question. If that is the position, it cannot be accepted that they were sleeping partners. On the contrary, having regard to the number (*sic.*), they were active partners in the business and as such the sons needed (*sic.* sons' requirement of) the accommodation with others would be for sons' business under Sec.10(3)(a)(iii) of the Tamil Nadu Act."

In the present case also, under Ex.B-2 partnership deed of the abovesaid firm Madras Financiers and Commission Agents, there is no exclusion of the 1st respondent from taking part in the business of the said firm, nor has she been described therein as sleeping partner only. On the other hand, it states that the parties therein *viz.*, all the partners (including the 1st respondent herein) "hereby become partners to carry on the business of financiers and commission agents." Therefore, the carrying on of the business by the firm, in which the 1st respondent was also a partner, will amount to 1st respondent carrying business. Further, in *Firm Rajniklal and Company v. Vithal Pandurang, A.I.R. 1952 Nagpur 312,* also it has been held that a business which a landlord carries on in partnership with his other partners, can be said to be "business of his own" as he has undoubtedly a pecuniary interest in the business. It has also been held *Kulsumbai Mulla Jeewajee v. Madras Marine P. Ltd.; (1984)1 M.L.J. 399,* that where a landlady is a partner in a firm carrying on business, she can be said to carry on the said business. Further, in the abovesaid *Shiv Bhagwan v. Onkarmal, A.I.R. 1952 Bom. 365,* it has also been observed thus:

"It has been laid down that a person in order to carry on the business need not do it personally. He can also do it through an agent duly authorised in that behalf. But that person must be an agent in the strict sense of the term, and the Privy Council has laid down that the manager of a joint Hindu family is not an agent within the meaning of this condition."

In the present case, it is admitted in the written statement itself that the abovesaid firm gave a power of attorney to the abovesaid Muthukumaraswami to carry on the business of the firm and it was also admitted in evidence that Muthukumaraswami was looking after the affairs of the said business and the account of the firm was operated from Madras since the said Muthukumaraswami was residing at Madras. There is also no evidence that the said power was cancelled.

17. The decisions cited by the learned counsel for

the respondents, *viz.*, the above referred to *Govindarajulu Naidu v. Secretary of State, 58 M.L.J. 356: 195 I.C. 576: A.I.R. 1927 Mad. 689* and *Pachaimmal v. Hindustan, C.I. Society, (1940) 2 M.L.J. 688: I.L.R. 1941 Mad. 109: A.I.R. 1941 Mad. 270*, turned on different facts and have no application to the present case. Likewise, the above referred to *Narayanappa v. Bhaskara Krishnappa, (1966) 2 M.L.J. (S.C.) 60: (1966) 2 An.W.R. (S.C.) 60: (1966) 2 S.C.J. 490: A.I.R. 1966 S.C. 1300*, cited by the said counsel has no application to the present case.

18. In the view we have taken, we think that the other contention of the learned counsel for the respondents that the suit liability is a joint liability and not joint and several liability, will not have any significance. No doubt in the context of Clause 12 of the Letters Patent and particularly the word "defendant" used therein, some Courts made a distinction between joint liability and joint and several liability (vide the above referred to *Bengal A. and I. Corporation v. Corporation of Calcutta, A.I.R. 1960 Cal. 123*, and the judgment of the Division Bench of this Court, dated 18.6.1991 in O.S.A.Nos.151, 165 and 166 of 1989. But, as already mentioned, we are here, in C.M.P.No.12502 of 1991, concerned not with the said Clause 12, but only with Sec.20(b) of the Civil Procedure Code, wherein as we have already seen, the term "defendant" in singular has not been used, but the expression used is "any of the defendants where there are more than one."

19. Therefore, we hereby grant leave to the appellant-plaintiff to institute and prosecute the suit O.S.No.7259 of 1981 and thus allow C.M.P.No.12502 of 1991 as prayed for. Therefore, the finding of the Court below on issue No.(1) is set aside and we hold that the trial Court, *viz.*, the City Civil Court, Madras has jurisdiction to try the above suit. Then, in view of the fact that the said Court has held on all other issues in favour of the plaintiff and the fact that the learned counsel for the respondents did not advance any argument attacking the said other findings in favour of the plaintiff, we decree the suit as prayed, subject to one qualification, *viz.*, the decree is only against the estate of the abovesaid deceased Kailasa Goundar in the hands of the defendants-respondents. The appeal is accordingly allowed. However, in view of the fact that the plaintiff could have easily filed the suit at Erode, but dragged all the defendants to the Madras Court, we are not inclined to award cost to the plaintiff in the suit or in this appeal.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.M.P.No.1408 of 1992 *4th March, 1992.*

Samsuddin Rowther and another ...*Petitioners*

v.

Avvammal and others ...*Respondents.*

(A) Title - Title by prescription - Proof.

It is certainly open to the plaintiffs to prove their title by prescription even if they had failed to prove their original title to property. *[Para 14]*

(B) Approbate and reprobate - Doctrine of - Question of title - Parties agreeing before the Bench hearing Special Tribunal Appeal that question of title could be decided in the second appeal - Cannot contend that High Court in second appeal has no jurisdiction to decide question of title.

When both the appeals were pending in this Court and the parties agreed that the question of title could be decided in this second appeal and independent of the same, the S.T.A. could be disposed of, it is no longer open to the plaintiffs to turn round and contend that this Court has no jurisdiction to decide the question of title. *[Para 26]*

(C) Tamil Nadu Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) and Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act (XXX of 1963) - Acts in pari materia *as to exclusion of jurisdiction of Civil Courts only.*

There are differences between the two Acts and it is not as if the entire Act is *in pari materia* with the Abolition Act. In so far as the exclusion of the jurisdiction of the civil court is concerned, the Acts are undoubtedly *in pari materia.* *[Para 30]*

(D) Tamil Nadu Patta Passbook Act (IV of 1986), Secs.3, 4, 6 and 14, Proviso - Patta Passbook - Entries in - Evidentiary value of - If conclusive proof of title.

Sec.4 of the Act provides that entries in the patta passbook and the certified copies of entries in the patta passbook shall be presumed to be true and correct until the contrary is proved or a new entry

is lawfully substituted therefor. Sec.6 reads that the entries in the patta passbook issued by the Tahsildar under Sec.3 shall be *prima facie* evidence of title of the person in whose name the patta passbook has been issued to the parcels of land entered in the patta passbook free of any encumbrance, unless otherwise specified therein. The proviso to Sec.14 reads: 'Provided that if any person aggrieved as to any right of which he is in possession, by an entry made in the patta passbook under this Act, he may institute a suit for a declaration of his rights under Chapter VI of the Specific Relief Act, 1963 (Central Act XLVII of 1963) and the entry in the patta passbook shall be amended in accordance with any such declaration. Thus it is seen that the patta passbook is only providing *prima facie* evidence and it is rebuttable.

[Paras 32 and 33]

Cases referred to:

T.K.Ramanujam Kavirayar v. Sri-la-Sri Sivaprakasa Pandara Sannadhi Avargal, (1988)2 L.W. 513; State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10; The Vettichenkuru Village Panchayat v. Hari Venkatarama Deeksithulu, A.I.R. 1991 S.C. 1303; K.M.Muhammed Mustafa Marakayar v. Udayanachiammal, (1968)2 M.L.J. 58; Sudhesgar Prasad Singh v. Ram Saroon Singh, A.I.R. 1963 Pat. 412; Shivasankar Prasad Sah v. Baikunth Nath Singh, A.I.R. 1969 S.C. 971; Angappa Gounder v. Sivamalai Gounder, (1988)2 M.L.J. 225.

O.V.Baluswamy, G.Gopalaswamy and *P.Mahabubjan,* for Appellants.

R.Sekar, for Respondents.

The Court delivered the following

JUDGMENT:- The plaintiffs, who succeeded in the trial court but failed in the appellate Court, have preferred this second appeal. The suit relates to three items of properties. The first two items are agricultural lands and the third item is a house.

2. The relationship of the parties is not in dispute. The plaintiffs are the sons of Abdul Kuthoose Rowther, son of Kader Moideen Rowther. The third defendant is the sister of Abdul Kuthoose Rowther and the daughter of Kader Moideen Rowther. The first defendant is the daughter of the third defendant. The second defendant is a stranger. For the sake of convenience, the parties will be referred to by their rank in the suit, as plaintiffs and defendants.

3. The case set out in the plaint is as follows: Kader Moideen Rowther died more than fifty years prior to suit and Abdul Kuthoose Rowther died about twenty years prior to suit. The latter was entitled to the suit properties and he was in long, continuous and open possession and enjoyment in his own right for more than fifty years and on his death, the plaintiffs became entitled thereto being his heirs. Patta was granted to the plaintiffs. They are paying kist to the Government and tax to the Panchayat through their mother. The plaintiffs have perfected their title by adverse possession also. The defendants have no right over the properties and they have not been in possession at least within twelve years prior to suit. The third defendant has been given other properties in the family arrangement and she has no right or possession in the suit properties. The second defendant is an interloper. He has instigated defendants 1 and 3 to make false claims to the suit properties and disturb the possession of the plaintiffs. The third defendant is not entitled to go behind the family arrangement. In any event, any right in the defendants has been lost by long, continuous and open hostile possession by the plaintiffs and their father. Since 10.2.1974, the defendants are interfering with the peaceful possession and enjoyment of the suit properties and attempting to trespass. The second defendant would appear to have brought about a sham and nominal and purposeful document dated 2.2.1974 in his favour with false recitals from defendants 1 and 3, which casts a cloud on the plaintiffs. Hence the suit for declaration of title and consequential relief of injunction.

4. The case of the defendants in the written statement is as follows: Kader Moideen Rowther died in 1931 and Abdul Kuthoose Rowther died in 1957. His brother Abdul Rowther died in 1959. The case set out in the plaint is false. Item 2 belonged originally to Kader Moideen Rowther. On 30.1.1929 he executed a registered deed styled as a partition deed, but in reality and substance it was a gift deed whereby he gifted all his properties, some in favour of his first wife's three children and some in favour of his second wife's two children. One item was given to his mother Ponnammal for her life with vested remainder in favour of all his five children. He constituted himself as guardian of his minor children during their minority. The document was accepted, acted upon and given effect to. Item 2 and Item 3 in the plaint were given absolutely under the document to the three

children of his first wife in common to be taken by them equally. Abdul Kuthoose Rowther had 1/3rd share, Abdul had another 1/3rd share and the remaining 1/3rd belonged to the third defendant. Kader Mohideen had no other property than what was disposed under the document. Ten years thereafter, Abdul executed a registered sale deed and sold his 1/3rd share in item 3 to Abdul Kuthoose. He sold his 1/3rd share in item 2 to the third defendant. Thus, the plaintiffs cannot claim exclusive title to items 2 and. If at all, the plaintiffs should file a suit for partition against all co-sharers. The plaintiffs are not the only heirs of Abdul Kuthoose. The grant of patta in favour of the plaintiffs for item No.2 is illegal and it is questioned by the third defendant in C.M.A.No.56 of 1972, Sub Court, Tiruchy. There is no division of item 2 among the co-sharers. The third defendant has dealt with her 2/3rd share in item 2 by mortgaging the same. The plaintiffs cannot claim any title to item 1. The property was purchased in 1914 in the name of Kader Moideen Rowther benami for the benefit of his brother's wife Vellayakkal with her funds. She was the real purchaser and she was alone in possession and enjoyment of the same as owner paying melwaram rent to the temple. She was in open, continuous and exclusive possession and she acquired prescriptive title by adverse possession for over the statutory period. Even in 1929 Kader Moideen admitted that he had no right in the said item. Vellayakkal executed a will on 7-4-1952 and got it registered. Under the will she bequeathed the western half share to Abdul with a condition that if he died without issues, it should be taken by the third defendant. She died in 1970. The third defendant took possession of the entire item 1 including the western half. The plaintiffs were never in possession of the said item. The plaintiffs cannot claim exclusive title to the said item and the grant of patta in their favour does not confer any title. The matter is pending in C.M.A.No.56 of 1972, Sub Court, Tiruchy. There is no cause of action for the suit. It is liable to be dismissed.

5. The plaintiffs filed a reply statement setting out the following: The document of 1929 is only a partition deed and item 2 devolved by inheritance. The partition deed takes in another item bearing survey No.136/1. An extent of three acres in the said Survey Number was allotted to the children of first wife, described as 'B' Schedule to the partition deed. It is true that the third defendant acquired the share of Abdul in item 2. The arrangement was entered into more than 25 years prior to suit between Abdul Kuthoose and the third defendant, where under the latter became entitled to 3 acres described as item II and suit item No.1 was allotted to Abdul Kuthoose. The third defendant was allotted an extent of 3 acres which was a valuable land in lieu of her giving up her share in item 3 and a few cents in S.F.560/8. That is how Abdul Kuthoose became entitled exclusively to the said items. The third defendant had dealt with her share in S.F.560/8, *viz.*, her western share by mortgaging the same to the plaintiffs themselves under a registered deed dated 16.9.1968 wherein she admitted unequivocally the partition arrangement. The description of the western boundary of the property is a clear admission of the right, title and interest of the plaintiffs. The 1st item is the exclusive property of the plaintiffs.

Pattas have been rightly granted. The plaintiffs are not aware of the third defendant's dealings with the property, Item 1 was the separate property of Kader Mohideen Rowther, purchased in 1914 and enjoyed as such. The plea of benami taken by the third defendant is an after-thought and in conflict with her case in the settlement enquiry. The third defendant has no consistent case and it is false to say that Vellayakkal provided funds for purchase of item 1. The plaintiffs do not admit the genuineness of the alleged will of Vellayakkal. They are not aware of the will. In any event, Vellayakkal had no title or possession to deal with item 1. The other heirs of Abdul Kuthoose are not necessary or proper parties to the suit. They do not claim any right to the properties. The plaintiffs and their father have been in exclusive possession and enjoyment of item 1 as their own property paying melwaram in their own right, under oral gift of father of the plaintiffs. The third defendant has no possession or right in item 1. In any event, the exclusive possession of the plaintiffs cannot be disturbed in any manner. Hence, they are entitled to a decree as prayed for by them.

6. The trial Court accepted the case of the plaintiffs in toto and decreed the suit. On appeal, the learned Subordinate Judge of Karur has reversed the conclusions of the trial Court and dismissed the suit. In this second appeal it is contended that the judgment of the lower appellate court is

vitiated by its erroneous reading of the pleadings and the documents filed in the case. It was argued that the lower appellate court has also misread the evidence. It is contended that some of the propositions adumbrated in the judgment of the lower Appellate Court are erroneous in law. According to learned counsel, the plaintiffs have established their title to the suit properties and proved their exclusive possession. It is submitted that the plaintiffs have also proved their title by prescription and that in any event they are entitled to a decree as prayed for by them on the basis of their possessory title. It is the further contention of learned counsel that in so far as items 1 and 2 are concerned, the grant of patta in favour of the plaintiffs under the provisions of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act 30 of 1963, hereinafter called 'the Act', prevents the civil court from considering the question of title. It is submitted that the grant of pattas by the settlement authorities having been affirmed by the Special Tribunal in S.T.A.No.33 of 1977 it is not open to the defendants to challenge the title of the plaintiffs.

7. The plaintiffs have filed C.M.P.No.1488 of 1992 for filing the patta passbook issued to them as additional evidence in the appeal. It is argued by learned counsel that after the filing of the second appeal, the Tamil Nadu Patta Pass Book Act (4 of 1986) has been passed by virtue of which the entries in the pass-book relating to ownership of the property will afford conclusive evidence of the plaintiff's title to the properties. It is also submitted that after the passing of Tamil Nadu Act 4 of 1986, the position in law has changed completely and it will not be open to the defendants to raise any contention which will run counter to the entries in the pass-book.

8. Learned counsel for the defendants has submitted that the question of title to the suit properties is one of fact and the lower appellate court has, after taking into consideration the entire documentary and oral evidence on record, come to a particular conclusion, which cannot be interfered with by this Court in the second appeal in view of the limitations imposed by Sec.100 of the Code of Civil Procedure. It is also argued that there is no error in the judgment of the lower Appellate Court which could vitiate the conclusion on facts. Learned counsel for the defendants places reliance on a judgment of mine in *T.K.Ramanujam Kavirayar and others v. Sri-la-Sri Sivaprakasa Pandara Sannadhi Avargal, (1988)2 L.W. 513*, to rebut the contention that the jurisdiction of civil court to decide the question of title is ousted by the provisions of the Act. It is also argued that it is not open to the plaintiffs to question the jurisdiction, of this Court to decide the rival claims after having expressly agreed before the Special Tribunal in S.T.A.No.33 of 1977 that the said question should be decided in this second appeal. It is submitted that the issue of Patta Pass-Book in favour of the plaintiffs during the pendency of these proceedings is of no consequence and the provisions of the Tamil Nadu Act 4 of 1986 do not have any relevance in this appeal. According to him, there is no justification for admitting additional evidence.

9. At the outset it should be pointed out that the plaintiffs are not sure of their own case......

[*Discussion of facts omitted-Ed.*]

12. It is seen from the evidence that the plaintiffs naturally developed their case in the course of trial. With regard to item 1, the trial Court found that it was gifted by Kader Mohideen Rowther to the plaintiffs' father in or about 1935-36. Referring to the contention of the defendants that there could not have been any such oral gift in or about 1935 or 1936 as Kader Mohideen Rowther died even in 1931, the trial Court observed that the witness. P.W.5 had spoken to the year of gift only approximately and as such mere fractional difference in the year will in no way improbabilse the case of the plaintiffs otherwise. Strangely, the trial Court has given a finding in paragraph 13 of its judgment at the end of the discussion of evidence that the gift was made in or about 1935-36. It goes without saying that the said finding is not only unsustainable, but also perverse. The date of death of Kader Mohideen Rowther has been proved by an official record marked as Ex.B-11. That has not been challenged by the plaintiffs. It is beyond one's imagination as to how the trial Court could hold that the man who died in 1931 made a gift of item No.1 in 1935-36 to his son (plaintiffs father). On the face of it, the case put forward by the plaintiffs is absurd, to say the least. Considering the evidence adduced by the plaintiffs with regard to the alleged oral gift by their grand-father in favour of their father, in the background of the vague pleadings sought to be improved in the course of evidence, it is hardly necessary to dwelve deep into the evidence for ascertaining the truth

of the same. But, the final court of fact has done its duty perfectly. The learned Subordinate Judge has referred to every document on record, relevant for the purpose and considered the entire oral evidence before coming to the conclusion that the plaintiffs' claim of exclusive title to item 1 should fail.

13. The lower Appellate Court has rightly pointed out that the father of the plaintiffs was a minor at the time of his father's death and the case of gift was wholly improbable. It is also pointed out, that the second plaintiff, who had examined himself as P.W.1, was aged only about 7 at the time of his father's death and there could have been no occasion for his father to speak to him about the alleged gift. His version that he came to know of it from his father is clearly false. The lower Appellate Court has also referred to the circumstances that the case of gift was not put forward by the plaintiffs during the settlement enquiry.

14. The case of perfection of title by adverse possession is also rightly rejected by the lower appellate court. Learned counsel for the plaintiffs refers to the observation of the learned Judge in paragraph 12 that the plaintiffs ought to have elected their case between the plea of title on the basis of gift and the plea of title on the basis of prescription. It is certainly open to the plaintiffs to prove their title by prescription, even if they had failed to prove their original title to the property. But, the learned Judge has considered the plea of the prescription fully and independently. He has discussed the entire evidence on record and he has rested his conclusion not on his statement as to the necessity for the election of the plea. He has rightly pointed out that there is no plea or evidence of ouster among co-sharers. I do not find any fallacy or infirmity in the discussion of the evidence in paragraph 12 of the judgment of the lower appellate court. I concur with its conclusion that the plaintiffs have not made out the case of prescription of title to item 1.

15. With reference to items 2 and 3, I have already adverted to the fact that the plea of family arrangement was developed in the reply statement. There is no direct evidence excepting the oral assertions of the witnesses with regard to the alleged family arrangement between the plaintiffs' father and the third defendant. The lower appellate court has analysed the oral and documentary evidence and held that the plea of the plaintiffs has not been proved. It is unnecessary for me to repeat the exercise in this judgment. It is a question of fact and I do not find any error in the judgment of the lower appellate court which would warrant interference in the second appeal.

16. Learned counsel for the plaintiffs has argued that there are certain mistakes in the judgment of the lower appellate court, based on his erroneous understanding of the documents and mistaken impressions of the law, which have vitiated his judgment..........

[*Discussion of facts omitted-Ed.*]

22. Learned counsel places reliance on the statements made by the parties in the settlement enquiry before the Tahsildar. Ex.B-72 is a statement by the second plaintiff relating to item No.2. Ex.A-65 is a statement by the third defendant's husband, wherein a claim is made for an extent of one acre in Survey Number 560-10 and the title is traced to an earlier exchange. Ex.A-66 is again a statement by the third defendant's husband relating to some other survey number which are not subject matter of the suit. It is argued by learned counsel that the statements prove the existence of a prior arrangement between the parties and separate possession of the properties pursuant thereto. He goes to the extent or arguing that the statements made by the third defendant's husband would amount to admission of the said arrangement. I do not agree. The statements are all made only in 1971. The suit has been filed in 1974. The statements do not contain any clear reference to any particular arrangement giving the details thereof. Even if they are taken as part of the evidence, the remaining evidence is overwhelming and the circumstances already referred to are sufficient to reject the case of the plaintiffs as to the family arrangement.

23. Learned counsel also submits that the orders passed by the Settlement Tahsildar under Exs.A-46, A-47 and A-67 could be considered to support the case of the plaintiffs. There is no merit in this contention. It is stated only to be rejected.

24. I have no hesitation to uphold the findings of fact arrived at by the lower appellate court. The plaintiffs have miserably failed to prove their exclusive title to the suit properties.

25. Now it is necessary to consider the argument that the grant of patta in the proceedings under the Act prevents the defendants from disputing the title of the plaintiffs and oust the jurisdiction

of the civil court to decide the question of title. Before considering the position in law, it is necessary to refer to a particular fact. The proceedings under the Act culminated in Special Tribunal Appeal No.33 of 1977 in this Court. The appeal was disposed on 13.7.1982. Even before the appeal was heard, the present second appeal had been filed. The second appeal was presented in this Court on 15.3.1982 and taken on file on 16.4.1982. It was admitted on 26.4.1982. Both the parties were aware of the pendency of the second appeal at the time when the Special Tribunal Appeal was taken up for hearing. While dismissing the Special Tribunal Appeal, the Bench *"(Tribunal?)"* passed the following order:

> "Mr.K.Sarvabhauman, learned counsel for the appellant submitted that a title suit in respect of the very same land for which patta has been granted, has already been filed, and it is pending by way of a second appeal before this Court. Mr.Rangaswamy Iyengar, learned counsel for the respondents submits that it is true that Second Appeal No.433 of 1982 is pending before this Court and that appeal is pending before this Court and that appeal was filed by the respondents herein. In the suit, as far as the land in respect of which patta has been granted by the Settlement Tahsildar in favour of the respondents herein, the trial court granted a decree in favour of the respondents herein. However, on appeal by the Appellant herein, the appellate court, granted the decree in favour of the appellant herein. It is as against this judgment and decree of the appellate court, *Second Appeal No.433 of 1982 has been filed by the respondents herein, and naturally the title as regards the land in respect of which patta has been granted by the Settlement Tahsildar, has to depend upon the decision that is to be rendered in Second Appeal No.433 of 1982. Counsel on both sides submit that as regards title to the land, the decision in Second Appeal No.433 of 1982 will govern* and as far as the present S.T.A. is concerned, Mr.Sarvabhauman submits that the same may be allowed in favour of the appellant herein, while Mr.Ranagaswami Iyengar opposes the same stating that the tribunal has correctly dismissed the appeal since there is absolutely no particulars and evidence to reverse the finding of the Settlement Officer."
> (*Italics is mine*).

The Bench proceeded to dismiss the appeal holding that no ground was made out for interfering with the order of the tribunal and the Settlement Tahsildar. It is seen from the underlined portion that the Special Tribunal took the view that the title as regards the land had to depend upon the decision in this second appeal. Counsel on both sides also admitted that position and proceeded to argue the S.T.A. only on that basis. Learned counsel for the plaintiffs contends that the dismissal of the S.T.A. by the Bench was on the merits of that case and it was not based on consent. Hence, according to him, it is open to him to argue in this appeal that the question of title cannot be gone into by me.

26. I am unable to accept this contention. On the facts of this case, the said contention is not available to the plaintiffs. When both the appeals were pending in this Court and the parties agreed that the question of title could be decided in this second appeal and independent of the same, the S.T.A. could be disposed of, it is no longer open to the plaintiffs to turn round and contend that this Court has no jurisdiction to decide the question of title. If the plaintiffs had taken such a stand before the Bench, they would have posted the second appeal also along with the S.T.A. and heard them together or they would have considered the question of title without leaving it open to be decided in this second appeal.

27. Even otherwise, there is no merit in the contention that the civil court has no jurisdiction to decide the question of title in view of the provisions of the Act. I have already considered the question in detail in *T.K.Ramanujam Kaviráyar and others v. Sri-la-Sri Sivaprakasam Pandara Sannadhi Avargal, (1988)2 L.W. 513.* I have held that the ruling of the Supreme Court in *State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10,* would apply with equal force to cases relating to inams under the Act. I have considered the question at length, by referring to the earlier judgments on the subject. I do not think it necessary to repeat on the exercise once again.

28. Learned counsel for the plaintiffs submits that my judgment requires reconsideration in view of a later ruling of the Supreme Court in *The Vettichanukuru Village Panchayat v. Hari Venkatarama Deeksithulu and others, A.I.R. 1991 S.C.W. 303.* It is also argued by him that my judgment in the

earlier case proceeded on the basis that the provisions of the Act were *in pari materia* with the provisions of the Tamil Nadu Estates Abolition Act (26 of 1948) and Tamil Nadu Inam Estates Abolition Act (26 of 1963) to a large extent. Learned counsel has been at pains to point out the difference between the Act and the Tamil Nadu Act 26 of 1948. There is a fallacy in the argument. It is not as if I decided the earlier case on the footing that the two Acts are *in pari materia*. While stating that the Acts are *in pari materia* to a large extent, I had myself pointed out the various differences between the provisions. I have also referred to the basic difference between Secs.11 to 14 of the Abolition Act and Sec.11 of the Act In paragraph 16 of my judgment, I have pointed out that in 'the Act' there is no question of deciding the character of the land as such, while under the Abolition Act, the Settlement Officer has to examine the nature and history of the lands in dispute and decide the character thereof. I have also referred to the fundamental difference between the two Acts and the Division Bench Judgments rendered earlier, in which the question had been considered specifically. Learned counsel for the plaintiffs has not been able to point out any lacuna in my judgment or omission to consider any particular aspect of the question.

29. Learned counsel submits that the view prevalent in this Court that the pre-existing rights are not affected by the vesting of the estate in the Government under the Act or under the Abolition Act, is no longer valid. He refers to the judgment of a Division Bench in *S.K.M.Muhammed Mustafa Marakayar v. Udayanachiammal and others, (1968)2 M.L.J. 58,* wherein it was held that the rights of a mortgagee to proceed against the erstwhile private or pannai lands of the mortgagor in execution of the mortgage decree after the grant of patta, stood unaffected by the provisions of the Act. He submits that the Division Bench had relied on a judgment of the Full Bench of the Patna High Court in *Sidheswar Prasad Singh v. Ram Saroon Singh and others, A.I.R. 1963 Pat. 412,* and it was later overruled by the Supreme Court in *Shivasankar Prasad Sah and another v. Baikunth Nath Singh and others, A.I.R. 1969 S.C. 971.* Hence, according to learned counsel, the Division Bench ruling of this Court in *S.K.M.Muhammed Mustafa Marakayar v. Udayanachiammal, (1968)2 M.L.J. 58,* is no longer good law and the basic principle set out therein that the grant of patta under the Abolition Act was only in recognition of a pre-existing right in the land was nullified by the Supreme Court. Learned counsel proceeds to refer to the judgment of another Division Bench of this Court in *Angappa Gounder v. Sivamalai Gounder and others, (1988)2 M.L.J. 225.* In that case, an argument was advanced that in a case rising under the Act, the mortgagee's rights as against the subject matter of the mortgage came to an end with the vesting of the estate in the Government and that the ruling in *S.K.M.Muhammed Mustafa Marakayar v. Udayanachiammal, (1968)2 M.L.J. 58,* was not good law in view of the judgment of the Supreme Court in *Shivasankar Prasad Sah v. Baikunth Nath Singh, A.I.R. 1969 S.C. 971.* The Division Bench repelled that contention holding that the principles applicable to an estate under the Abolition Act cannot be applied to an inam under the Inams Act. The Bench pointed out the distinction between the two Acts and held that the rights of the mortgagee were not affected by the vesting under the Inams Act. The Bench observed.

> "It will be inequitable to apply the principles mentioned by the Supreme Court in a case relating to an estate, to a minor inam. In so far as minor inams are concerned, the vesting is notional and does not affect the Kudiwaram right lawfully enjoyed or acquired as laid down in Act 30 of 1963. The vesting contemplated under Act 30 of 1963 is only to enable the Government to effect a ryotwari settlement and not extinguish the existing rights in an inam land."

30. Learned counsel submits that the Division Bench has pointed out the difference between the two Acts and on account of the same, the ruling of the Supreme Court in *State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10,* will not apply to a case under the Inam Act. It is, therefore, argued by him that the view taken by me in *T.K.Ramanujam Kavirayar and others v. Sri-la-Sri Sivaprakasa Pandara Sannadhi Avargal, (1988)2 L.W. 513,* that the ruling in *State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10,* would apply to a case of inam is incorrect. I do not agree. The Division Bench in *Angappa Gounder v. Sivamalai Gounder, (1988)2 M.L.J. 225,* had no occasion to decide the question of jurisdiction of the civil Court under the

provisions of the Act. The only question which the Division Bench had to consider was the effect of vesting *vis-a-vis* the rights of a mortgagee of an inam land. I have already referred to the factor that there are differences between the two Acts and it is not as if the entire Act is *in pari mcteria* with the Abolition Act. In so far as the exclusion of the jurisdiction of the Civil Court is concerned, the Acts are undoubtedly *in pari materia* and there is no error in the view taken by me that the ruling in *State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10,* would apply to cases relating to inams under the Act.

31. There is no merit in the contention of learned counsel that in view of the subsequent ruling in *The Vetticharukuru Village Panchayat v. Nori Venkatarama Deeksithulu and others, A.I.R. 1991 S.C.W. 303,* my judgment requires reconsideration. The above case arose under the Andhra Pradesh Grama Panchayat Act (2 of 1964) and Andhra Pradesh Inams Abolition and Conversion into Ryotwari Act (37 of 1958). No doubt, the Bench in the above case observed that the historical perspective and the real purpose and proper scope and operation of the Estates Abolition Act was not focused to the notice of the Court in the earlier case. After referring to the earlier rulings of the Supreme Court, it was observed in paragraph 26 as follows:

> "Thus we have no hesitation to hold that the ratio in all these cases are clearly distinguishable and render little assistance to the Gram Panchayat."

The Bench proceeded to refer to the provisions of the Andhra Act and held that it was a self contained Code expressly providing rights and liabilities and prescribing procedure and remedies of appeal and revision, thereby excluding the jurisdiction of the civil Court. I am unable to find anything in the judgment to run counter to my reasoning in *T.K.Ramanujam Kavirayar and others v. Sri-la-Sri Sivaprakasa Pandara Sannadhi Avargal, (1988)2 L.W. 513.* The judgment of the Supreme Court will not apply to the present case. The provisions of the Tamil Nadu Act are different from the provisions of the Andhra Act. In *State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10,* the Supreme Court pointed out the distinction between the Andhra Act and the Tamil Nadu Act inasmuch as the latter did not retain Sec.56, which provided for decision of a dispute between two rival claimants. The Court also placed reliances on the words "for the purposes of the Act" found in Sec.64-C of the Tamil Nadu Act which were absent in the Andhra Act. In 'the Act' in the present case Sec.46 provides for finality of the orders passed under the Act. Sub-sec.(1) reads thus:

> "Any order passed by any officer the Government or other authority or any decision of the Tribunal or the Special Appellate Tribunal under this Act in respect of matters to be determined *for the purposes of this Act* shall subject only to any appeal or revision provided under this Act be final." (*underlining mine*).

The underlined words show that it is similar to Sec.64-C of the Abolition Act 26 of 1948 and the same language is employed. The reasoning of the Supreme Court in *State of Tamil Nadu v. Ramalinga Swamigal Madam, A.I.R. 1986 S.C. 794: (1985)4 S.C.C. 10,* would apply and the ruling in the later judgment of the Supreme Court in *The Vettich-erukuru Village Panchayat v. Hari Venkatarama Deeksithulu, A.I.R. 1991 S.C.W. 303,* will not apply. Hence, there is no necessity for reconsideration of my judgment in *T.K.Ramanujam Kavirayar and others v. Sri-la-Sri Sivaprakasa Pandara Sannadhi Avargal, (1988)2 L.W. 513.*

32. The last contention of learned counsel is based on the additional evidence sought to be adduced by him. The patta pass-book which has been produced with the C.M.P.No.1488 of 1992 does not contain any evidence as to the date of issue. It is not the case of the plaintiffs that the pass-book was issued after the disposal of the appeal in the lower Appellate Court. The pass-book is sought to be introduced in evidence only for the purpose of invoking the provisions of Tamil Nadu Pattas Pass-Book Act (4 of 1986). For that purpose, it is not necessary to produce the pass book and mark it in evidence in the appeal. It is not in dispute in this case that patta has been granted by the Settlement Authorities in favour of the plaintiffs. It is only pursuant to the order of the Settlement Authorities, the patta pass-book has been issued to the plaintiffs. According to learned counsel for the plaintiffs the provisions of the said Act make the pass-book conclusive evidence of the title to the property. The said Act received the assent of the President on 24th January, 1986 and was

published in the Tamil Nadu Government Gazette dated 30th January, 1986. It shall come into force on such date as the Government may by notification appoint and different dates may be notified for different areas and for different provisions of this Act. No material has been placed before me as to whether any Notification has been issued by the Government bringing to force the provisions of this Act. However, I will proceed to dispose of the contention on the footing that this Act has come into force. Sec.4 of the Act provides that entries in the patta passbook and the certified copy of entries in the patta passbook shall be presumed to be true and correct until the contrary is proved or a new entry is lawfully substituted therefor. Sec.6 reads that the entries in the patta passbook issued by the Tahsildar under Sec.3 shall be *prima facie* evidence of title of the person in whose name the patta passbook has been issued to the parcels of land entered in the patta passbook free of any prior encumbrance, unless otherwise specified therein. Sec.12 thereof provides for appeal by any person aggrieved by an order made by the Tahsildar under the said Act within such period as may be prescribed. Sec.13 provides for a revision by any officer of the Revenue Department not below the rank of District Revenue Officer, *suo motu* as well as on application by party. Sec.14 is to the effect that no suit shall lie against the Government or any officer of the Government in respect of the claim to have an entry made in any patta passbook that is maintained under the Act or to have any such entry omitted or amended. The proviso to the Section is very important. It reads thus:

> "Provided that if any person aggrieved as to any right of which he is in possession, by an entry made in the patta passbook under this Act, he may institute a suit for a declaration of his rights under Chapter VI of the Specific Relief Act, 1963 (Central Act XLVII of 1963); and the entry in the patta passbook shall be amended in accordance with any such declaration."

33. Thus it is seen that the patta passbook is only providing *prima facie* evidence and it is rebuttable. The Proviso to Sec.14 of this Act enables an aggrieved person to file a suit. In the present case, these proceedings are already pending in which the question of title is canvassed. The patta-pass book issued during the pendency of these proceedings will not conclude the question. Whoever wins in these proceedings ultimately, is entitled to get the entry in the patta passbook rectified in accordance with the decision. There is no substance in the argument that the only remedy of the defendants is only to file a fresh suit against the plaintiffs for declaration of their title under the Specific Relief Act. Learned counsel submits that the burden is placed squarely on the defendants by this Act and it is for them to establish their title by so independent proceeding. I do not agree. Evidence has been let in by both the parties in the present proceedings and the question of title was already in issue. Hence, there is no necessity for the defendants to file a fresh suit to decide the question of title.

34. In the result, the second appeal fails and it is dismissed. There will be no order as to costs. For the reasons stated above C.M.P.No.14888 of 1992 is also dismissed. No costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

W.P.Nos.10575, 10580 to 10591 of 1991 etc.

20th December, 1991.

Thirubhuvanam Silk Handloom Weavers' Co-operative Production and Sales Society Ltd. ...*Petitioner*

v.

State of Tamil Nadu ...*Respondent.*

(A) Constitution of India (1950), Art.213 - Legislative power of the Governor - Satisfaction with regard to immediacy if justiciable.

Even a plain reading of Art.213 of the Constitution would indicate that it has got two distinct aspects one being positively objective and the other being entirely subjective. The objective and the factual aspect is that the Legislature, where it is a unicameral one must not be in session and where it is a bicameral one, both the Houses of the legislature should not be in session. If the

legislature is in session, the power of the Governor to issue ordinances is negatived. The other aspect which is purely subjective is with regard to the existence of circumstances which necessitate the immediacy of the promulgation of the Ordinance. Clause (2) of the Article declares that the ordinance shall have the same force and effect as an act of the legislature of the State assented by the Governor. Thus it is no less an Act of Legislature than an enactment by the legislature. What thus may be the scope of judicial review of such legislative action, when it is not in dispute that when the Ordinance was promulgated, the Legislature of the State which is a unicameral one was not in session and thus this factual requirement existed. A long time of unbroken precedent that the satisfaction of the Governor-General or the Government with regard to the immediacy in the Ordinance making power under the Government of India Acts 1915 and 1935 in the pre-Constitution era is available saying that the satisfaction was not justiciable. In the post-Constitution era, when the Court examined such contentions, it always accepted the necessity of immediate action for promulgating an Ordinance being a matter purely the subjective satisfaction of the Governor. The subjective satisfaction of the Governor who acted with the aid and advice of the Council of Ministers in promulgating the Ordinance is beyond the judicial review and the validity of the Ordinance cannot be examined on the grounds *bona fides* and *mala fides* of the advice of the Council of Ministers or the satisfaction of the Governor. But the Court, however, may examine whether in purporting the promulgate an Ordinance, the Executive has in sum and substance gone beyond its competence meaning the compentence of the legislature and/or violated any provision in Part III of the Constitution (Fundamental Rights) or any other provision of the Constitution. *[Paras 14 and 18]*

(B) Interpretation of Statutes - Legislative indent - Motive behind legislature - Distinction between.

It is indeed necesary in construing a statute to see the consequences and then to test the legislative intent. It is the consequence for which a law is designed to achieve some object or to remove or arrest a mischief. The motive behind the legislation has to be distinguished from the legislative intent. The former will fall in the category of *bona fides*, or malice in law or malice in fact generally called *mala fides*, the latter will be in the realm of operation - post enactment. This post enactment operation or effect may show that the Act in substance is something which is beyond the powers of the legislature to legislate upon and that the legislature has transgressed its power by adopting a device in a covert or indirect manner to achieve something other than the subject of legislation. *[Para 21]*

(C) Tamil Nadu Co-operative Societies (Appointment of Special Officers) Act (XXVI of 1990) - Constitution of India (1950), Sch. VII, List II, Entry 32 - Legislative compentence of Tamil Nadu legislature to make the Act - If extends to judging electoral malpractices is the elections held for the membership of the Board and/or other office-bearers of the Society - Act held, a colourable exercise of power.

Item 32 of the State List of the Seventh Schedule empowers the State legislature to legislate with respect to incorporation, regulation and winding up of corporations and co-operative societies. Such laws as to incorporation and regulation of Co-operative societies can undoubtedly take into their fold all schemes as to the constitution of the Board of Management etc., fixation of tenure of a member of the Board of Management and the determination of the members' rights. Since the legislature is competent also to make laws providing for forums for adjudication of disputes it, with or without the right to sue in a Civil or Criminal Court, can create a special forum for adjudication of disputes arising under its laws or even embracing various other kinds of disputes which otherwise will fall within the jurisdiction of the Civil and/ or Criminal Courts. It has already been notied that a machinary for resolving election disputes and for going into the allegations that elections were not true and fair, getting vitiated by malpractices is a must, for it will be going against the basic structure of the Constitution if elections are made automatically void or automatically valid and if such a power is assumed by the legislature, it will amount to exercise of judicial power. Adjudicatory facts are facts about the parties or their activities, businesses and properties usually answering the questions of who did what where, when, how, why, with, what motive or intent, the kind of facts that go to court to Tribunal unlike legislative facts to the Legislature the basis for formation of policy and thus enacting laws. Ordinarily the petitioner or the complainant and the person against whom allegations are made should

get opportunity to have their say and unless they got such opportunity a lis between the parties will not be determined or decided. To confirm or annul without even being ascertained and without there being answers to what, where, when, how, and why, will be unfair and unjust. Unless there is a forum for such determination even though purporting to be an act of a legislature of a Democractic Republic, it shall be an act of a despot. Members elected or nominated in accordance with the provisions of Tamil Nadu Act XXX of 1983 and having a tenure, have been unseated by the enactment in Sec.3 of the Ordinance and the Act as under this, the term of office has been made to expire on the appointed day and thus they have been asked to vacate their office on and from the appointed day. That has been done for the reasons *inter alia*, that (1) the Tamil Nadu Co-operative Societies Amendment Act 1990 (Act XXVI of 1990) provided for thirty per cent representation for women and 18 per cent representation for Scheduled Castes and Scheduled Tribes in the Boards of registered Co-operative Societies and for nomination of the representatives of women and Scheduled Castes and Scheduled Tribes if women and Scheduled Castes and Scheduled Tribes members were not elected to that extent; in the election to the boards of the primary co-operative societies held in the year 1990, representatives of women and Scheduled Castes and Scheduled Tribes were not elected in the extent of thirty per cent and eighteen per cent respectively. A large number of representatives of Women; Scheduled Castes and Scheduled Tribes disproportionate to the elected members have been nominated. This had resulted in an abnormal tilt towards the nominated members. The abnormal tilt towards nominated members was not conducive to the orderly development of Co-operative movement. It was also not in consonance with the principles of democratic management of co-operatives. (2) A number of complaints had been received by the Government regarding the malpractices in the conduct of election and in the management of the affairs of the primary co-operative societies. No one can question that authority of the legislature to amending the provisions that created a tilt in favour of nominated members. But this tilt, if at all, was caused not for any other reason but the power to nominate created by Tamil Nadu Act (XXVI of 1990). Those who got elected or nominated, acquired a statutory right and the Act which gave such right to them still holds the field. The preamble says that the Government has decided to amend the Act XXX of 1983 suitably so that the tilt does not exist. This amendment is yet to be made. The Government's desire to make the amendment may or may not be accepted by the legislature, the legislature may decide in favour of continuing the amendments by Tamil Nadu Act XXVI of 1990 it may not put forward future amendments. The court has not found any provision in the Act which empowers the State Government to receive complaints and/or to determine whether the complaints were true or not. It is, however, said, that a number of complaints were received by the Government regarding malpractices in the conduct of election and in the management of the affairs of the primary co-operative societies. The Act has provided forms for such complaints to be made and empowered the forums to adjudicate. These provisions are beside what Sec.9 of the Code of Civil Procedure prescribes that any Civil dispute can be taken to a civil court of competent jurisdiction or various provisions of the major and minor criminal laws. The questions what, where, when, how, why, with what motive and intent all falling in the category of adjudicative facts have been answered by the legislature that those who have been elected for a term of office shall cease forthwith to hold their respective offices and in their place Special Officers shall assume charge. The legislature's competence to make laws with respect to co-operative societies in Item 32 of the State list which is confined to make laws as to incorporation, regulation and winding up of a coperative societies does not and cannot extend to judging electoral malpractices in the elections held for the membership of the Board and/or other office-bearers of the society. True, as held by the Supreme Court, in a democratic set-up, disputes relating to the validity of elections need not be settled by courts of law only. Nonetheless an independent mechanism alone can justify interference on the ground of electoral malpractices in the tenure of office of the elected members of the Board. A decision as to maladministration by those who have been elected to administer the society in accordance with the provisions of the Act, the Rules and the By-laws will be despotic if the rule of adversary is ignored and as complaints in the hands of the Government of

the State. A legislative decision imposed upon the society and its members that those constituting the Board indulged in maladministration will be a pronouncement of guilt of a sort in exercise of legislative power without there being any adjudication. No legislature shall assume such power. The legislature could exercise the judicial power only if a law made by it for the said purpose empowered it to act in judicial capacity. The sovereign act of the legislature in the teeth of basic structure theory is an exercise that the court must not countenance. The view that the court has taken may lead it to hold that the Amendment Act is a colourable exercise of power and the legislature has acted beyond its competence in terminating the tenure of the elected or nominated members of the board of management of the primary co-opertive societies. *[Paras 49, 50, 51, 52 and 55]*

(D) Tamil Nadu Co-operative Societies (Appointment of Special Officers) Act (XXVI of 1990), Sec.5 - Appointment of Advisory Board - Absence of qualification for - Provision, if arbitrary and invalid.

Sec.5 of the Act which has given to the Government power to appoint an Advisory Board consisting of not more than five non-official members to advise the Special Officer and which Board shall be consulted by the Special Officer on all material relating to the affairs of the primary society is perhaps a provision which creates some semblance of a democratic functioning of the society during the interregnum for which the Special Officer has been appointed under the impugned Amendment Act. But then it is not indicated who will be the members of the Advisory Board. If they are coming from areas they are not covered by the primary society concerned in the sense that not all the persons who qualify for membership in the society, it is going to pollute the society and interfere with the right of the members of the society under Art.19(1)(c) of the Constitution. There are laws which say that a municipal Board or any other local self government may be constituted in a particular area until such Constitution of the municipality or the self-government, certain persons are nominated and notified to function as the Board of the local self-government. But then such persons must qualify to be members of the board of municipality and/or the local self-government. If they come otherwise to constitute the board of management, they not only interfere with the right of the local self-government but also interfere with the freedom of association. It is, however, reported that rules have not been framed prescribing qualifications for members of the Advisory Board. It is thus premature to say that for the reason of absence of any qualification of the five non-official members to constitute the Advisory Board of the society, the constitutional guarantees have been violated. The absence of guidelines, no doubt, render a provision of law arbitrary. But arbitrariness with respect to the nomination of five non-official members to advise the Special Officer can be rectified if care is taken to ensure that such members come from amongst the members of the society only and belong to the categories which constitute the Board. Therefore, it is not possible at this stage to say that Sec.5 of the impugned Act is stricken by such a serious vice which will render it invalid. *[Para 53]*

(E) Tamil Nadu Co-operative Societies (Appointment of Special Officers) Act (XXVI of 1990), Sec.7(2) - Appointment of Special Officers - Power delegated to Registrar to appoint - Registrar and person vested with all or any of the powers of Registrar - Person vested with powers of a Registrar - Appointment of Special Officer by such person, if legal.

Sub-sec.(2) of Sec.7 of the Amendment has given to the Government the power to authorise the Registrar by notification to exercise any of the powers vested in them under Sec.4 or under Sec.5 in respect of all or any of the primary societies. It is said that in many societies persons who are not the Registrar but appointed to exercise some or all the powers of the Registrar have been authorised by the Government to appoint Special Officers. The two provisions of Sec.3 of the Act clearly distinguish between an officer who is appointed as the Registrar and the officer of the Government as any officer of any body corporate owner or controller by the Government who is vested with all or any of the powers of the Registrar under the Act. While a person who falls in the first category is the Registrar, since the Act contemplates delegation of the governmental functions under Sec.4 or Sec.5 of the Amendment Act to him, he can be authorised by the Government to appoint Special Officers; those who, however, fall in the second category, they are not the Registrar. They are persons who have been given a limited role to exercise all or some of the powers of the Registrar under the Act. Merely because such powers are conferred upon them, they cannot be the

Registrar although they function as Registrar for the purposes of the Act. They cannot act as delegates of the State Government for Sec.7 of the Amendment Act limits the delegation to Registrar only. The conclusions will lead the court to hold that appointment of Special Officers by the persons who are not appointed as the Registrar but are merely conferred the powers of the Registrar are illegal. *[Paras 54 and 55]*

Cases referred to:

Bhagat Singh v. Emperor, A.I.R. 1951 P.C. 111: 34 L.W. 53; Emperor v. Benoarilal Sharma, (1945)1 M.L.J. 76: 1945 F.C.R. 161: 1945 F.L.J. 1: 1945 M.W.N. 41(2): (1945) M.W.N. (Crl.) 1: 58 L.W. 64: A.I.R. 1945 P.C. 48; The Emperor v. Sibnath Banerjee, (1945)2 M.L.J. 325: 1945 M.W.N. 546: 1945 M.W.N. (Crl.) 94: 221 I.C. 243: 1945 F.C.R. 195: 1945 F.L.J. 222: 72 I.A. 241: A.I.R. 1945 P.C. 156; Lakhi Narayan Das v. Province of Bihar, A.I.R. 1950 S.C. 59; State of Punjab v. Sat Pal Singh, A.I.R. 1969 S.C. 903; Rustom Cawasjee Cooper v. Union of India, (1970)1 S.C.J. 564: A.I.R. 1970 S.C. 564; S.K.G.Sugar Private Ltd. v. State of Bihar, A.I.R. 1974 S.C. 1533: (1974)4 S.C.C. 827: 1974 Tax.L.R. 2245; R.K.Garg v. Union of India, A.I.R. 1981 S.C. 2138; A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: 1982 Crl.L.J. 340: (1982)1 S.C.C. 272: (1982)2 S.C.J. 68; T.Venkata Reddy v. State of Andhra Pradesh, A.I.R. 1985 S.C. 724; K.Nagaraj v. State of A.P., (1985)1 Scale 31 at 50; Lalit Narayan Mishra v. State, A.I.R. 1987 Patna 53; Samsher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192: 1974 Lab.I.C. 1280; D.C.Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579; K.G.Gajapati Narayanan Deo v. State of Orissa, A.I.R. 1953 S.C. 375: 1953 S.C.J. 592: 1954 S.C.R. 1; P.Vajravelu Mudaliar v. Special Deputy Collector, Madras, (1964)2 M.L.J. (S.C.) 173: (1969)2 An.W.R. (S.C.) 173: (1969)2 S.C.J. 703: A.I.R. 1965 S.C. 1017; Dwarkadas Shrinivas of Bombay v. Sholapur Spinning and Weaving Ltd., (1954)1 M.L.J. 355: 1954 S.C.J. 175: 1954 S.C.R. 674: A.I.R. 1954 S.C. 119; Sakal Papers (P.) Ltd. v. Union of India, A.I.R. 1972 S.C. 305; L.N.Mishra Institute of E.D. and Social Change v. State of Bihar, A.I.R. 1988 S.C. 1136; Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840; O.K.Ghoush v. E.X.Joseph, A.I.R. 1963 S.C. 812: (1962)2 Lab.L.J. 615: (1963)3 S.C.R. 789; State of Madras v. V.G.Row, A.I.R. 1952 S.C. 196: (1952)2 M.L.J. 135: 1952 S.C.R. 597: 1952 S.C.J. 253; All India Bank Employees' Association v. National Industrial Tribunal, A.I.R. 1962 S.C. 171: (1961)2 Lab.L.J. 285: (1962)32 Com.Case 414; Daman Singh v. State of Punjab, A.I.R. 1985 S.C. 973; Smt. Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2292: (1976)2 S.C.R. 347; Ameerunnissa v. Mahboob Begum, 1953 S.C.J. 61: 1953 S.L.R. 404: A.I.R. 1953 S.C. 91; Taylor v. Beckham, 44 L.Ed. 547; Truman H.Newberry v. United States of America, 65 L.Ed. 913; David S.Barry v. United States of America, Ex. Rel., Tamas W.Cunningham, 73 L.Ed. 867; Charles W.Baker v. Joe C.Cart, 7 L.Ed. 2nd 663; Jullian Bond v. James Sloppy Floyd, 17 L.Ed. 2nd. 235; Adam Clayton Powell v. John W.Mc.Cormack, 23 L.Ed. 2nd. 491; Don John Douglas Liyange v. The Queen, 1967 A.C. 259; His Holiness Kesavananda Bharathi v. State of Kerala, A.I.R. 1973 S.C. 1461: (1973) S.C.R. (Supp.) 1: (1973)4 S.C.C. 325; N.P.Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 S.C.R. 218; State of Orissa v. Bhupendra Kumar Bose, (1962)2 S.C.R. (Supp.) 380; U.S. v. Brown, 381 U.S. 487; Baldev Singh v. State of M.P., A.I.R. 1987 S.C. 1239; S.L.Kapoor v. Jagmohan, A.I.R. 1981 S.C. 136: (1981)1 S.C.R. 746.

N.Paul Vasanthakumar, etc., for Petitioners.

G.Rajagopalan, Special Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Mishra, J.: The petitioners herein have challenged the Ordinance No.5 of 1991 dated 27th July, 1991 published in the Tamil Nadu Government Gazette (Extraordinary) dated 28th July, 1991. In the course of the hearing of the writ petitions, however, the Tamil Nadu Co-operative Societies (Appointment of Special Officers) Act, 1991 has been notified. They have amended the prayer and sought a declaration that it is void and unconstitutional.

2. The statement of Reasons and Objects in the Amendment Act is the same as in the Ordinance and the provisions therein are the same as in the Ordinance, It is useful to notice that the Legislature of the State has enacted the Tamil Nadu Co-operative Societies Act, 1983 (Tamil Nadu Act 30 of 1983) repealing the Tamil Nadu Co-operative Societies Act, 1961 (Tamil Nadu Act 53 of 1961) and the Tamil Nadu Co-operative Land Development Banks Act, 1934 (Tamil Nadu Act 10 of 1934) to amend and consolidate the law relating to and to make better provision for the organisation, management and supervision of co-operative societies in the State of Tamil Nadu

(See Preamble to the Act 30 of 1983). The Preamble to the Act 30 of 1983 contains *inter alia* that,

"to provide for an orderly development of the co-operative movement in accordance with co-operative principles such as open membership, democratic management, limited interest on capital, distribution of surplus based on patronage, provision for co-operative education and co-operation among co-operatives for the promotion of thrift, self-help and mutual aid among persons with common socio-economic needs so as to bring about improvement in agriculture and industry, better methods of production, better business and better living and for that purpose to amend and consolidate the law relating to co-operative societies in the State of Tamil Nadu."

The Legislature enacted the law.

3. The Act brought all societies, whether agricultural producers, marketing society, agricultural service co-operative society, milk producers society, oilseeds growers society, self-reliant society weavers, society, and scheduled co-operative society and whether with limited or unlimited liability under the definition of a "primary society" except an apex society or a central society as defined in Sec.2(21) thereof.

4. Chapter IV of the Act deals with the management of registered societies and contains a specific provision to the effect that the ultimate authority of a registered society shall vest in the general body of its members and in Sec.33 that the management of every registered society shall vest in a board constituted in accordance with the provisions of the Act, the Rules and the By-laws, which shall exercise such powers and perform such duties as may be conferred or imposed on it by the Act, the Rules and the By-laws, and in Sec.33(10) that the term of office of a member who is elected to any board constituted under the Act the Rules or the By-laws shall be three years and the term of office of a member of any board nominated thereto by the Government, the Registrar or the prescribed authority or the financing bank, if such member is not a Government servant shall not exceed three years, and the term of office of a member of any board who is a nominee of another society or other interest, such as the Tamil Nadu State Agricultural Marketing Board, shall not exceed three years.

5. The Act also provides for declaration and removal of members of the Board, and who shall not be eligible for being elected or nominated as a member of the Board of any registered society, in Sec.34 thus indicating as to who may be elected or nominated. In sub-sec.(2) thereof, the Act states,

"A member of the board shall cease to hold the office as such if he--

(a) becomes subject to any of the disqualifications mentioned in Sub-sec.(1):

Provided that a member of the board who ceases to hold office by reason of his having incurred the disqualification mentioned in,-(i) Sub-clause (i) of Clause (b) of sub-sec.(1) shall not be eligible for re-election or re-nomination as a member of the board of the registered society of which he was a member or for election or nomination to the board of any other registered society;

(ii) Sub-clauses (iii) or (iv) of the said Clause (b), shall not be eligible for re-election or re-nonmination as a member of that board or for re-election or nomination to the board of any other registered society,

for a period of three years which shall be reckoned,--

(A) in the case of the disqualification mentioned in Sub-clause (i) the said Clause (b), from the date on which the dues referred to therein have been fully cleared; and

(B) in the case of disqualification mentioned in sub-clause (iii) or (iv) of the said Clause (b), from the date on which the dues involved in such decree, decision, award, order, certificate or application in respect of which proceedings have been initiated, have been fully discharged;

Provided further that where a member of the board ceases to hold his office as such by reason of his having been sentenced for any offence under this Act, and the sentence is annulled on appeal or revision he shall be restored to office for such portion of the period for which he was elected or nominated as may remain unexpired at the date of such restoration and any person elected or nominated to fill the vacancy in the interim shall, on such restoration, vacate office; or

(b) ceases to be a member of the registered society; or

(c) purchases directly or indirectly any property of other members of the registered society brought to sale for recovery of any money due

from such other member to the registered society; or

(d) absents himself from four consecutive meetings of the board or from all meetings of the board for a continuous period of three months, whichever is longer:

Provided that the member ceasing to hold office under this clause may be restored in accordance with the procedure prescribed if such member makes an application for condonation of the absence,"

and sub-sec.(3) of Sec.34,

"The board of a registered society *may suo motu*, and shall on an application made by any person, consider whether any member of the board was or has become disqualified to hold office as such under this section and take a decision. Such a decision shall be communicated to the member and the applicant concerned, if any;

Provided that no decision shall be taken unless the member of the board is given an opportunity of making his representation:

Provided further that pending such decision, the member of the board shall be entitled to continue as such as if he is qualified or is not disqualified."

6. Sec.35 of the Act says that every person shall, prior to his election or nomination as a member of the board of any registered society, give such registered society, intimation of, and shall, before taking charge of his office as such member of the board sell or divest himself of any interest other than investment and borrowing which he may have for his own benefit whether in his own name or otherwise, in any contract made with the registered society or in any sale or purchase made by the registered society privately or in any auction or in any contract or transaction of the registered society and it shall not be lawful for a member of the board of any such society, so long as he holds office to acquire or purchase any such interest other than investment and borrowing and if he, under any will or by succession or by gift becomes entitled for his own benefit to such financial interest, he shall sell the same within three months after becoming so entitled thereto and he shall also within three months, sever any connections he may have and cease to have any such financial interest direct or indirect other than investment and borrowing provided that nothing contained in the subsection shall apply to such class of contracts, sales, purchases or transactions as may be prescribed and, under Sub-sec.(2), empowers the Registrar to remove such member from the office of membership of the board, who failed to comply with the said provision, Sub-sec.(3) of this section, however, says,

"No member shall be removed under Sub-sec.(2) without being given an opportunity of making his representations. A copy of the order removing him shall be communicated to him."

7. Besides the above, there is another provision in Sec.36 which reads as follows:

"(1) Where in the course of an audit under Sec.80 or an inquiry under Sec.81 or an inspection or investigation under Sec.82 or inspection of books under Sec.83 it appears that a person who is, or was a member of a board has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society or of any corrupt practice as defined in Sec.162 or of gross or persistent negligence in connection with the conduct and management of, or of gross mismanagement of the affairs of the society, the Registrar may, without prejudice to any other action that may be taken against such member by order in writing, disqualify him permanently from holding in future any office in any registered society. The Registrar shall, if such person holds office of members of the board, also by the same order remove him from that office.

(2) No person shall be disqualified or removed under Sub-sec.(1) without being given up an opportunity of making his representations. A copy of the order disqualifying or removing him shall be communicated to him."

8. Secs.82 and 83 of the Act are put in Chapter IX providing for audit and inquiry by the Registrar or by some person authorised by him into the constitution, working and financial condition of a registered society or any alleged misappropriation, fraudulent retension of any money or property, breach of trust, corrupt practice or mismanagement in relation to that society or into any particular aspect of the working of the society and also inspection and investigation by the Registrar of his own motion or on the application of a creditor of a registered society or by any person authorised by him, into the affairs of the registered society in

general or any alleged misappropriation fraudulent retention of any money or property, breach of trust, corrupt practice or mismanagement in relation to that society or into any particular aspect of the working of the society, having the same powers as in Sec.81 to hold inquiry, and inspection of books by financing banks and maintenance of accounts by registered societies. Secs.87 to 89 of this chapter of the Act provide for surcharge, supersession of the board and appointment of Special Officers in certain circumstances. The provision in Sec.88 reads as follows:

"(1) (a) The Registrar--

(i) may, if he is of opinion that the board of any registered society is not functioning properly or wilfully disobeys or wilfully fails to comply with any order or direction issued by the Registrar under this Act or the Rules

(ii) shall, where for two consecutive co-operative years--

(A) in the case of a financing bank more than sixty per cent of the total dues to the financing bank from its members remain unpaid or the number of defaulting members of such financing bank exceeds sixty per cent of the total number of members indebted to such bank, and

(B) in the case of other registered societies, more than seventy per cent of the total dues to the registered society from its members remain unpaid or the number of defaulting members of such registered society exceeds seventy per cent of the total number of members indebted to such society after giving the board of the registered society or the financial bank, as the case may be, an opportunity of making its representations, by order in writing, supersede the board and appoint a Government servant or an employee of any body corporate owned or controlled by the Government (hereinafter referred to as the Special Officer) to manage the affairs of the society for a specified period not exceeding one year:

Provided that an order under this sub-section shal be passed within a period of three months from the date of issue of notice of supersession or such further period or periods as the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate:

Provided further that in computing the total dues remaining unpaid for the purposes of item (ii), any instalment or sum which is not recoverable by reason of any remission or suspension or order of stay passed by the appropriate authority due to adverse seasonal conditions or any other reason shall be excluded in respect of that instalment or sum:

Provided also that for the purposes of computing the number of defaulting members referred to in item (ii) any member who is not liable to pay any instalment or sum by reason of any remission or suspension or order of stay passed by the appropriate authority due to adverse seasonal conditions or any other reason shall be excluded in respect of that instalment or sum,

(b) The period specified in such order may at the discretion of the Registrar, be extended from time to time provided that such order shall not remain in force for more than two years in the aggregate:

Provided that where on the date of commencement of this Act, the period of supersession exceeds one and half years, the Registrar may extend the period of supersession for such further period or periods not exceeding six months in the aggregate.

(2) Where a Special Officer is appointed, the Registrar may appoint an advisory board consisting of not more than five persons from among the members of that society who are not disqualified for being elected or nominated to the board of that society to advise the Special Officer in such matters as may be specified by him. The Registrar may at any time withdraw any person or persons so appointed under this sub-section and fill up the vacancy or vacancies by fresh appointment.

(3) The Special Officer appointed under Sub-sec.(1) shall, subject to the control of the Registrar and to such directions as he may, from time to time give, have power to exercise all or any of the functions of the board or of any officer of the society and to take such action as may be required in the interest of the society.

(4) The Registrar may fix the remuneration payable to the Special Officer appointed under Sub-sec.(1). The amount of remuneration so fixed and such other expenditure incidental to the management of the society during the period of supersession as may be approved by the

Registrar shall be payable from the funds of the society.

(5) The Special Officer appointed under Sub-sec.(1) shall arrange for the constitution of a new board in accordance with the provisions of this Act, the Rules and the By-laws so that the new board may be constituted and the members thereof come into office at the expiry of the period of his appoitment.

(6) Before passing an order under Sub-sec.(1)(a)(i) in respect of any registered society, the Registrar shall consult in the manner prescribed the board of the financing bank to which the society is indebted:

Provided that if the financing bank does not communicate its comments within fifteen days of the receipt of a communication from the Registrar in this regard, the board of the financing bank shall be deemed to have no comments to make on the order proposed to be passed under Sub-sec.(1).

(7) Nothing contained in this section shall be deemed to affect the powe of the Registrar to order the winding up of the society under Sec.137.

(8) An order under Sub-sec.(1) shall take effect from the date specified therein unless stayed by an order of the appellate authority. Where an order under Sub-sec.(1) is reversed on appeal, the Special Officer appointed under Sub-sec.(1) shall forthwith hand over the management of the society to the board.

(9) Any paid officer of servant of the registered society against whom there is a *prima facie* evidence that he was also responsible for the acts leading to the supersession of the board under this section, shall, without prejudice to any other action that may be taken against him under this Act or any other law, be liable to disciplinary action including suspension, pending enquiry into grave charges."

This is followed by the provision in Sec.89, which states:

"(1) Where--

(i) the term of office of the board of any registered society has expired and a new board cannot be constituted in accordance with the provisions of this Act, the Rules and the By-laws; or

(ii) the new board constituted fails to enter, or is prevented from entering upon office on the expiration of the term of office of the earlier board: or

(iii) the existig board has tenderd resignation en bloc; or

(iv) (a) vacancies have arisen for any reason, or (b) one or more members of the board have tendered resignation and the number of remaining members cannot form the quorum for the meeting of the board,

The Registrar may, of his own motion or on application of any member of the registerd society, and in the case of a new board which has failed to enter, or prevented from entering, upon office, after giving the members of the said board an opportunity of making their representations, by order appoint a Government servant or an employee of any body corporate owned or controlled by the Government (hereinafter referred to as the Special Officer) for a specified period not exceeding six months to manage the affairs of the registered society pending the constitution of a new board, or as the case may be, the entering upon office by the new board:

Provided that the period specified in such order may for special reasons to be recorded in writing by the Registrar, be extended from time to time but such order shall not remain in force for more than one year in the aggregate.

(2) The provisions of Sub-secs.(2) to (5) and Sub-secs.(7) and (8) of Sec.88, so far as may be, shall apply in relation to the appointment of a Special Officer under Sub-sec.(1), as they apply in relation to the appointment of a Special Officer under Sub-sec.(1) of the said Sec.88."

9. The Act thus is a comprehensive compendium of the actions that may be taken against a member of the Society who may be guilty of misappropriation or fraudulent retention of any money or other property of the society or of breach of trust in relation to the society or of any corrupt practice or of gross or persistent negligence in connection with the conduct and management of or gross mismanagement of the affairs of the society and for the supersession of the society if it is not functioning properly or wilfully disobeying or wilfully failing to comply with any order or direction issued by the Registrar.

10. Besides the individual liability as to disqualification as a member of the Board of the society, in the case of any person who is or was entrusted with

the organisation or management of the society or any past or present officer or servant of the society, the Act gives power to the Registrar either to himself frame charges against such person or officer or servant or to authorise any other person to do so for a surcharge proceeding under Sec.87 of the Act subject to a limitation of seven years from the date of the act or omission leading to such offence.

11. Although the Act received the assent of the President of India on 15th July, 1983 and published in the Tamil Nadu Government Gazette Extraodinary of Part IV, Sec.2 dated 1st November, 1983 it became operational only in the year 1988 and nothing followed under this Act except the election held in October, 1990. After the elections and nominations of the women and S.C./S.T. representatives, etc., when the new board assumed office, the Ordinance terminated its tenure with effect from the appointed day, that is to say, the date on which the Ordinance came into force (28.7.1991). The Ordinance and its successor Act have however got a long Preamble and state as follows:

> "An Act to provide for the appointment in the public interest of Special Officers for certain primary societies in the State of Tamil Nadu:
>
> *Whereas* the Tamil Nadu Co-operative Societies Act, 1983 (Tamil Nadu Act 30 of 1983) as amended by the Tamil Nadu Co-operative Societies (Amendment) Act, 1990 (Tamil Nadu Act 26 of 1990), provides for thirty per cent representation for women and eighteen per cent representation for Scheduled Castes and Scheduled Tribes in the boards of registered co-operative societies and for nomination of the representatives of women and Scheduled Castes and Scheduled Tribes, if women and Scheduled Castes and Scheduled Tribes members are not elected to that extent.
>
> *And whereas* in the election to the boards of the primary co-operative societies held in the year 1990, representatives of women and Scheduled Castes and Scheduled Tribes were not elected to the extent of thirty per cent and eighteen per cent respectively:
>
> *And whereas* a large number of representatives of women and Scheduled Casted and Scheduled Tribes, disproportionate to the elected members have been nominated, which resulted in an abnormal tilt towards the nominated members:
>
> *And whereas* the abnormal tilt towards the nominated members will not be conducive to the orderly development of co-operative movement but also be not in consonance with the principles of democratic management of co-operatives:
>
> *And whereas* a number of complaints have been received by the Government regarding the malpractices in the conduct of election and in the management of the affairs of the primary co-operative societies:
>
> *And whereas* the Government with a view to set right the abnormal tilt towards the nominated members and also to ensure the proper management of the said co-operative 'societies, have decided to amend the Tamil Nadu Co-operative Societies Act, 1983 (Tamil Nadu Act 30 of 1983) suitably and also to conduct election to all co-operative societies under the said Act as proposed to be amended:
>
> *And whereas* pending amendment, it has been decided to supersede the boards of management of the primary societies and to appoint Special Officers for a limited period, in the public interest:
>
> *Be it enacted* by the Legislative Assembly of the State of Tamil Nadu in the Forty-Second Years of the Republic of India as follows: (in the place of the last paragraph above, the Ordinance contained/contains,
>
> *And whereas* the Legislative Assembly of the State is not in session and the Governor of Tamil Nadu is satisfied that circumstances exist which render it necessary for him to take immediate action for the purposes hereinafter appearing:
>
> *Now therefore,* in exercise of the powers conferred by Clause (1) of Art.213 of the Constitution, the Governor hereby promulgates the following Ordinance."

12. After Secs.1 and 2 which give the short title and commencement and definitions of the expressions "appointed day", "board", "Co-operative Societies Act", "Government" and "primary society" the Ordinance and the successor Act in Sec.3 contain a provision as to term of office of members of board of certain primary societies to expire. This section reads as follows:

> "Notwithstanding anything contained in the Co-operative Societies Act, or in any other law

for the time being in force, or in any decree or order of any court, tribunal or other authority, the term of office of every member (whether elected or nominated) of the board of every primary society, including its president and vice-president, holding office as such as, immediately before the appointed day, shall expire on the appointed day and such members shall vacate their office on and from the appointed day,"

the appointed day being the date of the promulgation of the Ordinance. Sec.4 of the Ordinance and the Amendment Act empowers the State Government to appoint a person as Special Officer to manage the affairs of such a superseded primary society prescribing as follows:

"(1) (a) Notwithstanding anything contained in the Co-operative Societies Act, or in any other law for the time being in force, or in any decree or order of any court, tribunal or other authority, on and from the appointed day, the Government shall appoint a person as Special Officer to manage the affairs of any primary society referred to in Sec.3.

(b) Nothing in this sub section shall prevent the appointment of the same person as Special Officer for two or more primary societies.

(2) Each Special Officer appointed under Sub-sec.(1)shall hold office for a period of one year with effect on and from the appointed day or for such shorter period as the Government may, by notification, specify in this behalf. Provided that if any vacancy arises in the office of the Special Officer, the vacancy shall be filled up the Government and the person so appointed in the vacancy shall hold office for the remainder of the said period.

(3) The Special Officer appointed under Sub-sec.(1), subject to the control of the Registrar and to such directions as he may, from time to time, give shall exercise all or any of the functions of the board or of any officer of the primary society and take such action as may be required in the interest of such primary society.

(4) The Government may fix the remuneration payable to the Special Officer appointed under sub-sec.(1) and the amount of remuneration so fixed and such other expenditure incidental to the management of the primary society as may be approved by the Registrar, shall, subject to such directions as the Government may give in this regard, be payable from the funds of such primary society.

(5) The Special Officer appointed under Sub-sec.(1) shall arrange for the constitution of a new board in accordance with the provisions of the Co-operative Societies Act and the Rules made thereunder and By-laws of such primary society, so that the new board may be constituted and the members thereof come into office at the expiry of the period of appointment of the Special Officer."

For the interregnum, that is to say from the date of termination of the term of office of every member, whether elected or nominated, of the Board of every primary society until the expiry of the period of appointment of the Special Officer, the ordinance or the Act has got a prescription. Sec.5 of the Ordinance or the Act provides as follows:

"(1) Notwithstanding anything contained in the Co-operative Societies Act, the Government may appoint an advisory board consisting of not more than five non-official members to advise such Special Officer.

(2) The members of the Advisory Board shall be entitled to receive such allowances or fees and other amenities as may be prescribed.

(3) The Advisory Board shall be consulted by the Special Officer on all matters relating to the affairs of the primary society."

Sec.6 of the Ordinance or the Act has extended the application of the provisions of the Co-operative Societies Act and the Rules made thereunder to a Special Officer appointed under Sub-sec.(1) of Sec.4 as they apply in relation to a Special Officer under Sub-sec.(1) of Sec.88 of the Co-operative Societies Act. Since under Secs.4 and 5, the Government is required to do certain functions, Sec.7 provides for a delegation by the State to the Registrar to exercise any of the powers vested in them under Sec.4 or under Sec.5 in respect of all or any of the primary societies. This section reads as follows:

"(1) The Government may, by notification, authorise the Registrar to exercise any of the powers vested in them under Sec.4 or under Sec.5 in respect of all or any of the primary societies.

(2) The exercise of any power delegated under Sub-sec.(1) shall be subject to such restrictions and conditions as may be specified in the

notification and subject also to control and revision by the Government."

Sec.9 provides for the rule making power of State Government and Sec.10 provides for:

"Notwithstanding anything contained in the Co-operative Societies Act, or in any other law for the time being in force or in any decree or order of any court, tribunal or other authority;--

(a) every member elected to the board of primary society but not assumed office immediately before the appointed day shall be deemd never to have been elected as such member; and

(b) any dispute appeal, revision, rview or other proceedings in repspect of any election to a primary society pending before any court or other authority on the appointed day shall abate."

13. Learned counsel appearing for the parties have addressed us at length on the execise of power by the Governor of the State under Art.213 of the Constitution of India in promulgating the Ordinance and taken us through the various provisions of law and the constitutional rights of the members of the Board of the Co-operative Society as well as the statutory rights under the Co-operative Societies Act, 1983. They have contended *inter alia* that Clause (1) of Art.213 of the Constitution relating to the satisfaction of the Governor is composite, that is, the satisfaction relates to the existence of circumstances as well as the necessity to take immediate action on account of those circumstances and since the circumstances mentioned in the Preamble to the Ordinance are not immediate and present or and are vague and not germane to the object stipulated in that clause of the article, the promulgation of the Ordinance is a colourable exercise of power and that the effect of the legislation has been to settle the dispute between the complainants on the one hand and the elected members and office bearers of the managing board of the Co-operative Society on the other, a matter beyond the competence of the Legislature and in any event, smacks of all the characteristics of Bills of Attainder. They have attacked Secs.3 and 5 in particular, which *inter alia* terminate the election or nomination of every member of the Board of every primary society including its President and Vice President notwithstanding the provisions aforementioned which fixed a tenure of three years and the appointment of the Advisory Board by the Government consisting of not more than five non-official members to advise the Special Officer on the ground that the former is unconstitutional and *ultra vires* Sec.33(10) of the Co-operative Societies Act, 1983 and other similar provisions therein and latter for its unconstitutionality as it gives arbitrary power to the Government to bring in lieu of the members of the society any person to advise the Special Officer. They have worded their submissions differently but attacked precisely on the same grounds the Ordinance as well as the Act contending that the Legislature's interference is violative of the petitioner's freedom of association guaranteed under Art.19(1)(c) of the Constitution of India. Since the Ordinance has been repealed by the Act, it is only of academic interest to examine whether the conditions precedent for promulgation of the Ordinance existed and the Governor had reasons to be satisfied to legislate under Art.213 of the Constitution of India.

14. Courts in India have examined the language in Art.213 of the Constitution which falls in Chapter IV of the Constitution headed as the legislative power of the Governor and reads as follows:

"(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if--

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature: or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President: or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such ordinance....."

and pronounced that even a plain reading of this would indicate that it has got two distinct aspects one being pristinely objective and the other being entirely subjective. The objective and the factual aspect is that the Legislature, where it is a unicameral one, must not be in session, and where it is a bicameral one, both the Houses of the legislature should not be in session. If the legislature is in session, the power of the Governor to issue Ordinances is negatived. The other aspect which is purely subjective is with regard to the existence of circumstances which necessitate the immediacy of the promulgation of the Ordinance. Clause (2) of this Article declares that the Ordinance shall have the same force and effect as an act of the legislature of the state assented to by the Governor. Thus it is no less an Act of Legislature than an enactment by the Legislature. What thus may be the scope of judicial review of such legislative action, when it is not in dispute that when the Ordinance was promulgated, the Legislature of the State which is a unicameral one was not in session and thus this factual requirement existed. A long time of unbroken precedent that the satisfaction of the Governor-General or the Government with regard to the immediacy in the Ordinance making power under the Government of India Acts 1915 and 1935 in the pre-Constitution era is available saying that the satisfaction was not justiciable (see the judgments of the Privy Council in *Bhagat Singh v. Emperor, A.I.R. 1951 P.C. 111: 34 L.W. 53, Emperor v. Benoarilal Sharma, (1945) 1 M.L.J. 76: 1945 F.C.R. 161: 1945 F.L.J. 1: 1945 M.W.N. 41(2): (1945) M.W.N. (Crl.) 1: 58 L.W. 64: A.I.R. 1945 P.C. 48* and in *Emperor v. Sibnath Banerjee, (1945) 2 M.L.J. 325: 1945 M.W.N. 546: 1945 M.W.N. (Crl.) 94: 221 I.C. 243: 1945 F.C.R. 195: 1945 F.L.J. 222: 72 I.A. 241: A.I.R. 1945 P.C. 156* and *Lakhi Narayan Das v. Province of Bihar, A.I.R. 1950 S.C. 59,* it is said:

"It is admitted that the Bihar Legislature was not in session when this Ordinance was passed it was urged, however, in the court below, and the argument was repeated before us, that no circumstance existed as is contemplated by Sec.88(1) which could justify the Governor in promulgating this Ordinance. This obviously is a matter which is not within the competence of Courts to investigate. The language of the section shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance. The existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test.....On promulgating an Ordinance the Governor-General is not bound as a matter of law to expound reasons therefor nor is he bound to prove affirmatively in a Court of law that a State of emergency did actually exist. The language of Sec.88 postulates only one condition, namely, the satisfaction of the Governor as to the existence of justifying circumstances and the Preamble to the Ordinance expresses in clear terms that this condition has been fulfilled. The first contention of the appellants must therefore be rejected."

15. Craies on Statute Law, Seventh Edition, 1971, has stated as under:

"When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which had been so put upon them."

16. In the light of the above, when we recall the debate in the Constituent Assembly (See Constituent Assembly Debates, Vol.8, page 214), we have to presume that the Constituent Assembly was fully aware of the same and intended to retain the same legal results by employing virtually identical phraseology in Arts. 123 and 213 of the Constitution (Art.123 is the President's power). When the Parliament is not in session, to promulgate an Ordinance, in the above debate Dr.Ambedkar repelled the criticism against the retention of the Ordinance making power in the Constitution and pointed out that the legislative power conferred on the President and the Governor was not a parallel power of legislation, but one exercisable only when both the houses of the Legislature were not in session. So in the post-Constitution era, when the Court examined such contentions, it always accepted the necessity of immediate action for promulgating an Ordinance

being a matter purely the subjective satisfaction of the Governor. This view expressed by the Supreme Court in *State of Punjab v. Sat Pal Singh, A.I.R. 1969 S.C. 903, Rustom Cawasjee Cooper v. Union of India, (1970)1 S.C.J. 564: A.I.R. 1970 S.C. 564; S.K.G. Sugar Private Ltd. v. State of Bihar, A.I.R. 1974 S.C. 1533: (1974)4 S.C.C. 827: 1974 Tax.L.R. 2245* and in *R.K.Garg v. Union of India, A.I.R. 1981 S.C. 2138,* holds the field although there are some observations in the judgment of the Supreme Court in *A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: 1982 Crl.L.J. 340: (1982)1 S.C.C. 272: (1982)2 S.C.J. 68,* wherein it has been observed at one place,

> ".....It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction."

and again,

> "That is why we do not feel called upon to examine the correctness of the submission made by the learned Attorney General that in the very nature of things, the satisfaction' of the President which is the basis on which he promulgates an Ordinance is founded upon materials which may not be available to others and which may not be disclosed without detriment to public interest and that the circumstances justifying the issuance of the Ordinance as well as the necessity to issue it lie solely within the President's judgment and are, therefore, not justiciable."

17. We say so with respect for, in a later judgment of the Constitution Bench of the Supreme Court in the case of *T. Venkata Reddy v. State of Andhra Pradesh, A.I.R. 1985 S.C. 724,* the judgment in the case of *A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: 1982 Crl.L.J. 340: (1982)1 S.C.C. 272: (1982)2 S.C.J. 68,* has been taken into consideration and yet, the law stated in the same terms as in the case of *R.K.Garg v. Union of India, A.I.R. 1981 S.C. 2138,* has been reiterated in these words:

> "The above view has been approved by another Constitution Bench of this Court in *A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: 1982 Crl.L.J. 340: (1982)1 S.C.C. 272: (1982)2 S.C.J. 68.* Both these decisions have firmly established that an ordinance is a 'law' and should be approached on that basis. The language of Clause (2) of Art.213 of the Constitution leaves no room for doubt. An ordinance promulgated under either of these two articles has the same force and effect as an Act of Parliament or an Act of the State Legislature, as the case may be. When once the above conclusion is reached the next question which arises for consideration is whether it is permissible to strike down an Ordinance on the ground of non-application of mind or *mala fides* or that the prevailing circumstances did not warrant the issue of the Ordinance in other words, the question is whether the validity of an Ordinance can be tested on grounds similar to those on which an executive or judicial action is tested. The legislative action under our Constitution is subject only to the limitations prescribed by the Constitution and no other to. Any law made by the Legislature, which it is not competent to pass, which is violative of the provisions in Part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the Legislature concerned, dependent upon the subject-matter of the statute the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute "unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the Legislature in passing a statute is beyond the scrutiny of courts. Nor can the Courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative Act are for the determination of the legislative authority and are not for determination by the courts. An Ordinance passed either under Art.123 or under Art.213 of the Constitution stands on the same footing. When the Constitution says that the Ordinance making power is legislative power and an Ordinance shall have the same force as an Act, an Ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents, immunities and limitations under the Constitution. In cannot be treated as an executive action or administrative decision."

In this judgment, the Supreme Court has said in no uncertain words that the true legal position about the justiciability of these issues in relation to an ordinance has been expressed in *K.Nagaraj v. State of A.P., (1985)1 Scale. 31 at 50,* in these words:

> "It is impossible to accept the submission that the Ordinance can be invalidated on the ground of non application of mind. The power to issue an Ordinance is not an executive power but is the power of the executive to legislate. The power of the Governor to promulgate an Ordinance is contained in Art.213 which occurs in Chapter IV of Part VI of the Constitution. The heading of that Chapter is "Legislative Power of the Governor'. This power is plenary within its field like the power of the State Legislature to pass laws and there are no limitations upon the power except those to which the legislative power of the State Legislature is subject. Therefore, though an Ordinance can be invalidated for contravention of the constitutional limitations which exist upon the power of the State legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An Executive Act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature."

18. A Full Bench of the Patna High Court has gone into this aspect in the case of *Lalit Narayan Mishra v. State, A.I.R. 1987 Patna 53.* As in some judgments of the Supreme Court, so in the Patna Full Bench judgment also, a reference has been made to the judgment of a Constitution Bench of the Supreme Court comprising seven Judges in the case of *Samsher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192: 1974 Lab.I.C. 1280.* It can never be in doubt that in promulgating an Ordinance under Art.213 of the Constitution of India, the Governor or under Art.123 of the Constitution of India, the President, acts on the aid and advice of the Council of Ministers for exercising the legislative power of the Executive, that is to say, the Governor or the President as the case may be. They will, for all purposes, have the legislative power of the Constitutional Government. In *Samsher Singh v. State of Punjab, A.I.R. 1974 S.C. 2192: 1974 Lab.I.C. 1280,* the Supreme Court has observed:

> "For the foregoing reasons we hold that the President as well as the Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers."

and proceeded further to hold that what advice is rendered to the President or the Governor by the Council of Ministers is beyond the judicial review except for limited purposes. In the case of *R.K.Garg v. Union of India, A.I.R. 1981 S.C. 2138,* this has been clearly stated that even in the legislative field the Governor equally, if not doubly is bound by the aid and advice of the Council of Ministers. The Patna Full Bench has reiterated the said view. We do not propose to repeat the exercise. We hold accordingly that the subjective satisfaction of the Governor, who acted with the aid and advice of the Council of Ministers in promulgating the Ordinance is beyond the judicial review, and the validity of the Ordinance cannot be examined on the grounds of *bona fides* or *mala fides* of the advice of the Council of Ministers or the satisfaction of the Governor. But the Court, however, may examine whether in purporting to promulgate an Ordinance, the Executive has in sum and substance gone beyond its competence meaning the competence of the legislature and/or violated any provision in Part III of the Constitution (Fundamental Rights) or any other provision of the Constitution. Since we are aware that in the case of *A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: 1982 Crl.L.J. 340: (1982)1 S.C.C. 272: (1982)2 S.C.J. 68,* the Supreme Court as well as in the case of *Lalit Narayan Mishra v. State, A.I.R. 1987 Patna 53,* the Full Bench of the Patna High Court, despite finding that the exercise of legislative power of promulgation of an Ordinance by the Governor cannot be impeached on the grounds of *mala fide,* examined whether there was any substance in the allegation of malice and found on facts in favour of the validity of the law, we, for the said reason, heard learned counsel for the parties in detail on such allegations as well. Those, however, are no longer relevant for, if the Amendment Act is valid, the invalidity of the Ordinance will be of no consequence.

19. The judgment of the Supreme Court in the case of *D.C.Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579,* proceeded on the footing that there was an abuse of the constitutional authority in repeatedly promulgating Ordinances and such a

strategem would be repugnant to the constitutional scheme, as it would enable the Executive to transgress its constitutional limitation in the matter of law making in an emergent situation and to covertly and indirectly arrogate to itself the law making function of the Legislature.

20. Beyond the above statement of law by the Supreme Court that the Legislature cannot violate the constitutional prohibition and transgress its legislative power, in a situation as one in *D.C.Wadhwa v. State of Bihar, A.I.R. 1987 S.C. 579,* the Supreme Court has said more than once as in the case of *K.G.Gajapati Narayanan Deo v. State of Orissa, A.I.R. 1953 S.C. 375: 1953 S.C.J. 592: 1954 S.C.R. 1.*

> "It is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the powers of that Legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method."

and in the case of *P.Vajravelu Mudaliar v. Special Deputy Collector, Madras, (1964)2 M.L.J. (S.C.) 173: (1969)2 An.W.R. (S.C.) 173: (1969)2 S.C.J. 703: A.I.R. 1965 S.C. 1017,* that when it is said that Legislation is a colourable one, what is means is, that the Legislature has transgressed its legislative power in a covert or indirect manner.

21. It is indeed necesary in construing a statute to see the consequences and then to test the legislative intent. It is the consequence for which a law is designed to achieve some object or to remove or arrest a mischief. The motive behind the legislation has to be distinguished from the legislative intent. The former will fall in the category of *bona fides,* or malice in law or malice in fact generally called *mala fides,* the latter will be in the realm of operation - post enactment. This post enactment operation or effect may show that the Act in substance is something which is beyond the powers of the legislature to legislate upon and that the legislature has transgressed its power by adopting a device in a covert or indirect manner to achieve something other than the subject of legislation.

22. To support the above view, we have the authorities of the Supreme Court in the case of *K.G.Gajapati Narayanan Deo v. State of Orissa, A.I.R. 1953 S.C. 375: 1953 S.C.J. 592: 1954 S.C.R. 1,* and *P.Vajravelu Mudaliar v. Special Deputy Collector, Madras, (1964)2 M.L.J. (S.C.) 173: (1969)2 An.W.R. (S.C.) 173: (1969)2 S.C.J. 703: A.I.R. 1965 S.C. 1017.*

23. Item 32 of List II of the Seventh Schedule of the Constitution gives to the State Legislature power to make laws with respect to incorporation, regulation and winding up of corporations other than those specified in List I, and universities, unincorporated trading, literary, scientific, religious and other societies and associations, co-operative societies. Item 43 of List I of the Seventh Schedule of the Constitution gives to the Union the power to make laws with respect to incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

24. Art.19(1)(c) gives to all citizens the right to form associations or unions. Clause (4) of Art.19 of the Constitution, however, states that nothing in this clause shall affect the operation of any existing law in so far as it imposes or prevents the State from making any law imposing in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said clause. The right to form associations or unions is thus made subject to the laws that the Union or the State Legislatures make within the limits of their powers and in respect of co-operative societies, subject to the laws made by the State Legislature as to incorporation, formation or regulation of the society or the winding up thereof.

25. The Supreme Court has indicated how to interpret the nature and contents of the fundamental rights in *Dwarkadas Shrinivas of Bombay v. Sholapur Spinning and Weaving Ltd., (1954)1 M.L.J. 355: 1954 S.C.J. 175: 1954 S.C.R. 674: A.I.R. 1954 S.C. 119,* and *Sakal Papers (P) Ltd. v. Union of India, A.I.R. 1972 S.C. 305* and in *L.N.Mishra Institute of E.D. and Social Change v. State of Bihar, A.I.R. 1988 S.C. 1136,* the Supreme Court has observed,

> "In these two decisions, it has been laid down that while considering the nature and content of the fundamental rights, the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down, but must interpret the same in a manner which would enable the citizens to enjoy the right guaranteed by it in the fullest

measure subject of course, to permissible restrictions. Further, in construing the Constitution it is the substance and the practical result of the act of the State that should be considered rather than its purely legal aspects and that the correct approach in such cases should be to enquire as to what in substance is the loss or injury caused to the citizens and not merely what manner and method has been adopted by the State in placing the restriction."

Having so said as to what the Supreme Court has held in *Dwarkadas Shrinivas of Bombay v. Sholapur Spinning and Weaving Ltd., (1954)1 M.L.J. 355: 1954 S.C.J. 175: 1954 S.C.R. 674: A.I.R. 1954 S.C. 119,* in this judgment, it is added.

"The above principles, as laid down in those two decisions, are well settled and no exception can be taken to them. It is true that the provisions of the Constitution, particularly the provisions relating to the fundamental rights, should not be construed in a pedantic manner, but should be construed in a manner, that would enable the citizens to enjoy the rights in the fullest measure. But, that does not surely mean and it was not the intention of this Court to lay down that in construing the provisions relating to fundamental rights it should be stretched to the extent of covering even certain extent of extraneous matters which would be far from the the ambit and scope of the fundamental rights. Art.19(1)(c) confers a right on the citizens to form association."

26. In *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* a law enacted under Entry 63, List I of the Seventh Schedule was challenged as violative of the fundamental right under Art.19(1)(c) of the Constitution. The Act declared the institution known as Hindi Sahitya Sammelan as an institution of national importance and constituted a statutory Sammelan as a body corporate by the name of the Hindi Sahitya Sammelan. The Sammelan was to consist of the first members of the Society and all persons who might become thereafter in accordance with the rules made in that behalf by the first Governing Body to be constituted by the Central Government by notification. It also provided for vesting in the Sammelan of all property movable or immovable or of belonging to the society. Holding that if this law infringed the fundamental right of the citizens who constituted the society, the Supreme Court observed as follows:

"It was arged that the right guaranteed by Art.19(1)(c) is only to form an association and, consequently, any regulation of the affairs of the Association, after it has been formed, will not amount to a breach of that right. It is true that it has been held by this Court that, after an Association has been formed and the right under Art.19(1)(c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire. Those cases are, however inapplicable to the present case. The Act does not merely regulate the administration of the affairs of the Society, what it does is to alter the composition of the Society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interfers with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an association, in our opinion, necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Art.19(1)(c) is confined to the initial stage of forming an Association with the membership either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition

as voluntarily agreed upon by the persons forming the Association...."

There are two other cases referred to in this judgment by the Supreme Court, (1) the case of *O.K.Ghosh v. E.X.Joseph, A.I.R. 1963 S.C. 812: (1962)2 Lab. L.J. 615: (1963)3 S.C.R. 789,* and (2) the case of *State of Madras v. V.G.Row, A.I.R. 1952 S.C. 196: (1952)2 M.L.J. 135: 1952 S.C.R. 597: 1952 S.C.J. 253.* In *O.K.Ghosh v. E.X.Joseph, A.I.R. 1963 S.C. 812: (1962)2 Lab.L.J. 615: (1963)3 S.C.R. 789,* the rule which said that no Government servant would join or continue to be a member of the Service Association of the Government servants, which had not within a period of six months from its formation, obtained the recognition of the Government under the rules prescribed in that behalf or recognition in respect of which had been refused or withdrawn by the Government under the said rules was declared *ultra vires* for the above reason that the Government servants were entitled to form associations or unions and that the rule imposed a restriction on this right. In *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* the Supreme Court thus said,

> "That case, thus, supports our view that the right to form an Association includes the right to its continuance and any law altering the composition of the Association compulsorily will be a breach of the right to form the Association."

27. *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* however, has been distinguished by the Supreme Court in *L.N.Mishra Institute of E.D. and Social Change v. State of Bihar, A.I.R. 1988 S.C. 1136,* saying that the decisionin the *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* has no manner of application to the facts of the present case. In that case, the composition of the Society was interfered with by introducing new members which was construed by the Court as interference with the fundamental right of the Society to form association and continue the same. In the instant case, the composition of the society had not been touched at all. All that has been done is to nationalise the Institute of the Society by the acquisition of the assets and properties relating to the Institute. The Society may constitute its governing body in accordance with its rules without any interference by the Government."

28. *All India Bank Employees' Association v. National Industrial Tribunal, A.I.R. 1962 S.C. 171: (1961)2 Lab.L.J. 285: (1962)32 Com.Case 414,* is another case decided by the Supreme Court in which it is said that the right guaranteed by Art.19(1)(c) of the Constitution does not carry with it a concomitant right that unions formed for protecting the interests of labour shall achieve their object that any interference to such achievement by any law would be constitutional unless it could be justified under Art.19(4) as being in the interests of public order or morality and that the right under Art.19(1)(c) extends only to the formation of an association or union and in so far as the activities of the association or union are concerned or as regards the steps which the union might take to achieve its object, they are subject to such laws as may be framed and such laws cannot be tested under Art.19(4). But then this has to be understood that the statement of law in *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* that right to form an association will include within it the right to continue the association. As held in *L.N.Mishra Institute of E.D. and Social Change v. State of Bihar, A.I.R. 1988 S.C. 1136,* Art.19(1)(c) does not extend to or embrace within it the objects or purposes or the activities of an association. In other words, it does not carry with it a further guarantee that the objects or purposes or activities of an association so formed shall not be interfered with by law except on grounds as mentioned in Art.19(1) namely, sovereignty and integrity of India or public order or morality. Thus the competence of the State Legislature has to be tested on the anvil of the right under Art.19(1)(c) that those who form the association have the right to continue the association and that in any interference in their right to continue the association will be an infringement of the right under Art.19(1)(c) and thus beyond the legislative competence unless protected under Art.19(4) of the Constitution.

29. There is, however, some observation in the Constitution Bench judgment of the Supreme Court in *Daman Singh v. State of Punjab, A.I.R. 1985 S.C. 973,* with respect to a legislation providing for compulsory amalgamation of co-operative societies. The Supreme Court, however, noticed that Art.31-A(1)(c) of the Constitution protected such a law and also observed:

"Once a person becomes a member of a

co-operative society, he loses his individuality *quo* the society and he has no independent rights except those given to him by the statute and the by-laws. He must act and speak through the society or rather, the society alone can act and speak for him *quo* rights or duties of the society as a body. So if the statute which authorises compulsory amalgamation of co-operative societies provides for notice to the societies concerned, the requirement of natural justice is fully satisfied. The notice to the society will be deemed as notice to all its members."

30. The above observation was made by the Supreme Court in regard to the argument that the law giving power to amalgamate without notice to the individual members of the concerned co-operative societies violated the principles of natural justice.

31. Before, however, we advert to the facts of instant case and refer to the case of *Smt.Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2292: (1976)2 S.C.R. 347,* which is a store house of many informations that the Courts may like to bear in mind in cases where legislative power *qua* right of citizens is required to be examined, we may refer to the case of *Ameenunnissa v. Mahboob Begum, 1953 S.C.J. 61: 1953 S.L.R. 404: A.I.R. 1953 S.C. 91.* In that case, an Act known as Walliudowla Succession Act, 1950 was challenged as a law void under Art.13(2) of the Constitution to the extent that it affected the rights of the respondents, who petitioned before the High Court under Art.226 of the Constitution. The object of the impugned Act was to put an end to the disputes that existed at the time regarding the succession to the 'Matrooka' or personal estate of Nawab Walliuddowla, a wealthy noble man and a high dignitary of Hyderabad. The Act itself dismissed the claims of succession to the said property put forward by two of the alleged wives of the late Nawab named Mahboob Begum and Kadiran Begum and their children. The Supreme Court observed,

"It is well settled that a Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not *'per se'* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the Legislature has in view....The British Parliament enjoys legislative omnipotence and there are no constitutional limitations upon its authority or power. There were indeed a few statutes passed by the Provincial Legislature in India during British days which regulated succession to the estate of certain princely families. The Bijni Succession Act (II of 1911) passed by the Assam Legislature is an enactment of this type and it did shut out the rights of certain persons who claimed the Bijni estate under the Law of Inheritance. But at that time the Governor-General of India had express authority under the provisions of the Government of India Act, 1915, to authorize the Provincial Legislatures to make laws regarding subjects of a private nature. Quite apart from this, no question of infraction of the equal protection rule could arise in pre-Constitution days. We are not unmindful of the fact that the presumption is in favour of the constitutionality of an enactment but when on the fact of it a piece of legislation is palpably unreasonable and discriminatory and the selection or classification made by it cannot be justified on any conceivable or rational ground, the court has got to invalidate the enactment on the ground of its violating the equal protection clause."

This judgment thus is an authority that a law which will affect the private right will be *ultra vires*. Art 14 of the Constitution and thus invalid under Art.13(2) thereof. Coming to the case of *Smt.Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2292: (1976)2 S.C.R. 347,* one of the contentions before the Supreme Court was that judicial review is an essential feature on basic structure. It is the doctrine of separation of power that, just as legislative and executive functions, judicial review is the basic or essential function assigned to the courts/tribunals or other form of judicial mechanism. Ray, C.J. in his separate judgment has noted the information in regard to election disputes in these words:

"In England formerly Parliament used to hear

election disputes. In 1870 Parliament found that because of political factions it would be better to leave the task of deciding controverted elections to Judges. Parliament delegated its power of deciding controverted elections to Courts. Under the English Law the Courts hear and make a report to Parliament. In America each House shall be the Judge of the elections, returns and qualifications of its own Members. That is Art.1, Sec.5 of the American Constitution. In Australia any question of a disputed election to either House, shall be determined by the House in which the question arises. Under the German Federal Republic Constitution the legislature decides whether a person has lost his seat. Against the decision of the Bundestag an appeal shall lie to the Federal Constitutional Court.

The view of Story on the American Constitution is that the power to judge elections, returns and qualifications of the members of each House composing the legislature is to be lodged the legislature. Story stays that no other body can be so perpetually watchful to guard its own rights and privileges from infringement (See Story page 585)

In Corpus Juris, Vol.16 (1956), it is said that the judiciary cannot exercise powers which are to be found in the other two departments of Government which are normally legislative powers or which are generally executive in their nature. All matters relating to or affecting elections are political questions, and as such, are not questions for the judiciary. All matters relating to or affecting elections are in the absence of controlling constitutional or statutory provisions to the contrary, political questions and, as such, are, not questions for the judiciary. So, subject to express constitutional restrictions, all matters relating to the holding of elections and determining their results, including contests are political questions (pp.691, 692, 710).

In Corpus Juris, Vol.29 (1965), it is stated that under constitutional provision conferring on the legislature the power to determine by law, before what authority, and in what manner the trial of contested elections shall be conducted, the legislature is given broad power. A constitutional provision authorising the legislature to provide for the mode of contesting elections in all cases not otherwise specifically provided for in the Constitution itself confers on the legislature adequate authority to provide for all election contests and to determine where and by what means election contests shall be conducted. The right to contest an election is not a common law right. Elections belong to the political branch of the Government and, in the absence of the special constitutional or statutory provisions are beyond the control of the judicial power. Secs.245, 246). A contested election case is a proceeding in which the public is interested, since it is for the public good. An election contest is not merely a proceeding for the adjudication and settlement of the private rights of rival claimants to an office. It is the public interest, not the parties' claims, which is the paramount legislative concern. [Sec.247]

In America disputed elections are decided by the Legislature. In *Taylor v. Beckham, 44 L.Ed. 547,* the American Supreme Court held that a determination of an election contest for the office of the Governor is a political question and is not justiciable. In *Truman H.Newberry v. United States of America, 65 L.Ed. 913,* the American Supreme Court held that the manner of elections can be controlled. In *David S.Barry v. United States of America, Ex. Rel., Tomas W.Cunningham, 73 L.Ed. 867,* the decision of the American Supreme Court in *Charles W.Baker v. Joe C.Carr, 7 L.Ed. 2nd 663,* was referred to in order to find out as to what aspects of election would be justiciable and not a political question. In *Charles W.Baker v. Joe C.Carr, 7 L.Ed. 2nd 663,* the delimitation of constituencies was held to be a justiciable issue. In *Jullian Bond v. James Sloppy Floyd, 17 L.Ed. 2nd. 235,* the exclusion of an elected representative because of his statement attacking the Vietnam policy was held to be justiciable on the ground that it was not within the jurisdiction of the Legislature to find out whether a member was sincere in regard to his mouth of the legislature. In *Adam Clayton Powell v. John W.Mc.Cormack, 23 L.Ed. 2nd. 491,* the disqualification by the House of a Congressman on the basis of qualification on the ground which was not in the Constitution was held to be justiciable. The Federal District Court has jurisdiction over the subject matter

of controversies arising under the Constitution. The conferment of power on each House in America to be a judge of elections is an exclusive ground of power and constitutes the House to be the sole and ultimate Tribunal. The American decisions show that if the House claims additional power to disqualify a member on the ground other than those stated in the Constitution judicial review against disqualification would be available. In *Jullian Bond v. James Sloppy Floyd, 17 L.Ed. 2nd. 235,* disqualification was on an unconstitutional ground that his statement on Vietnam policy was a matter of free speech and expression. The court did not decide an election dispute but as a custodian of judicial power judged whether the House was acting within its power.
Parliament itself can also hear election disputes. That was the English practice until the Grenville Act, 1968 when Parliament conferred power on courts. Before 1770, controverted elections were tried by the whole House of Commons as party questions. The House found that the exercise of its privilege could be submitted to a Tribunal constituted by the law to secure impartiality in the administration of justice according to the laws of the land. In 1868 the jurisdiction of the House is the trial of controverted elections was transferred by statute to the courts of law. The present procedure is contained in the English Representation of the People Act, 1949. The trial is confided to judges selected from the judiciary. Provision is made in each case for constituting a rata from whom these judges are selected. The house has no cognizance of these proceedings until their determination when the judges certify their determination when the judges cerify their determination in writing, to the Speaker, which is final to all intents and purposes. Trial is not a proceeding of the House. The judges are to make a report in any case where charge has been made in the petition of corrupt and illegal practice. Provision is also made for the trial of a special case. All certificates and reports of the election court are entered in the Journals of the House. Under Sec.124(5) of the English Representation of the People Act, 1949, it is the duty of the House to make orders for carrying the determination of the judges into execution."

32. Khanna, J. and others who constituted the majority of the Bench of the Supreme Court, have given to us clear reason as to the role that a legislature may play with respect to matters which should be left for adjudication by the Courts. Before, however, we refer to their views in this regard, we may take notice of the issue that the Supreme Court was considering.

33. The election of Shrimathi Indira Gandhi, who incidentally was the Prime Minister of the country was challenged before the Allahabad High Court. The Court accepted the case of the petitioner and held that the election was vitiated for the reason of certain corrupt practices and other violations of the rules of law. The Parliament in the exercise of its constitutional power passed the Constitution (Thirty-Ninth Amendment) Act, 1975. By the Amendment, Art.71 of the Constitution was substituted by a new Article and that Article provided by Clause (1) that subject to the provisions of the Constitution, Parliament may, by law, regulate any matter relating to or connected with the decision of a President or Vice President including the grounds on which such election may be questioned. By Clause (2) of the Article, it was provided that all doubts and disputes arising out of or in connection with the election of President or Vice-President shall be inquired into and decided by such authority or body in such manner as may be provided for by or under any law referred to in Clause (1), Clause (3) stated that the validity of any such law referred to in Clause (1) and the decision of any authority or body under such law shall not be called in question in any court. By Clause 4 of the Amendment, Art.329-A was inserted reading as follows:

> "A special provision as to elections to Parliament in the case of Prime Minister and Speaker:
> (1) subject to the provisions of Chapter II of Part V (except sub-Clause (e), of Clause (1) of Art.102) no clection (a) to either House of Parliament of a person who holds the office of the Prime Minister at the time of such election or is
> appointed as Prime Minister after such election:
> (b) to the House of the people of a person who holds the office of a Speaker of that House at the time of such election or who is chosen as the Speaker for that House after such election: shall be called in question except before such

authority (not being any such authority as is referred to in Clause (b) of Art.329 or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned;

(2) The validity of any such law as it referred to in Clause (1) and the decision of any authority or body under such law shall not be called in question in any court.

(3) Where any person is appointed as Prime Minister or as the case may be, chosen to the office of the Speaker of the House of the People, while an election petition referred to in Clause (b) of Art.329 in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister or, as the case may be, being chosen to the office of the Speaker of the House of the People, but such election may be called in question under any such law as is referred to in Clause (1).

(4) No law made by Parliament before commencement of the Constitution (Thirtyninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void, or has, before such commencement, been declared to be void under any such law, and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.

(5) Any appeal or cross appeal against any such order of any court as is referred to in Clause (4) pending immediately before the commencement of the Constitution of (Thirty Ninth Amendment) Act, 1975 before the Supreme Court shall be disposed of in conformity with the provisions of Clause (4).

(6) The provisions of this Article shall have effect notwithstanding anything contained in this Constitution".

34. The contention before the Court was that Clause (4) above damaged some of the basic structures of the Constitution. The argument was that although the amending body could declare that the election of the appellant shall not be deemed to be void and the judgment of the High Court to be void on the basis that no law relating to election petition and matters connected therewith would apply to the election, yet the amending body could not have held the election to be valid *as it did not ascertain the facts relating to the election and apply the relevant law to them* (*Italics is ours*). The submission was that by its very nature, an election dispute in a democratic system of government raises questions which can be decided only by the exercise of judicial power; that by retrospectively rendering the forum for investigation into the complaints regarding the validity of the election of the appellant *coram non judice*, and by the amending body judging its validity *without ascertaining the facts* (*Italics is ours*) and applying the relevant law, the Amendment has fundamentally damaged an essential feature of the democratic structure of the Constitution, namely, free and fair election.

35. Khanna, J., referred to the judgment of the Judicial Committee in the case of *Don John Douglas Liyange v. The Queen, 1967 A.C. 259,* in which the validity of the Criminal Law (Special Provisions) Act, 1962 of the Parliament of Ceylon was examined and declared *ultra vires* and *void* on the ground that it involved the usurpation and infringement by the Legislature of the judicial powers inconsistent with the written constitution of Ceylon. The Judicial Committee, however, expressly referred to the fact that he impugned legislation had not been passed by two-third majority in the manner required for the amendment of the Constitution contained in Sec.29(4) of the Constitution and observed:

> "There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to Sec.29(4) of the Constitution purports to usurp

or infringe the judicial power it is *ultra vires*." Our Supreme Court, however, expressed no final opinion about it but said,

"The declaration that her election was to be valid in all respects necessarily involved the process of going into the grounds on which her election had been assailed and holding those grounds to be either factually incorrect or to be of such a nature as in law did not warrant the declaration of her election to be void. The case of the appellant is that some of the grounds mentioned against her were factually incorrect and in respect of those grounds the findings of the High Court are against the respondent and in her favour. In respect of some other grounds, except in one or two matters there is not much divergence between the appellant and the respondent on the question of facts. The point of controversy between the parties mainly is that, according to the respondent, those facts constituted corrupt practice as defined in Sec.123 of the Representation of People Act, while according to the appellant those facts did not constitute corrupt practice. In any case, according to the appellant, in view of the amendment made in the Representation of People Act by amending Acts 58 of 1974 and 40 of 1975, these facts did not constitute corrupt practice. The declaration made in part (iii) of Clause (4) that the election of the appellant was to be valid in all respects was tantamount in the very nature of things to the repelling of the grounds advanced by the respondent to challenge the election of the appellant. Question therefore arises as to what, if any, was the law which was applied in repelling the grounds advanced by the respondent to challenge the election of the appellant. So far as the existing law relating to election disputes was concerned, part (i) of Clause (4) expressly stated that such a law would not apply to the petition filed by the respondent to challenge the election of the appellant. This means that the provisions of the Representation of the People Act were not to apply to the petition filed by the respondent against the appellant. This also means that the amending Acts 58 of 1974 and 40 of 1975 were not to apply to the dispute relating to election of the appellant.

The dispute relating to the election of the appellant is also not to be governed by law which is to be enacted under Clause (1) of Art.329-A. Such a law would apply only to future elections. The result is that so far as the dispute relating to the election of the appellant is concerned, a legal vacuum came into existence. It was open to the constituent authority to fill that vacuum by prescribing a law which was to govern the dispute arising out of the petition filed by the respondent to challenge the election of the appellant. The constituent authority; however, did not do so and straightaway proceeded to declare the election of the appellant to be valid. There is nothing in Clause (4) to indicate that the constituent authority applied any law in declaring the election of the appellant to be valid and if so, what was that law.

I am unable to accede to the argument that the constituent authority kept in view the provisions of the Representation of People Act as amended by Act 58 of 1974 and 40 of 1975 and their impact on the challenge to the election of the appellant in declaring the election of the appellant to be valid. The difficulty in accepting this argument is that in part (i) of Clause (4) the constituent authority expressly stated that the previous law, namely, the Representation of People Act as amended in so far as it related to election petitions and matters connected therewith was not to apply so far as the challenge to the election of the appellant was concerned. It is also difficult to agree that the constituent authority took into account some other unspecified law or norm in declaring the election of the appellant to be valid. As mentioned earlier, there is nothing in Clause (4) to indicate that the constituent authority took into account some other law and norm and if so, what that law or norm was. The position which thus emerges is that according to Clause (4) no law was to apply for adjudicating upon the challenge to the election of the appellant and the same was in terms of part (iii) to be valid in all respects. The question with which we are concerned is whether the provisions of Clause (4) of Art.329-A by which the constituent authority in effect prescribed that no election law was to govern the challenge to the election of the appellant and that the same in any case was to be valid in all respects is a permissible piece of constitutional amendment

or whether it is void on the ground that it affects the basic structure of the Constitution."

36. Khanna, J., referred to various authorities including the judgments in the case of *His Holiness Kesavananda Bharathi v. State of Kerala, A.I.R. 1973 S.C. 1461: (1973) S.C.R. (Supp.) 1: (1973)4 S.C.C. 325* and *N.P.Ponnuswami v. Returning Officer, Namakkal Constituency and others, 1952 S.C.R. 218,* to state that democratic set-up was part of the basic structure of the Constitution Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections. Even in the absence of unfair means and malpractices, sometimes the result of an election is materially affected because of the improper rejection of ballot papers. Likewise, the result of an election may be materially affected on account of the improper rejection of a nomination paper. Disputes, therefore, arise with regard to the validity of elections. For the resolving of those disputes, the different democratic countries of the world have made provisions prescribing the law and the forum for the resolving of those disputes. In the judgment of Khanna, J., it is said,

"To give a few examples, we may refer to the United Kingdom where a Parliamentary election petition is tried by two judges on the rota for the trial of parliamentary election petitions in accordance with the Representation of the People Act, 1949. Sec.5 of Art.1 of the U.S. Constitution provides that each House (Senate and the House of Representatives) shall be the judge of the elections, returns and qualifications of its own members, Sec.47 of the Australian Constitution provides that until the Parliament otherwise provides, any question respecting the qualification of a Senator or of a member of the House of Representative, or respecting a vacancy in either House of Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises. Art.55 of the Japanese Constitution states that each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present Art.46 of the Ireland Constitution provides that the Althing itself decides whether its members are legally elected and also whether a member is disqualified. Art.64 of the Norwegian Constitution states that the representatives elected shall be furnished with certificates, the validity of which shall be submitted to the judgment of Storting. Art.59 of the French Constitution provides that the Constitutional Council shall rule, in the case of disagreement, on the regularity of the election of deputies and senators. Art.41 of the German Federal Republic Constitution states that the scrutiny of election shall be the responsibility of the Bundestag. It shall also decide whether a deputy has lost his seat in the Bundenstag. Against the decision of the Bundestag an appeal shall lie to the Federal Constitutional Court. Details shall be regulated by a federal law. According to Art.66 of the Italian Constitution, each Chamber decides as to the validity of the admission of its own Members and as to cases subsequently arising concerning ineligibility and incompatibility. In Turkey Art.75 provides *inter alia* that it shall be the function of Supreme Election Board to review and pass final judgment on all irregularities, complaints and objections regarding election matters during and after elections. The function and powers of the Supreme Election Board shall be regulated by law. Art.53 of the Malaysian Constitution provides that if any question arises whether a member of a House of Parliament has become disqualified for membership, the decision of that House shall be final."

37. Having thus examined the laws in different countries, Khanna, J., said,

"Not much argument is needed to show that

unless there be a machinery for resolving an election dispute and for going into the allegations that elections were not free and fair being vitiated by malpractices, the provision that a candidate should not resort to malpractices would be in the nature of a mere pious wish without any legal sanction. It is further plain that if the validity of the election of a candidate is challenged on some grounds, the said election can be declared to be valid only if we provide a forum for going into those grounds and prescribe a law for adjudicating upon those grounds. If the said forum finds that the grounds advanced to challenge the election are not well-founded or are not sufficient to invalidate the election in accordance with the prescribed law or dismisses the petition to challenge the election on some other ground, in such an event it can be said that the election of the returned candidate is valid.

Besides other things, election laws lay down a code of conduct in election matters and prescribe, what may be called, rules of electoral morality. Election laws also contain a provision for resolving disputes and determination of controversies which must inevitably arise in election matters as they arise in other spheres of human activity. The object of such a provision is to enforce rules of electoral morality and to punish deviance from the prescribed code of conduct in election matters. It is manifest that but for such a provision, there would be no sanction for the above code of conduct and rules of electoral morality. It is also plain that nothing would bring the code of conduct into greater contempt and make a greater mockery of it than the absence of a provision to punish its violation. The position would become all the more glaring that even though a provision exists on the statute book for punishing violation of the code of conduct in election matters, a particular election is made immune and granted exemption from the operation of such a provision."

Khanna, J., also, however, observed,

"I agree that it is not necessary in a democratic set-up that disputes relating to the validity of the elections must be settled by courts of law. There are many countries like France, Japan and the United States of America where consistently with the democratic set-up the determination of such controversies is by Legislatures or by authorities other than the courts. The question with which we are concerned, however, is whether it is permissible in a democratic set-up that a dispute with regard to the validity of a particular election shall not be raised before any forum and shall not be governed by law and whether such an election can be declared, despite the existence of a dispute relating to its validity, to be valid by making the existing law relating to election disputes not applicable to it and also by not applying any other election law to such a dispute. The answer to such a question, for the reason given earlier by me, should be in the negative."

38. Khanna, J., has referred to the case of *State of Orissa v. Bhupendra Kumar Bose, (1962)2 S.C.R. (Supp.) 380,* in these words:

"It arose out of elections to the Cuttack Municipality held in December, 1957 to March 1958 as a result of which 27 appellants were declared elected as Councillors. The respondent, who was defeated at the elections, filed a writ petition before the High Court challenging the elections. The High Court held that the electoral rolls had not been prepared in accordance with the provisions of the Orissa Municipalities Act 1950, as the age qualification had been published too late thereby curtailing the period of claims and objections to the preliminary roll to 2 days from 21 days as prescribed. The High Court consequently set aside the elections. The State took the view that the judgment affected not merely the Cuttack Municipality but other municipalities also. Accordingly, the Governor promulgated an Ordinance validating the elections to the Cuttack Municipality and validating the electoral rolls prepared in respect of various municipalities. The respondent thereupon filed a writ petition before the High Court contending that the ordinance was unconstitutional. The High Court struck down the Ordinance. One of the grounds which weighed with the High Court in striking down the Ordinance was that it contravened Art.14 of the Constitution. The State and the Councillors came in appeal to this Court. It was held by this Court that the Ordinance was valid and that it successfully cured the invalidity of the electoral rolls and of elections to the Cuttack

Municipality. The Ordinance was further held not to offend Art.14 of the Constitution as its object was not only to save the elections to the Cuttack Municipality, but also to other municipalities whose validity might be challenged on similar grounds. The Ordinance, in the opinion of the Court, did not single out the respondent for discriminatory treatment. Gajendragadkar, J., (as he then was) speaking for the Constitution Bench of this Court observed:

"The Cuttack Municipal elections had been set aside by the High Court and if the Governor thought that in the public interest, having regard to the factors enumerated in the Preamble to the Ordinance, it was necessary to validate the said elections, it would not necessarily follow that the Ordinance suffers from the vice contravening Art.14."

"Therefore, if the infirmity in the electoral rolls on which the decision of the High Court in the earlier writ petition was based, had not been applicable to the electoral rolls in regard to other Municipalities in the State of Orissa, then it may have been open to the Governor to issue an Ordinance only in respect of the Cuttack Municipal Elections, and if, on account of special circumstances or reasons applicable to the Cuttack Municipal Elections, a law was passed in respect of the said elections alone, it could not have been challenged as unconstitutional under Art.14. Similarly, if Mr.Bose was the only litigant affected by the decision and as such formed a class by himself, it would have been open to the Legislature to make a law only in respect of his case. But as we have already pointed out, the Ordinance does not purport to limit its operation only to the Cuttack Municipality; it purports to validate the Cuttack Municipal Elections and the electoral rolls in respect of other Municipalities as well. Therefore, we are satisfied that the High Court was in error in coming to the conclusion that Sec.4 contravenes Art.14 of the the Constitution."

39. The above passage clarifies that the Legislature shall be competent to enact a law with respect to election disputes and that there would be no contravention of Art.14 of the Constitution in case it is applied to a class of the elected candidates, and that can be done amending the basic provisions under which elections are challenged in Courts. But such amendment should not affect the basic structures of democratic set-up.

40. What are the basic structures of the Constitution are pointed out by the Supreme Court in *His Holiness Kesavananda Bharathi, Sirpadagalavaru v. State of Kerala and another, A.I.R. 1973 S.C. 1461: (1973) S.C.R. (Supp.) 1: (1973)4 S.C.C. 325.* The illustrations include.

(1) supremacy of the Constitution,
(2) democratic republican form of government,
(3) secular character of the Constitution,
(4) separation of powers among the Legislature, Executive and Judiciary,
(5) the federal character of the Constitution.
(6) Rule of Law,
(7) equality of status and of opportunity;
(8) justice, social, economic and political;
(9) unity and integrity of the nation, and
(10) the dignity of the individual secured by various provisions of the Constitution. The consensus being that democracy is a basic structure of the Constitution.

The consensus being that democracy is a basic structure of the Constitution.

41. Mathew, J., in his separate judgment in the case of *Smt.Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2292: (1976)2 S.C.R. 347,* held that Clause (4) of Art.329-A of the Constitution destroyed the basic structure of the Constitution and observed,

"One way of looking at the first part of Clause (4) is that the amending body has, with retrospective effect, repealed the law relating to election petition in respect of the persons specified in Clause (1) and hence the judgment rendered on the basis of the previous law relating to election petition became automatically void, and the amending body was merely stating the consequence of the retrospective repeal of the law and therefore the declaration that the judgment was void was not an exercise of judicial function. On the other hand, it might be possible function to view the first part of Clause (4) as an exercise of judicial power for the reason that, even assuming that by virtue of the retrospective repeal of the law relating to election petition, there was no jurisdiction in the High Court to entertain or try the election petition and pass the judgment, a repeal simpliciter did not render the judgment *ipso facto* void, the amending body

was performing a function which has traditionally been in the province of court.

Be that as it may, I feel no doubt that the amending body, when it declared the election of the appellant to be valid, had to ascertain the adjudicative facts and apply the relevant norm for adjudging its validity. If however, the amending body did not ascertain the facts relating to the election and apply the relevant norm the declaration of the validity of the election was a fiat of a *sui generis* character of the amending body."

Adjudicative facts as indicated by Mathew, J. are facts about the parties or their activities, businesses and properties usually answering the questions of who did what, where, when, how why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the Immediate parties but are general facts which help the tribunal decide questions of law, policy and discretion. Mathew, J., also pointed out that facts pertaining to the parties and their activities that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavourable to them, that is, without providing the parties an opportunity for trial. He also observed in one place that an election dispute has a public aspect in that it is concerned more with the right of a constitutency to be represented by a particular candidate. But it does not follow from the public character of the controversy that there is no *lis* between the parties to the election contest, and that the *lis* can be resolved otherwise than by ascertaining the facts relating to the election, and applying the relevant law. He has said,

"According to the historic analysis, the essence of the distinction between the legislative power and judicial power is that the legislature makes new law which becomes binding on all persons over whom the legislature exercises legislative power; the judicature applies already existing law in the resolution of disputes between particular parties; and judges may not deviate from this duty. This view of the distinction between the obligation to apply and enforce rules and a discretion to modify rules are make new rules was at one time applied uncompromisingly in describing functions as legislative or judicial. Thus De Lolme said that courts of equity as then existing in England had a legislative function. They are, he said, a kind of inferior experimental legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the courts of common law, nor the legislature have as yet found it convenient or practicable to establish any (see the Constitution of England, New Ed. (1800 p. 149). Though this would how that neither for logic nor in language has the boundary between legislation and adjudication ever been rigidly and clearly drawn, the distinction between the two is well established.

If, therefore, the decision of the amending body that the election of the appellant was valid was the result of the exercise of judicial power or of despotic discretion governed solely by considerations of political expediency, the question is, whether that decision, though couched in the form of an enactment, can be characterized as an amendment of the Constitution."

42. Explaining his own observations in *His Holiness Kesavananda Bharathi v. State of Kerala, A.I.R. 1973 S.C. 1461: 1973 S.C.R. (Supp.) 1: (1973)4 S.C.C. 325.*

"...Under the Indian Constitution, the original sovereign-the people-created, by the amending clause of the Constitution, a lessor sovereign, almost co-extensive in power with itself. This sovereign, the one established by the revolutionary act of the full or complete sovereign has been called by Max Radin, the "pro-sovereign", the holder of the amending power under the Constitution,"

Mathew, J., said,

"I fully appreciate that 'sovereign', if conceived of as an omnipotent being, has no existence in the real world. Several thoughtful writers have deprecated the use of the expression in legal discussion as it has the logical and religious overtones. Nevertheless, as the practice has become inveterate, it will only create confusion if any departure is made in this case from the practice. If it is made clear that the sovereign is not a 'mortal God' and can express himself or itself only in the manner and form prescribed by law and can be sovereign only when he or it acts in a certain way also

prescribed by law, then perhaps the use of the expression will have no harmful consequence."

Mathew, J., quoted from "The Theory of Sovereignty Restated by W.J.Rees quoted at page 68 of "In Defence of Sovereignty', ed. W.L.Stankiewicz (Mind, Vol.LIX 1950),

" 'Legal sovereignty' is a capacity to determine the actions of persons in certain intended ways by means of a law..... where the actions of those who exercise the authority, in those respects in which they do exercise it, are not subject to any exercise by other persons of the kind of authority which they are exercising."

43. The distinction between constitution law and ordinary law in a constitution like ours is that the validity of the constitutional law cannot be challenged whereas that of ordinary law can be challenged on the touchstone of constitution. But constitutional law is as much law as ordinary law. A Constitution cannot consist of a string of isolated dooms and thus constitutional law as much as the ordinary law must stand the test of being in no way transgressing into the fields reserved for others in the democratic framework. Mathew, J., has said,

"A judgment or sentence which is the result of the exercise of judicial power or of despotic discretion is not a law as it has got the generality which is an essential characteristic of law. A despotic decision without ascertaining the facts of a case and applying the law to them, though dressed in the garb of law, is like a bill of attainder. It is a legislative judgment."

44. We are not saying more, for we ourselves may commit transgression of the constitutional limitation, upon it we are only looking into some of the observations in this behalf in the judgment of the Supreme Court in the case of *Smt.Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2292: (1976)2 S.C.R. 347,* we do not propose to extract many other passages in the separate judgments of the Honourable Judges constituting the Bench. We, however, cannot resist from referring to a small passage in the judgment of Mathew, J., which reads,

"It is no doubt true that the House of Commons in England used to pass bills of attainder. But the practice has fallen into desuetude, since the year 1696. A bill of attainder is a special Act of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. The legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions (See 3 J. Story, Commentaries on the Constitution of the United States (Boston, 1833), 1388.

In *U.S v. Brown,* the Supreme Court of United States of America stated that the main reason why the power to pass bill at attainder was taken away from the Congress was:

"Everyone must concede that a legislative body, from its number and organisation and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamour, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited the very class of cases most likely to be prosecuted by this mode" (see Cooley, Constitutional Limitations, pp.536-537, 8th ed., (1927) Macaulay's account of the attainder of Sir John Fenwick in 1696, the last in the History of the House of Commons, is particularly vivid:

Much the same reason will apply to the resolution of an election dispute by an amending body as it consists, in all democratic countries, of an assembly of persons like Parliament."

45. Being aware, however, of the fact that the Parliament or appropriate Legislature may confer upon itself the judicial power as well, Mathew, J., said,

"The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes licence; and, the difficulty has been to discover the practical means of achieving this grand objective and to find the opportunity for applying these means in

the ever shifting tangle of human affairs. A large part of the effort of man over centuries has been expended in seeking a solution of this great problem. A reign of law, in contrast to the tyranny of power can be achieved only through separating appropriately the several powers of government. If the law makers should also be the constant administrators and dispensers of law and justice, then, the people, would be left without a remedy in case of injustice since no appeal can lie under the fiat against such a supremacy. And, in this age-old search of political philosophers for the secret of sound government, combined with individual liberty, it was Montesquieu who first saw the light. He was the first among the political philosophers who saw the necessity of separating judicial power from the Executive and Legislative branches of government. Montesquieu was the first to conceive of the three functions of government as exercised by three organs, each juxtaposed against others. He realised that the efficient operation of government involved a certain degree of overlapping and that the theory of checks and balances required each organ to impede too great an aggrandizement of authority by the other two powers... There can be no liberty where the legislative and executive powers are united in the same person or body of Magistrates, or, if the power of judging be not separated from the legislative and executive powers...Nobody can deny that by passing a law within its competence, Parliament can vest judicial power in any authority for deciding a dispute or vest a part of that power in itself for resolving a controversy, as there is no exclusive vesting of judicial power in courts by the Constitution. The doctrine of separation of powers which is directed against the concentration of the whole or substantial part of the judicial power in the Legislature or the Executive would not be a bar to the vesting of such a power in itself. But, until a law is passed enabling it to do so, its potential judicial power would not become actual...A sovereign in any system of civilized jurisprudence is not like an oriental despot who can do anything he likes, in any manner he likes and at any time he likes. That the Nizam of Hyderabad had legislative, judicial and executive powers and could exercise any one of them by a firman has no relevance when we are considering how a pre-sovereign the holder of the amending power-in a country governed by a constitution should function. Such a sovereign can express 'himself' only by passing a particular kind of law; and not through sporadic acts...

If the basic postulate that a sovereign can act only by enacting laws is correct, then that is a limitation upon his power to do anything he likes. If I may re-parte the classical statement of Sir Owen Dixon: The law that a sovereign can act only by law is supreme but as to what may be done by a law so made, the sovereign is supreme over that law (See 'Law and the Constitution", 50 Law Quarterly Rev. 590, 604). Of course, this is subject to the theory of basic structure. In other words, even though a sovereign can act only by making law, the law he so makes may vest the authority to exercise judicial power in himself, without such law he cannot exercise judicial power."

46. The case of *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* which has been distinguished in the case of *L.N.Mishra Institute of E.D. and Social Change v. State of Bihar, A.I.R. 1988 S.C. 1136,* is relevant for the purpose of understanding as to what is the meaning and extent of freedom to form an association. The Hindi Sahitya Sammelan was a registered society founded for the development ad propagation of Hindi. After a number of years of its successful working, difference arose between its members and this has resulted in litigation. In 1956, the Uttar Pradesh Legislature passed the Uttar Pradesh Hindi Sahitya Sammelan Act under which a statutory body was created under the name of the Hindi Sahitya Sammelan. This Act was declared as void by the Allahabad High Court as violating the freedom to form an association under Art.19(1)(c) of the Constitution. Thereafter, Parliament enacted the Hindi Sahitya Sammelan Act, 1962, legislating under Entry 63, List I of the Seventh Schedule, declaring that the institution known as Hindi Sahitya Sammelan' is an institution of national importance and by the Act constituted a statutory Sammelan as a body corporate. Under Sec.4(1) of the Act, the Sammelan was to consist of the first members of the Society and all persons who might become thereafter in accordance with the rules made in that behalf by the first Governing Body to be constituted by the Central

Government by notification. The Supreme Court held, that the right guaranteed by Art.19(1)(c) cannot be confined to the initial stage of forming an Association and if it is so confined, the right would be meaningless, because, as soon as an Association is formed a law may be passed interfering with its composition, so that the association formed may not be able to function at all. The right can be effective only, if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association.

47. We have reiterated the statement of the principles of law by the Supreme Court in the case of *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* for we shall presently see when we advert to the facts of the instant case that the formation of the societies voluntarily by the members thereof strictly in accordance with the provisions of the Act and the rules, regulations and by-laws framed thereunder and the statutory right to elect and nominate as provided under the Act, the members to constitute the Board of Management has been suddenly dealt with by the Legislature by introducing the Amendment Act. We have already seen that in the case of *L.N.Mishra Institute of E.D. and Social Change v. State of Bihar, A.I.R. 1988 S.C. 1136,* the Supreme Court has pointed out that *Damayanthi Naranga v. Union of India, A.I.R. 1971 S.C. 966: (1971)3 S.C.R. 840,* was one in which the Act did not merely regulate the administration or the affairs of the society, but it altered the composition of the society itself. The result of this change in composition was that the members, who voluntarily formed the society, were compelled to act in the Association with other members who have been imposed as members by the Act and in whose admission to membership, they had no say and that the right to form an association necessarily implied that the persons forming the Association had also the right to continue to be associated with only those whom they voluntarily admitted in the Association. Any law by which members were introduced in the voluntary Association without any option being given to the members to keep them out of any law which had taken away the membership of those who had voluntarily joined it, according to the. Supreme Court would be a law violating the right to form an association and further that the right guaranteed by Art.19(1)(c) was not confined to initial stage of the forming of Association, but also included within it the right to continue in the Association. In the case of *All India Bank Employees' Association v. National Industrial Tribunal, A.I.R. 1962 S.C. 171: (1961)2 Lab.L.J. 285: (1962)32 Com.Case 414,* the Supreme Court observed that the right guaranteed by Art.19 (1)(c) of the Constitution does not carry with it a concomitant right that unions formed for protecting the 'interests of labour shall achieve their object such that any interference to such achievement by any law would be unconstitutional unless it could be justified under Art.19(4) as being in the interests of public order or morality and that the right under Art.19(1)(c) extends only to the formation of an association or union and in so far as the activities of the association or union are concerned or as regards the steps which the union might take to achieve its object, they are subject to such laws as may be framed and such laws cannot be tested under Art.19(4).

48. These observations of the Supreme Court thus show that there can be laws regulating/restricting the exercise of the right under Art.19(1)(c) as provided under Art.19(4) of the Constitution that is to say, in the interests of the sovereignty and integrity of India and Public order or morality as well as beyond within the legislative competence such as in the case of co-operative societies and other societies as to incorporation, regulation and winding up (See Item 32 of the State List).

49. Our brief study of the relevant aspects of the laws which enable to Courts to go into the validity of the enactments by the legislatures thus compels us to restrict our examination of the validity of the impugned Amendment Act to seeing whether the Amendment Act in substance is beyond the powers of the Legislature to legislate upon or whether the Legislature has transgressed its power by adopting a device in oblique or covert manner to achieve something other than the subject of legislation or whether by it there is any encroachment upon the fundamental freedom to form associations, which right includes the right to its continuance without interference. We cannot, as courts of law, enquire into the propriety of the exercise of the legislative power. We have to proceed on the assumption that the legislative discretion is properly exercised. We must repel any arguments as to the ill motive or *mala fides,* for Courts must keep off from such examination. We have, however,

seen the limitation on the legislative power of the State. Item 32 of the State List of the Seventh Schedule empowers the State legislature to legislate with respect to incorporation, regulation and winding up of corporations and co-operative societies. Such laws as to incorporation and regulation of Co-operative societies can undoubtedly take into their fold all schemes as to the Constitution of the Board of Management etc., fixation of tenure of a member of the Board of Management and the determination of the members' rights. Since the legislature is competent also to make laws providing for forums for adjudication of disputes it, with or without the right to sue in a Civil or Criminal Court, can create a special forum for adjudication of disputes arising under its laws or even embracing various other kinds of disputes which otherwise will fall within the jurisdiction of the Civil and/or Criminal Courts. We have already noticed that a machinery for resolving election disputes and for going into the allegations that elections were not free and fair, being vitiated by malpractices is a must, for it will be going against the basic structure of the Constitution if elections are made automatically void or automatically valid and if such a power is assumed by the Legislature, it will amount to exercise of judicial power. Adjudicatory facts are facts about the parties or their activities, businesses and properties usually answering the questions of who did what where, when, how, why, with what, motive or intent, the kind of facts that go to court or Tribunal unlike legislative facts which do not concern the immediate parties and which only give to the Legislature the basis for formation of policy and thus enacting laws. Ordinarily, the petitioner or the complainant and the person against whom allegations are made should get opportunity to have their say and unless they got such opportunity, a *lis* between the parties will not be determined or decided. To confirm or annul without ever being ascertained and without there being answers to what, where, when, how and why, will be unfair and unjust. Unless there is a forum for such determination, even though purporting to be an act of a legislature of a Democratic Republic, it shall be an act of a despot. Members elected or nominated in accordance with the provisions of Tamil Nadu Act 30 of 1983, and having a tenure, have been unseated by the enactment in Sec.3 of the Ordinance and the Act as under this the term of office has been made to expire on the appointed day and thus they have been asked to vacate their office on and from the appointed day. That has been done for the reasons *inter alia*, that

(1) the Tamil Nadu Co-operative Societies Amendment Act, 1990 (Tamilnadu Act 26 of 1990) provided for thirty per cent representation for Women and 18 per cent representation for Scheduled Castes and Scheduled Tribes in the boards of registered co-operative societies and for nomination of the representatives of women and Scheduled Castes and Scheduled Tribes if women and Scheduled Castes and Scheduled Tribes members were not elected to that extent; In the election to the boards of the primary co-operative societies held in the year 1990, representatives of women and Scheduled Castes and Scheduled Tribes were not elected in the extent of thirty per cent and eighteen per cent respectively. A large number of representatives of women' Scheduled Castes and Scheduled Tribes disproportionate to the elected members have been nominated. This had resulted in an abnormal tilt towards the nominated members. The abnormal tilt towards nominated members was not conducive to the orderly development of co-operative movement. It was also not in consonance with the principles of democratic management of co-operatives. (2) A number of complaints has been received by the Government regarding the malpractices in the conduct of election and in the management of the affairs of the primary co-operative societies.

50. For these reasons the Government with a view to set right the abnormal tilt towards the nominated members and also to ensure the proper management of the said co-operative societies, decided to amend the Act suitably and also to conduct election to all co-operative societies after the amendment. Pending amendment, it was decided to supersede the boards of management of the primary societies and to appoint Special Officers for a limited period in the public interest.

51. The first above, which has been one of the reasons for the Amendment Act resulted not on account of any fault on the part of the members of the society but for the reason of the provisions in the Tamil Nadu Co-operative Societies Amendment Act, 1990 which prescribes thirty per cent representation for woman and eighteen per cent representation to Scheduled Castes and Scheduled Tribes in the boards of registered

co-operative societies and for nomination of the representatives of women and Scheduled Castes and Scheduled Tribes members if they were not elected to that extent. No one can question the authority of the Legislature to amending the provisions that created a tilt in favour of nominated members. But this tilt, if at all, was caused not for any other reason, but the power to nominate created by Tamil Nadu Act 26 of 1990. Those who got elected or nominated, acquired a statutory right and the Act which gave such right to them still holds the field. The Preamble says that the Government has decided to amend the Act 30 of 1983 suitably so that the tilt does not exist. This amendment is yet to be made. The Government's desire to make the amendment may or may not be accepted by the Legislature, the Legislature may decide in favour of continuing the amendments by Tamil Nadu Act 26 of 1990, it may not put forward future amendments.

52. We have not found any provision in the Act which empowers the State Government to receive complaints and/or to determine whether the complaints were true or not. It is, however said, that a number of complaints were received by the Government regarding malpractices in the conduct of election and in the management of the affairs of the primary co-operative societies. The Act has provided forums for such complaints to be made and empowered the forums to adjudicate. These provisions are besides what Sec.9 of the Code of Civil Procedure prescribes that any Civil dispute can be taken to a civil court of competent jurisdiction or various provisions of the major and minor criminal laws. The questions what, where, when, how, why, with what motive and intent all falling in the category of adjudicative facts have been answered by the legislature that those who have been elected for a term of office shall cease forthwith to hold their respective offices and in their place the Special Officers shall assume charge.

52-A. The Legislature's competence to make laws with respect to co-operative societies in item 32 of the State List which is confined to make laws as to incorporation, regulation and winding up of co-operative societies does not and cannot extend to judging electoral malpractices in the elections held for the membership of the Board and/or other office-bearers of the society. True, as held by the Supreme Court, in a democratic set-up, disputes relating to the validity of elections need not be settled by Courts of law only. Nonetheless, an independent mechanism alone can justify interference on the ground of electoral malpractices in the tenure of office of the elected members of the Board. A decision as to maladministration by those who have been elected to administer the society in accordance with the provisions of the Act, the Rules and the By-laws will be despotic if the rule of adversary adjudication is ignored and on complaints in the hands of the Government of the State. A legislative decision imposed upon the society and its members that those constituting the Board indulged in maladministration, will be a pronouncement of guilt of a sort in exercise of legislative power without there being any adjudication. No Legislature shall assume such power, We say so with respect, for as observed in *U.S. v. Brown, 381 U.S. 487,* by the Supreme Court of United States of America,

> "Every one must concede that a legislative body, from its numbers and organisation and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamour, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited the very class of cases most likely to be prosecuted by this mode."

The charges that were brought before the Government and which formed the basis of the Ordinance and the Act may not essentially be criminal charges, but they are in the nature of allegations that may safely be called quasi-criminal, reiterating the words Mathew, J, in the case of *Smt.Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2292: (1976)2 S.C.R. 347,*

> "even though a sovereign can act only by making law, the law he so makes may vest the authority to exercise judicial power."

The legislature could exercise the judicial power only if a law made by it for the said purpose empowered it to act in judicial capacity. The sovereign act of the legislature in the teeth of basic structure theory is an exercise that we must not countenance.

53. Sec.5 of the Act, which has given to the Government power to appoint an Advisory Board consisting of not more than five non-official members to advise the Special Officer and which Board shall be consulted by the Special Officer on

all matters relating to the affairs of the primary society, is perhaps a provision which creates some sembance of a democratic functioning of the society during the interregnum for which the Special Officer has been appointed under the impugned Amendment Act. But then it is not indicated who will be the members of this Advisory Board. If they are coming from areas they are not covered by the primary society concerned in the sense that not all the persons who qualify for membership in the society, it is going to pollute the society and interfere with the right of the members of the society under Art.19(1)(c) of the Constitution. There are laws which give power to the Government to nominate until a regular body is created in accordance with law. There are laws which say that a municipal board or any other local self government may be constituted in a particular area until such constitution of the municipality or the self-government, certain persons are nominated and notified to function as the board of the local self-government. But then such persons must qualify to be members of the board of municipality and/or the local self-government. If they come otherwise to constitute the board of management, they not only interfere with the right of the local self-government but also interfere with the freedom of association. In the case of *Baldev Singh v. State of M.P., A.I.R. 1987 S.C. 1239,* the Supreme Court pointed out.

> "Ours is a democratic polity. At every level, from the villages up to the national level, democratic institutions have been introduced. The villages are under Gram Panchayats, urban areas under Municipalities and Corporations, districts are under Parishads; for the State there is a Legislature and for the entire country. We have the Parliament. People residing within Gram Panchayats have their electoral rights to exercise and in exercise of such rights, they have elected their representatives. Citizens of India have a right to decide, what should be the nature of their society in which they live-agrarian, semi-urban or urban. Admittedly, the way of life varies, depending upon where one lives."

That was a judgment in which they say that guidelines are necessary and if detailed guidelines are not indicated in the section, yet from the provisions contained therein, it can be gathered as to what guidelines are given. We are, however, informed that rules have not been framed prescribing qualifications for members of the Advisory Board. It is thus premature to say that for the reason of absence of any qualification of the five non-official members to constitute the Advisory Board of the society, the constitutional guarantees have been violated. The absence of guidelines, no doubt, render a provision of law arbitrary. But arbitrariness with respect to the nomination of five non-official members to advise the Special Officer, can be rectified by the rules and if care is taken to ensure that such members come from amongst the members of the society only and belong to the categories which constitute the board. Therefore, it is not possible at this stage to say that Sec.5 of the impugned Act is stricken by such a serious vice which will render it invalid.

54. Another infirmity argued before us is in respect of the appointment of Special Officers. Sub-sec.(2) of Sec.7 of the Amendment Act has given to the Government the power to authorise the Registrar by notification to exercise any of the powers vested in them under Sec.4 or under Sec.5 in respect of all or any of the primary societies. It is said that in many societies persons who are not the Registrar but appointed to exercise some or all the powers of the Registrar have been authorised by the Government to appoint Special Officers. Some of the appointment letters of the Special Officers have been produced before the Court. Sec.3 of 1983 Act says,

> "The Government may appoint any officer of the Government to be Registrar of Co-operative Societies for the State of Tamil Nadu or any portion of it or for any class or classes or category or categories of registered societies and may, by general or special order, confer on any other officer of the Government or any officer of any body corporate owned or controlled by the Government all or any of the powers of a Registrar under this Act."

The two divisions of Sec.3 of the Act clearly distinguish between an officer, who is appointed as the Registrar and the officer of the Government or any officer of any body corporate owned or controlled by the Government who is vested with all or any of the powers of the Registrar under the Act. While a person who falls in the first category is the Registrar, since the Act contemplates delegation of the governmental functions under Sec.4 or Sec.5 of the Amendment Act to him, he can be

authorised by the Government to appoint Special Officers, those who, however, fall in the second category, they are not the Registrar. They are persons who have been given a limited role to exercise all or some of the powers of the Registrar under the Act. Merely because such powers are conferred upon them, they cannot be the Registrar, although they function as Registrar for the purposes of the Act, 1983. They cannot act as delegates of the State Government for Sec.7 of the Amendment Act limits the delegation to Registrar only.

55. The view that we have taken may lead it to hold that the Amendment Act is a colourable exercise of power and the legislature has acted beyond its competence in terminating the tenure of elected or nominated members of the boards of management of the primary co-operative societies. Our conclusions will also lead us to hold that appointments of the Special Officers by the persons who are not appointed as the Registrar but are merely conferred the powers of the Registrar are illegal.

56. We are, however, aware of the fact that the societies have already been superseded and the Special Officers have been appointed and the administration of the societies has been taken over by them. In the case of *S.L.Kapoor v. Jagmohan, A.I.R. 1981 S.C. 136: (1981)1 S.C.R. 746,* the Supreme Court found that supersession of a municipal committee was illegal, but then put the question what relief should be given to the appellant? The superseded Municipal Committee's term was almost reaching its completion. The Supreme Court said,

> "If now the order is quashed and the Committee is directed to be reinstated with liberty to the Lt.Governor to proceed according to law-this should be our order ordinarily -, it may lead to confusion and even chaos in the affairs of the Municipality...We have held that the notification is vitiated by the failure to observe the principles of natural justice and we let the matter rest there. We neither quash the notification nor reinstate the Committee. Nor are we to be understood as having expressed any opinion on the merits of the supersession. We allow the appeal in the manner indicated."

57. When we ask the same question, we find a situation in which the petitioners may suggest that the Amendment Act as well as the consequential appointment of the Special Officers should be quashed. That will be ordinarily an order that a Court on account of the findings recorded by us may pass. Thus, if the Amendment Act goes and consequently the Special Officer is also out of office, unless there is a mandamus issued to restore the erstwhile members of the Boards of Management to their respective offices, there shall be no one to manage the affairs of the superseded societies. Should we then follow this course and issue a mandamus to restore the erstwhile members of the Boards of Management to their respective offices? Only a few of the superseded societies have come before us. Many thousands have accepted supersession and the Special Officers are comfortably functioning in such societies. It is not known how in the event of removal of the Special Officers, this Court would succeed in reinstating the removed members of the Board to their respective offices. While the Amendment Act and the supersession may be said to have affected the society, which is a juristic entity, the persons *de facto* affected are such members, who were elected and/or nominated, but were removed as a consequence of the enforcement of the Amendment Act. Most of them or not before us. Those who are before us claim to represent their respective societies. It will be difficult to transfer to them the management of the society in the absence of any mechanism created for the said purpose. There shall be confusion all around and the Court may not and should not like to create chaos. We have carefully examined the facts of individual cases. It has been conceded on behalf of the respondents that the Board of Management of the Society petitioner in W.P.No.13883 of 1991 has not been superseded and no Special Officer has been appointed in that Society. So far as other petitioners are concerned, their grievance is that although Boards of Management of their societies were constituted and they were entitled to continue for their full term of office, they have been removed by the appointment of the Special Officers. In some of the cases, their further grievance is that the Special Officers have been appointed not by the Registrar but by the persons who have been only empowered to act as Registrar. Yet, any change in the *status quo* without a scheme to re-start the democratic process, in our opinion, shall cause and confound confusion and chaos.

58. The respondents have submitted a scheme and it is said that they have submitted this scheme

before the Supreme Court in W.P. (Civil) No.758 of 1991. The scheme states that the State of Tamil Nadu proposed to hold elections for the primary co-operative societies. The Schedule for conducting the elections is as follows:

"(i) Enrolment of Women and Scheduled Castes/ Schedule Tribes members to the required extent by 31.12.1991.

(ii) Amending the Tamil Nadu Co-operative Societies Act, 1983 and the Tamil Nadu Co-operative Societies Rules, 1988 by 31.01.1992.

(iii) Amending by-laws of various co-operative societies by 28.02.1992.

(iv) Completing the elections for all the primary co-operative societies by 31.05.1992."

This solemn promise, we have every reason to believe, shall be fulfilled by the State and it shall in no way depart from the schedule. We are unaware of the amendment that may be made in the Act, the rules and the bylaws. Therefore, it is not possible to predicate how they will affect the members of the society. We, however, hope and believe that the State will do nothing that will infringe any such right of the members of the primary co-operative societies which will give rise to further litigations. The schedule, if adhered to, will bring back the management in the hands of the members of the society and thus the Amendment Act shall operate only as a transitory law and the Special Officers shall function only as a stop gap arrangement. We, for the said reason, determine as above that the Amendment Act suffers from the vice of legislative incompetence and arbitrariness thus violating Arts.14 and 13 of the Constitution of India but issue no writ either in the nature of certiorari or in the nature of *mandamus*. We, however, direct the State to act in accordance with the schedule for enrolment of women, Scheduled Castes and Scheduled Tribes members to the required extent, for amending the Tamil Nadu Co-operative Societies Act, 1983 and the Tamil Nadu Co-operative Societies Rule, 1988 and by-laws of various co-operative societies and for completing the elections for all primary co-operative societies without fail.

59. With the directions as above, the writ petitions are disposed of. No costs.

B.S. ---- Petitions disposed of with the directions.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

W.A.No.946 of 1991 *9th December, 1991.*

The Government of Tamil Nadu represented by its Secretary, Adi Dravidar and Tribal Welfare Department, Fort St. George, Madras-9 and another *...Appellants*

v.

S.Jayaraman *...Respondent.*

(A) Land Acquisition Act (I of 1894), (as amended by Central Act (LXVIII of 1984), Sec.6(1), Proviso (ii) - 'Date of publication of Notification' for the purposes of - What is.

A plain reading of the words namely, the 'last of the dates of such publication and of the giving of such public notice being hereinafter referred to as the date of publication of the Notification introduced in Sec.4(1) by Central Act LXVIII of 1984 will only mean that the date on which public notice of the substance of the notification is given at convenient places in the locality is to be taken as the date of publication of the Notification in Sec.4(1) of the Act for the purpose of computing the period of one year contemplated under clause (ii) of proviso to sub-sec.(1) of Sec.6 of the Act. It is obvious on a plain reading of the said Amendment that for the purpose of finding out the last of the dates the publication and giving of public notice are made inseparable in the Amendment and therefore that date on which public notice of the substance of the 4(1) notification was given at the convenient places in the locality cannot be ignored for the purpose of finding out the last of the dates. *[Paras 15 and 16]*

(B) Land Acquisition Act (I of 1894), Sec.4(1) - Publication of Notification in official gazette, and in the newspapers and publication of substance of Sec.4(1) notification - Must be continuous.

There must be continuity of action in the publication of the Sec.4(1) notification in the Official Gazette and in the newspapers and also in giving public notice of the substance of the Sec.4(1) notification at convenient places in the locality, and if there is any long delay and/or break in the continuity, in any individual case, it is open to the court to quash the acquisition proceedings.

Unless there are convincing reasons such as stay, granted by courts or competent Authorities or otherwise, the delay between the publication of the 4(1) notification in the Official Gazette and the public notice of the substance at convenient places of the locality should not exceed two months. If it exceeds two months, it is liable to be questioned. *[Para 16]*

Cases referred to:

S.Vellaikkan v. The State of Tamil Nadu, 1988 Writ. L.R. 22; State of U.P. v. Radhey Shyam, A.I.R. 1989 S.C. 682; G.Nandakumar v. State of Tamil Nadu, 1985 T.L.N.J. 109; P.Venkatarathinam Naidu v. State of Tamil Nadu, 1990 T.L.N.J. 264; Khub Chand v. The State of Rajasthan, (1967)1 S.C.R. 1074; Collector (District Magistrate), Allahabad v. Raja Ram Jaiswal, A.I.R. 1985 S.C. 1622; Raja Satyanendra Narayan Singh v. State of Bihar, A.I.R. 1987 S.C. 1390: (1987)3 S.C.C. 319.

M.A.Sadanand, Government Pleader, for Appellants.

M/s.A.Muthukrishnan, V.Balaji, R.Sureshkumar and *Malarkodi,* for Respondent.

The Judgment of the Court was delivered by *Venkataswami, J.*:- This writ appeal is filed against the order of the learned judge in W.P.No.14480 of 1990, dated 15.2.1991.

2. The only question that arises for our consideration in this writ appeal is, what exactly is the date of the publication of the Notification for the purpose of Clause (ii) of the Proviso to sub-sec.(1) of Sec.6 of the Land Acquisition Act, 1894 (hereinafter called 'the Act')? Is it from the date of publication of the 4(1) Notification in the Official Gazette, or can it be from the date of publication of the 4(1) Notification in two daily newspapers circulating in the locality as required in that section, or from the date of publication notice of the substance of such Notification at convenient places in the locality. We are concerned with Sections as amended by Central Act 68 of 1984.

3. The admitted facts are the following:

> In this case, the Notification under Sec.4(1) of the Act dated 21.4.1989 was published in the Official Gazette on 17.5.1989. The publication of the Notification in the daily was on 19.5.1989. However, the substance of the same was published in convenient place of the locality only on 5.7.1989. The declaration under Sec.6 of the Act was published on 3.7.1990. It is common ground that if the date of publication of Sec.4(1) notification is to be counted from the date of publication of the same in the Official Gazette, then the declaration under Sec.6 of the Act is barred under Clause (ii) of Proviso to sub-sec.(1) of Sec.6 of the Act. On the other hand, if the time is to reckon from the date of public notice of the substance of the 4(1) Notification in convenient places of the locality, the declaration is in time.

4. Mishra, J. was of the view that the time has to be reckoned from the date of publication of Sec.4(1) Notification in the Official Gazette, and in so doing, the declaration being out of time, quashed the Notification under Sec.4(1) of the Act. Aggrieved by the above decision of the learned Judge, the Government have preferred this appeal.

5. Mr.M.A.Sadanand, learned Government Pleader, after referring to Secs.4(1) and 6 of the Act, as amended by Central Act 68 of 1984, and in particular, inviting our attention to the amendment to Sec.4(1) by Central Act 68 of 1984, submitted that the view taken by the learned Judge is contrary to the view expressed by Mohan, J., as he then was, in *S.Vellaikkan v. The State of Tamil Nadu, 1988 Writ.L.R. 22,* and requires reconsideration. In the case reported in *S.Vellaikkan v. The State of Tamil Nadu, 1988 Writ.L.R. 22,* the learned Judge has taken the view that it is the date on which the substance of the 4(1) Notification was published in the convenient place of the locality, that was material for the purpose of calculating the period of one year contemplated under Sec.6 of the Act. We find a reference to a judgment of the Supreme Court in *State of U.P. v. Radhey Shyam, A.I.R. 1989 S.C. 682,* and two Division Bench judgments of this Court in *G.Nandakumar v. State of Tamil Nadu, 1985 T.L.N.J. 109* and *P.Venkatarathinam Naidu v. State of Tamil Nadu, 1990 T.L.N.J. 264,* will be apposite in the context.

6. Contending contra, the learned counsel appearing for the respondent submitted that on the language of Sec.4(1) read with Sec.6 of the Act, the view taken by the learned Judge (Mishra, J.) is correct, and if at all, only the view taken by Mohan, J., as he then was, requires reconsideration.

7. For appreciating the rival contentions, it is necessary to set out Sec.4(1) and the relevant portion of Sec.6 of the Act as amended by Act 68 of 1984. They are as follows:

"4. *Publication of preliminary notification and*

powers of officers thereupon: (1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, or for a company, a notification to that effect shall be published in the Official Gazette, and in two daily newspapers circulating in that locality of which at least one shall be in the regional language and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification."

"6. *Declaration that land is required for a public purpose:* (1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Sec.5-A, sub-sec.(2), that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Sec.4, sub-sec.(1), irrespective of whether one report or different reports has or have been made (wherever required under Sec.5-A, sub-sec.(2):

Provided that no declaration in respect of any particular land covered by a notification "under Sec.4, sub-sec.(1):

(i) xx xx xx

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

"Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

"*Explanation 1:*- In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issue under Sec.4, sub-sec.(i), is stayed by an order of a court shall be excluded."

8. Before expressing our view, we consider that it would be advantageous to extract the relevant portions from the reported judgments cited before us.

9. In *S. Vellaikkan v. The State of Tamil Nadu, 1988 Writ.L.R. 22*, Mohan, J., as he then was, had occasion to consider an exactly identical question. The learned Judge held as follows:-

"Now, the question arises what exactly is the date of publication of the notification, because it is from that date one year is prescribed under the amended Sec.6(1) of the Act. It is clear by a careful reading of Clause (c) the last date of such publication and the giving of such public notice being hereinafter referred to as the date of the publication of the notification. In the case on hand, as stated earlier, the notification under Sec.4(1) of the Act was made in G.O.Ms.No.1824, Social Welfare Department, dated 5.9.1985. That was published in the Tamil Nadu Government Gazette on 18.9.1985, in the Tamil Daily Dhinathanthi on 28.9.1985, and in The Hindu of 1.10.1985. Thereafter, the Collector caused public notice of the substance of the notification under Sec.4(1) at convenient places in the said locality on 10.10.1985. Page 94 of the file clearly shows that this was done in the village by beat of tom-tom, which will be sufficient compliance, and by affixture at convenient places. Thus it is clear the last date of the publication of the notification under Sec.4(1) being 19.10.1985, it is that date which is material for calculating the one year period prescribed under Sec.6 of the Act. By the amendment of Sec.6 it is laid down in no uncertain terms, that where the notification under Sec.4(1) is published after the amendment of the Land Acquisition Act, which amendment came into force on 24.9.1984, the period is one year because the Proviso to Sec.6(ii) says that no declaration under Sec.6 shall be published after the expiry of one year from the date of the publication of the notification. In this case Sec.4(1) notification is on 5.9.1985 as seen already. It is undoubtedly after the amending Act 68 of 1984 in which case the one year period alone is available. It is, in this connection, the date of publication of notification under Sec.4(1), the last of the date being 19.10.1985, becomes material. If reckoned from

the date, undoubtedly the declaration under Sec.6 made in G.O.Ms.No.2743, dated 16.10.1986 published in the Tamil Nadu Government Gazette on 16.10.1986 and in English daily News Today on 17.10.1986, 18.10.1986, Makkalkural Tamil Daily on 17.10.1986 and 18.10.1986 are perfectly within the one year period. Therefore, the first contention raised by the petitioner fails."

10. In *G.Nandakumar v. State of Tamil Nadu, 1985 T.L.N.J. 109,* a Division Bench of this Court has considered the consequence of inordinate delay between the dates of publication of 4(1) in the Official Gazette and the publication of substance of the same in the convenient places of the locality. While so considering, the learned Judges have noted that compliance of publication of the substance of Sec.4(1) Notification is mandatory and non-compliance of it is fatal to the entire acquisition proceedings. In support of that, the learned Judges have referred to a judgment of the Supreme Court in *Khub Chand and others v. The State of Rajasthan and others, (1967)1 S.C.R. 1074.* Of course, they have repelled a contention that the substance of the 4(1) Notification should be published simultaneously with the publication of the 4(1) Notification in the Official Gazette. However, the learned Judges held that they must be contemporaneous and there must be evidence to show that there was continuity of action. This is what the learned Judges have held, after elaborate discussion:

> "The provisions being mandatory and the law of acquisition being one of depriving the citizens of their right to property to which some of them are sentimentally attached, strict compliance of the provisions of law is required. It is clear that local notice should be made if not simultaneously at the announced time in the Gazette and in the locality but at least within a minimum possible time after the notification. The officials concerned have to act with sincerity and in a most diligent manner because any avoidable delay would render the publicity contemplated under Sec.4(1) of the Act effectless."

11. In *P.Venkatarathinam Naidu v. State of Tamil Nadu, 1990 T.L.N.J. 264,* another Division Bench followed the above Division Bench judgment and quashed the acquisition proceedings on the ground of a deep gap between the publication in the newspapers and the publication of the substance of the 4(1) Notification in convenient places of the locality.

12. One Supreme Court judgment has to be looked into now. In *State of U.P. v. Radhey Shyam, A.I.R. 1989 S.C. 682,* the Supreme Court considered a question in the light of Amendments introduced to Secs.4, 6 and 17(4) of the Act by Central Act 68 of 1984, and the question is as follows:

> "whether the declaration under Sec.6 of the Act could be issued simultaneously along with the Notification under Sec.4 of the Act in view of the amendment made to Sec.17(4) of the Act.?"

After an elaborate discussion, the Supreme Court held as follows:

> "But the words "after the date of the publication of the notification" in sub-sec.(4) of Sec.17 read simpliciter clearly indicate that declaration under Sec.6 had to be made *after the publication of the notification meaning thereby subsequent to the date of the publication of the notification."*

In the course of the judgment, the Supreme Court has made certain observations which are relevant and helpful for deciding the issue on hand. The Supreme Court, after noticing an earlier decision *Collector (District Magistrate), Allahabad v. Raja Ram Jaiswal, A.I.R. 1985 S.C. 1622,* observed as follows:

> "This Court held that the publication of the notice in the locality as required in the second part of Sec.4(1) of the Act was mandatory and unless that notice was given in accordance with the provisions contained therein, the entire acquisition proceedings would be vitiated. The Court further held that the assumption that the sole purpose behind publication of a notice in the locality under Sec.4(1) was to give an opportunity to the person interested in land to object to the acquisition under Sec.5-A of the Act was not well-founded. Therefore, it cannot be said that where such person files his objections, the purpose was achieved and that the failure to give public notice in the locality need not be treated as fatal to the proceedings."

The Supreme Court, on the scope of the interpretation of a statute, observed, after noticing another judgment of the Supreme Court in *Raja Satyendra Narayan Singh v. State of Bihar, A.I.R. 1987 S.C. 1390: (1987)3 S.C.C. 319,* as follows:

"The basic principle, it was reiterated at page 325 of the reports, of the construction of every statute was to find out what is clearly stated and not to speculate upon latent imponderables. The scheme of the Act also must be looked into. In interpreting the statutes it is safer to rely on the obvious meaning rather than to investigate the imponderables."

Bearing in mind the various ratios laid down by this Court and the principles laid down by the Supreme Court as referred to above, let us now consider the question on hand.

13. Bearing in mind the various ratios laid down by this Court and the principles laid down by the Supreme Court as referred to above, let us now consider the question on hand.

14. We have extracted above, the relevant provisions. Mishra, J., expressed his view about the question on hand as follows:

"Coming to the language of Sec.4 of the Act however I find that while it has clearly stipulated publication of the Preliminary notification in the Official Gazette and in two daily newspapers circulating in the locality, it says that the Collector shall cause public notice of the substance of such notification. While the contemplated publication in the Official Gazette and in two daily newspapers is the publication of the text of the notification, only substance of the notification is required to be given at convenient places in the locality. It is clear therefore that publication of the notification must in the circumstances of the case mean publication in the Official Gazette and in two daily newspapers circulating in the locality. The words "the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification" are meant for the actions that the officers may take with respect to the land proposed to be acquired."

The learned Judge has also given another reason for the above view in the following words:

"If publication in the Official Gazette and in daily newspapers on the one hand and notice of the substance of the notification on the other hand are made on different dates and there is a long gap of time between the two, will it be open to the State Government and/or officers to say that they would treat the public notice of the substance of the notification as the date of the publication and ignore the publication in the official gazette and in the daily newspapers for the purpose of clause (ii) to Proviso to sub-sec.(1) of Sec.6 of the Act?

The learned Judge answers the above question as follows:

"The legislature has said 'the last of the dates of such publication and the giving of such public notice' evidently to indicate that there may be some gap between the publication in the Official Gazette ad the newspapers and between the publication in the Official Gazette and the newspapers and the public notice. The last date of such publication in the said expression must in the context confine to the purpose under Sec.4(2) of the Act and not extend to the purpose of the declaration under Sec.6 of the Act."

On that basis, the learned Judge was firmly of the view that the date of publication of the substance of the 4(1) Notification in the convenient places of the locality cannot be taken as the last date for the purpose of counting one year contemplated under Clause (ii) to Proviso to sub-sec.(1) of Sec.6 of the Act. With respect, we are unable to agree with the view taken by the learned Judge. We shall immediately give our reasons.

15. First of all, the reason given by the learned Judge that the words 'the last of the dates of such publication and the giving of such public notice,' being hereinafter referred to as the date of the publication of the notification' are meant for the actions that the officers may take with respect to the land proposed to be acquired, does not appear to be sound. For, even in the absence of those words, the section conveys the same idea particularly in view of the use of the word 'thereafter' in Sec.4(2). The language employed in Sec.4(1) is, that each one of the requirements, namely, publication in Official Gazette, publication in the newspapers, and publication of the substance in convenient places of the locality are all indispensable and, as observed by the Supreme Court, the non-observance of any one of those requirements will be fatal to the acquisition proceedings. Therefore, unless all the three requirements are complied with, the officers cannot invoke Sec.4(2) of the Act. As noticed above, the Supreme Court has clearly observed that the publication of the substance of the notification in the convenient places

of the locality is as important as that of the other two requirements. Again, applying the principle laid down by the Supreme Court in the matter of interpretation of statutes, namely, the Court must find out what is clearly stated in the statute and not speculate upon the latent imponderables, we consider that the interpretation given by the learned Judge cannot be sustained. We are, therefore, of the view that a plain reading of the words, namely, 'the last of the dates of such publication and of the giving of such public notice being hereinafter referred to as the date of publication of the Notification' introduced in Sec.4(1) by Central Act 68 of 1984, will only mean that the date on which public notice of the substance of the notification is given at convenient places in the locality is to be taken as the date of publication of the Notification in Sec.4(1) of the Act for the purpose of computing the period of one year contemplated under Clause (ii) of proviso to sub-sec.(1) of Sec.6 of the Act. Mohan, J., as he then was, in *S.Vellaikkan v. The State of Tamil Nadu, 1988 Writ L.R. 22,* has taken similar view, with which we concur.

16. The apprehension expressed by the learned Judge that the other interpretation, namely, taking into account the publication of the substance of the 4(1) Notification in the convenient places of the locality, as the last date, would enable the Government to take undue advantage of the same, is answered in the two Division Bench judgments of this Court. The learned, Judges have clearly stated that there should not be long gap between the publication of the 4(1) Notification in the Official Gazette and in the newspapers and the publication of the substance of the 4(1) notification in the convenient places in the locality. In fact, the learned Judges have quashed the acquisition proceedings in those two cases on account of deep gap, as noticed above. We would like to reiterate that there must be continuity of action in the publication of the 4(1) notification in the Official Gazette and in the newspapers and also in giving public notice of the substance of the 4(1) notification at convenient places in the locality, and if there is any long delay and/or break in the continuity, in any individual case, it is open to the court to quash the acquisition proceedings. It is obvious on a plain reading of the said Amendment that for the purpose of finding out the last of the dates, the publication and giving of public notice are made inseparable in the Amendment and therefore the date on which public notice of the substance of the 4(1) notification was given at the convenient places in the locality cannot be ignored for the purpose of finding out the last of the dates. Unless there are convincing reasons such as stay granted by Courts or Competent Authorities or otherwise, the delay between the publication of the 4(1) notification in the Official Gazette and the public notice of the substance at convenient places of the locality should not exceed two months. If it exceeds two months, it is liable to be questioned.

17. On facts, it is not disputed before us that the declaration under Sec.6 was well within one year from the date of public notice of the substance of the 4(1) notification in the convenient places in the locality. Therefore, the challenge to the declaration under Sec.6 on the ground that it is beyond one year from the date of publication of 4(1) notification in the Gazette, cannot be (*sic.*) sustained.

18. In the result, the writ appeal is allowed, the order of the learned judge is set aside, and the writ petition is dismissed. However, there will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:- *Thangamani, J.*

S.A.No.1598 of 1991 *8th February, 1991.*

Chellammal *...Appellant*

v.

Alandur Municipality, represented by its Commissioner *...Respondent.*

Tamil Nadu District Municipalities Act (V of 1920), Sec.82(2) - Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.4 - Levy of Property tax - Basis of assessment under Act (V of 1920) - Should be fair rent worked out under Sec.4 of Act XVIII of 1960 - Assessment not worked out on that basis - Cannot be sustained - Civil Court can declare the levy illegal.

A reading of the decision of the Supreme Court in

Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353, would make it clear that the basis of assessment should only be fair rent worked out as provided in Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act. The mere fact that the Commissioner also took into consideration the provisions of the Rent Control Act while arriving at the annual value on the basis of actual rent received by the landlord from the tenant would not suffice. In the absence of evidence to indicate that the Municipality assessed the properties on the basis of fair rent worked out under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act the assessment cannot stand and it will be contrary to the dicta laid down by the Supreme Court in the decision referred to above. When the basis of the levy itself is wrong or that there is no basis at all for the levy and in that sense there is no substantial compliance with the provisions of the Municipalities Act, it is open to the Civil Court to declare the levy as illegal and in fact it is its duty to do so. *[Paras 7 and 10]*

Cases referred to:

Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353; Corporation of Calcutta v. Padma Debi, A.I.R. 1962 S.C. 151: (1962)3 S.C.R. 49; Ramaswami v. The Commissioner Corporation of Madras, (1977)2 M.L.J. 457: 90 L.W. 713.

R.Sundaravaradan for *Smt.Revathi Muralidharan,* for Appellant.

C.Chinnaswami, for Respondent.

The Court delivered the following

JUDGMENT:- The plaintiff who has lost in both the courts below has preferred this Second Appeal. She is the owner of the premises bearing door No.33, Kothawal Street, Alandur. The property tax for this property which was originally Rs.92-70 per half year was suddenly increased to Rs.927.00 per half year. There was no notice served on the appellant before revision. Besides the assessment No.9217 was split into three bearing numbers as 92/7, 92/8, 92/9. The plaintiff filed revision and appeal to the Municipality on which the Municipality did not pass any orders. So she instituted O.S.No.505 of 1972 in the court of District Munsif, Poonamalle for declaration that the enhanced assessment is illegal and void and for permanent injunction restraining the respondent municipality from collecting tax at the enhanced rate.

2. The municipality resisted the suit contending that when their Bill Collector inspected the premises he found that the appellant has converted the premises into 17 tenements. He was able to gather information from 15 tenants that applicant was collecting a rent of Rs.623 per month from them. On the basis of the information gathered at the time of inspection of the Bill Collector the annual rental value was fixed at Rs.7,200 and the tax was enhanced accordingly. Special notice was issued to the appellant prior to the enhancement and the same has been acknowledged by the appellant's husband. A personal enquiry was held at the instance of the appellant in the revision preferred by her and the enhanced assessment was confirmed after another inspection by the Municipal Authorities. The appellant has not preferred any appeal under Rule 23(c) of Schedule 4 of Tamil Nadu District Municipalities Act. The respondent Municipality has followed the procedure prescribed in the District Municipalities Act in increasing the assessment.

3. In both the courts below it was argued on behalf of the appellant that in arriving at the rental value of the premises, the Municipality has not followed the provisions of District Municipalities Act and the Tamil Nadu Buildings (Lease and Rent Control) Act and hence the enhancement should be held to be illegal on the basis of the judgment in *Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353.* However both the courts below took the view that the evidence of D.W.1 that the Commissioner examined the tenants of the premises and took into consideration the provisions of the Rent Control Act was sufficient even though no document was available to show that such procedure as required under the Rent Control Act had been followed. The lower Appellate Court held that the decision in *Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353,* will not apply to the facts of this case, since the impugned building herein has been rented out to the tenants and accordingly it dismissed the appeal and confirmed the assessment.

4. The substantial questions of law that have been formulated for consideration in this Second Appeal are:

(1) Whether the Courts below erred in not, applying the *ratio decidendi* of the Supreme Court in *Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353*?

(2) Whether the Courts below are right in holding that the municipality can make an assessment on the basis of rent and not in accordance with the fair rent fixed under the Tamil Nadu Act 18 of 1960?

5. Relying on the decision of the Supreme Court in *Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353*, the appellant herein contended before the lower Appellate Court that the Municipality has not followed the basis prescribed under the provisions of the Rent Control Act in arriving at the rental value of the building. The Municipality on its part argued that though it has taken into consideration the provisions of the Rent Control Act before fixing the rental value of the premises, it is not necessary to take the actual measurements and note down the other features. It is enough if the assessing authority bears in mind the (sic) factors prescribed under the Rent Control Act before determining the rental value of the building. The lower appellate court accepted this contention and relying on the evidence of D.W.1 that the Commissioner took into consideration the provisions of the Rent Control Act besides examining the tenants of the premises upheld the assessment.

6. Thiru R.Sundaravaradan the learned Senior Counsel for the appellant argued that the basis of assessment should be only the fair rent which can be fixed according to the rules under the Rent Control legislation and it is immaterial whether the building has been actually leased out or not. The lower appellate Court has erred in thinking that there was evidence of higher rental income derived by the Appellant and that the same can be basis of municipal assessment, In *Guntur Municipal Council v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353*, suits were instituted for a declaration that the general revision of the rental values of the houses and buildings effected by the Guntur Municipality in the year 1960, for the purpose of assessment of tax is illegal and *ultra vires* and for a consequential relief of a permanent injunction restraining the Municipality from acting on the special notices issued on the tax payers. The Supreme Court was called upon to decide whether before the fixation of fair rent of any premises the Municipality was bound to make assessment in the light of the provisions contained in the Rent Control Acts. It held Sec.62(2) of the District Municipalities Act makes provisions for the fixation of annual value according to the rent at which lands and buildings may reasonably be expected to be let from month to month or from year to year less the specified deductions. The test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant. The Municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair or the standard rent which would be payable for a particular premises under the Rent Control Act in force during the year of assessment.

7. It was urged before the Supreme Court that it is only after fixation of fair rent of a building that the landlord is debarred from claiming and receiving payment of any amount in excess of such fair rent. So long as the fair rent of a building is not fixed the assessment or valuation by a municipality need not be limited or governed by the measures provided by the provisions of the Act for determination of fair rent. The Supreme Court repelled this argument and laid down that on the language of Sec.62(2) of the Municipalities Act no distinction can be made between buildings the fair rent of which has been actually fixed by the Controller and those in respect of which no such rent has been fixed. It has made it clear that the landlord cannot lawfully expect to get more rent than the fair rent which is payable in accordance with the principles laid down in the Act. The assessment of valuation must take into account the measure of fair rent as determinable under the Act. It may be that where the Controller has not fixed the fair rent the municipal authorities will have to arrive at the figure of fair rent but that can be done without any difficulty by keeping in view the principles laid down in Sec.4 of the Act for determination of fair rent. A reading of this decision would make it clear that the basis of assessment should only be the fair

rent worked out as provided in Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act. The mere fact that the Commissioner also took into consideration the provisions of the Rent Control Act while arriving at the annual value on the basis of actual rent realised by the landlord from the tenant would not suffice. In the absence of evidence to indicate that the Municipality assessed the properties on the basis of fair rent worked out under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act the assessment cannot stand and it will be contrary to the dicta laid down by the Supreme Court in the decision referred to above.

8. The learned Senior Counsel for the appellant next argument that even if the landlord actually receives more than the fair rent that would be applicable to the building that cannot form the basis for arriving at the annual value. The decision in *Corporation of Calcutta v. Padma Debi, A.I.R. 1962 S.C. 151: (1962)3 S.C.R. 49,* supports his claim. In this case the Calcutta Corporation in fixing the annual valuation of the respondent's premises took as basis of Rs.1450 as the monthly value of th premises. The respondent filed objection to the said assessment and meanwhile, under the West Bengal Premises Rent Control (Temporary Provision) Act 1950, the standard rent of the said premises was fixed by the Rent Controller at Rs.632/8 per month. One of the objections raised was that the Corporation had no power to fix the annual valuation at a figure higher than the standard rent. It was held the rental value cannot be fixed higher than the standard rent under the Rent Control Act.

9. The learned senior counsel for the appellant also cited decision in *Ramaswami v. The Commissioner Corporation of Madras, (1977)2 M.L.J. 457: 90 L.W. 713.* In this case no fair rent was fixed in respect of the building in question. The petitioner contended that the rent which he was receiving is the fair rent and therefore the rental value should be fixed with reference to the actual rent received by him. The Municipality proceeded on the basis that the rent received by the landlord did not represent the reasonable rent and that the building may fetch a higher rent if let to be fixed with reference to the fair rent, if any, fixed under the statutory provisions for the building and if no fair rent has been fixed by the Rent Controller the Municipal Authorities have to apply the provisions of the Rent Control Act and determine the fair rent for the building before assessing the property to tax. It was not the actual rent received by the landlord but the hypothetical rent which could be expected if the building is to be let, is the legal yardstick for determination of the reasonable rent. The decisions are to the effect that as a landlord cannot reasonably be expected to let a building for a rent higher than the fair rent in contravention of the Rent Restriction Laws, it should be taken that an upper limit has been fixed on the rate of rent, that a transaction entered into between the parties in defiance of the law cannot be taken to be the basis for determining the rent which can reasonably be expected if the building is to be let. This decision also pointed out that the Supreme Court has taken consistently the view that the standard of reasonableness has to be judged not from the expectation of a landlord who takes the risk of prosecution and punishment which the violation of the law involves, but the expectation of the landlord who is prudent enough to abide by the law and that therefore, even in cases where the rents actually collected by the landlords are higher than the standard rent the assessment could not be made on the basis of the actual rents received by the landlord but by the fair rent which alone the landlord is entitled to collect legally from the tenants.

10. Thiru C.Chinnaswami, the learned senior counsel for the respondent contended that the Municipal Authorities have taken into account the provisions of Rent Control Act while determining the annual rental value. Whether the formula prescribed under the Rent Control Act has been properly applied is not the criterion. Once the provisions of Rent Control Act have been invoked, it cannot be said that the Municipality has acted arbitrarily or capriciously in which case alone the matters could be agitated before a civil court. But we have already seen that there is only the *ipsi dixits* of D.W.1 that the Commissioner has also taken into account the provisions of the Rent Control Act in arriving at the annual rental value. Without producing the working sheet to indicate that the fair rent was arrived at as per the provisions of Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act, a mere verbal statement in the witness box that the provisions of the Act have been followed is of little consequence. In the course of his monthly visit during July 1976, the

Bill Collector of the Municipality found that the premises of the appellant has been underassessed, and sent his monthly report Ex.B-5 of the Municipality. On the report Ex.B-5 of the Revenue Inspector, the Commissioner of the Municipality has issued the notice under the original of (*sic.*) annual value was worked out only on the basis of the information collected by the Bill Collector from the tenants at the time of inspection and no fair rent was in fact arrived at as per the procedure prescribed in Sec.4 of the Rent Control Act. So it cannot be said that the Municipal Authority has complied with the provisions of the Act, the civil court has no jurisdiction to go into the question whether the levy is excessive or not. But it is equally well settled that when the basis of the levy itself is wrong or that there is no basis at all for the levy and in that sense there is no substantial compliance with the provisions of the Municipalities Act, it is open to the Civil Court to declare the levy as illegal and in fact it is its duty to do so.

11. In these circumstances, it is seen that the courts below have erred in not applying the *ratio decidendi* of the Supreme Court in *Guntur Municipal Counsel v. Guntur Town Rate Payers' Association, (1971)2 M.L.J. (S.C.) 7: (1971)2 An.W.R. (S.C.) 7: (1971)2 S.C.J. 142: A.I.R. 1971 S.C. 353,* and in holding that the Municipality can make an assessment on the basis of rent not in accordance with the fair rent fixed under the Tamil Nadu Act 18 of 1960.

12. In the result, the second appeal is allowed and the judgments and decrees of the lower courts are set aside and the suit is decreed as prayed for with costs throughout.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction]

Present:- *Mishra* and *Janarthanam, JJ.*

O.S.A.No.175 of 1981 *20th September, 1991.*

Tamil Nadu Cements Corporation Ltd. ...*Appellant*

v.

M/s.Sathiapal and Company ...*Respondent.*

(A) Arbitration Act (X of 1940), Sec.30 - Award under - Validity - Examination of, by Court - Ambit and scope - Error of law or calculation done by the arbitrator - Conditions of contract and the clauses, if can be read in the award to find out whether there has been any error of law - Objection to the award on ground that arbitrator committed error in awarding certain amounts related to matter either prohibited in the contract or not contemplated in the contract, something more than asked for the contractor - Objection, held, not sustainable.

The grounds of attack to the award in this case, are based solely on the award having been made the specific items of dispute enumerated therein. Otherwise, it is conceded that the award is not a speaking award. The Judgment of the Supreme Court in *M/s.Hind Builders v. Union of India, A.I.R. 1990 S.C. 1340,* is authority for proposition that merely because award is made for each item of claim, it cannot be treated as a speaking award or award with reason stated therefor and further that items of claims enumerated in the award will not be related to the various clauses of the contract and conditions of contract will not be read in the award or deemed to have been incoporated in the award. In the instant case, therefore, unless the said declaration of law by the Supreme Court is ignored it will not be permissible to read in the award contents of the various clauses of the contract and to find out whether there has been any error of law or calculation done by the arbitrator. Since there were specific issues framed and referred by the District Judge to the arbitrator, the terms of the contract were very much incorporated in the reference and the consequent award. Moreover to answer a general objection, it had become necessary to refer to the terms of the contract and once the Court referred to the terms

of the contract and found that any claim for extra cost was not contemplated and also that such objection has been raised before the arbitrator, there as no other conclusion possible. If any reference to the terms of the contract is permitted to find out whether the arbitrator has misconducted himself or not, the court shall be committing a serious error of law. *[Para 6]*

(B) Arbitration Act (X of 1940), Sec.29 - Arbitration proceedings - Award of interest by arbitrator - Power of.

The only inhibition which courts have recognised upon the jurisdiction of the arbitrator to award interest is that interest could not be awarded for the period prior to the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive law entitling the plaintiff to recover interest and that it must be assumed that the arbitrator will have the same power to award interest as the court. The instant case is not one in which without reference to the contents of the contract and various terms and conditions therein, it will be possible to say that award of interest has been illegal and thus the arbitrator misconducted himself in making such an award. *[Para 6]*

Cases referred to:

Raipur Development Authority v. M/s.Chokramal Contractors, (1989)2 S.C.C. 721: A.I.R. 1990 S.C. 1426; M/s.Hind Builders v. Union of India, A.I.R. 1990 S.C. 1340; Continental Construction Co. Ltd. v. State of U.P., 1988 S.C. 1166; Seth Thawardas v. Union of India, (1955)2 M.L.J. (S.C.) 23: 1955 S.C.T. 445: (1955)2 S.C.R. 48: A.I.R. 1955 S.C. 468. Nachiappa Chettiar v. Subramaniam Chettiar, A.I.R. 1960 S.C. 307; Satindar Singh v. Umarao Singh, A.I.R. 1961 S.C. 909; Union of India v. Sungo Steel Furniture Pvt. Ltd., A.I.R. 1967 S.C. 1032; State of Madhya Pradesh v. Saith & Skeleton Pvt. Ltd., A.I.R. 1972 S.C. 1507.

Appeal under Clause 15 of the Letters Patent against the order of Shanmukham, J., dated 29.9.1981 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P.No.129 of 1981 on the file of the Original Side of this Court.

C.Harikrishnan, for Appellant.

S.Ramamurthi, for Respondent.

The order of the Court was made by

Mishra, J.:- This Appeal has arisen out of a proceeding under Sec.30 of the Arbitration Act in Application No.5374 of 1988 and O.P.No.129 of 1981 on the Original Side of this Court. The Tamil Nadu Cements Corporation Limited (appellant and M/s.Sathiapal and Company, a partnership firm represented by its partner, S.Sathiapal, carrying on business in the city of Madras (first respondent) had fallen in dispute with respect to a works contract for

(1) Lime stone crusher Building vide agreement No.36/77-78, dated 10.10.1977.

(2) Sub Station building vide agreement No.50/77-78 dated 28.12.1977.

(3) Central Control Room Building, vide agreement No.14/78-79, dated 22.7.1978; and

(4) Lime stock piles contruction, vide agreement No.77/78-79, dated 29.11.1978.

2. The dispute, with the agreement of the parties, was referred to arbitration in terms of the arbitration clause in the agreement between the parties with the second respondent Mr.S.P.Namasivayam, an Engineer, as the Arbitrator made this award as follows:

S. No.	Particulars	Claim Rs.	Award Rs.	Claim Rs.	Award Rs.	Claim Rs.	Award Rs.
1.	Excavation in Hard Rock	1,52,541.21	10,967.00	38,483.91	1,341	10,941.64	613.
2.	Piecemeal excavations	50,494.98	41,931.00	Nil	Nil	Nil	Nil
3.	Shuttering for PCC	25,489.65	24,414.00	5,001.15	Nil	Nil	Nil

4.	Additional lead for AA stones	18,360.00	16,324.00	5,218.70 (Steel)	5,219	Nil	Nil
5.	Extended stay	1,10,053.26 (G.1) 94,917.00 (G.2)	23,053.00	66,535.76	Nil	44,000.00	Nil
6.	Expenses overload	6,80,000.00	88,918.00	Nil	Nil	Nil	Nil
7.	Interest on undisputed amount	5,310.00	Nil	Nil	Nil	Nil	Nil
		12,03,486.15	3,15,834	1,69,727.86	6,560.00	82,659.33	1,183

and accordingly the award was sought to be made a rule of the Court. The petitioner/appellant has challenged the award on the grounds *inter alia* that the Arbitrator committed error in awarding certain amounts related to matter, either prohibited in the contract, or not contemplated in the contract, something more than asked for by the contractor and interest for which he had no authority. On the question that the Arbitrator had awarded certain amounts with respect to matters either prohibited in the contract or not contemplated in the contract, the petitioner/appellant relied upon the tender for piece work which stated as follows:

> "We hereby distinctly and expressly declare and acknowledge that before the submission of our tender we have carefully followed the instructions in the tender notice and have read the Tamil Nadu Detailed Standard Specifications and the relevant clauses of the Preliminary Specification of the Tamil Nadu Detailed Standard Specifications and that we have made such examinations of the contract documents and of the location where the said work is to be done and such investigation of the work required to be done and in regard to the material required to be furnished as to enable us thoroughly to understand the intention of the same and the requirements, covenants, agreements, stipulations and restriction contained in the contract and in the said specifications, and distinctly agree that will not thereafter make any claim or demand upon the Corporation based upon or arising out of any alleged misunderstanding or misconception or mistake on our part of the said requirements, covenants, agreements, stipulations, restrictions and conditions."

3. Shanmukham, J., who heard the matter, however, found that the claim made by the Contractor under this head did not relate to any alleged misunderstanding or misconception or mistake at the part of the requirements, covenants, agreements, stipulations, restrictions, and conditions set out in the contract document and quoted clause 3(2) of the tender to substantiate his conclusion under which clause it was stated.

> "Tenderers must satisfy themselves fully before tendering by a personal examinationof the site of the proposed work to study about soil conditions, availability of water, power etc. by examination of the plans and specifications attached with tender equiry and by other means as they prefer as to the accuracy and sufficiency of the statement of quantities and all terms and conditions attached with tender enquiry and shall not at any time after the submission of their offer dispute or complain of such statement of quantities nor assert that there was any misunderstanding in regard to the nature or amount of the work to be done or facilities mentioned above nor in consequence apply for extension of time for completion beyond the date of completion of job as covered in the agreement."

On that basis, the learned Judge observes,

"The claim made by the petitioner is that the quantity of hard rock was not as expected but was something more, but then there is no dispute with regard to the total quantity involved in the work. The dispute only related to the quantity of hard rock, compared to soft soil. So long as there is no dispute regarding the total quantity of work to be done, there is no room for the application of this provision. There is nothing in the contract which has disabled the contractors to make the claim relating to the excavation in hard rock. If there is no such prohibition even impliedly the contractor is entitled to be paid because the petitioner had the benefit of such work. As a matter of fact, there is no dispute about the quantity of work so done. Then the matter is certainly within the competence of the Arbitrator, because under arbitration clause II-1 at page 30 Vol.III the arbitrator shall also have power to open up, review and revise any certificate, opinion, decision, requisition or notice, save in regard to the matters expressly exempted and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid. Thus, the arbitrator has wide powers to determine all matters between the two contracting parties, namely the petitioner and the Contractor. Consequently, any decision of the arbitrator turns on a dead question of fact and cannot be impeached under Sec.30 of the Arbitration Act, because such a decision will not amount to an error apparent on the face of the record."

4. Coming to the second objection, the learned Judge held that the dispute under this head turned on pure question of fact and to the third objection that it arose from the combined effect of the agreement and the assurance given to the contractor on behalf of the petitioner, to the fourth objection that as material had been placed before him as to how the award suffered and to the fifth objection that a reading of clause 9(2) of the agreement meant that if there is any cause beyond the control of both the contracting parties, then the Project Manager of the Appellant Corporation will be provided an opportunity to assess the delay and hindrance observed:

"In the instant case, it is common ground that there were delays by the petitioner in supplying the drawings with complete and required details piecemeal without clarity, resulting in the contract, applied for clarification, and so it is not necessary to recapitulate several causes for the delay, as they are attributable to the petitioner. According to the contractor, it is because of this delay for which the petitioner is solely responsible, they were constrained to extend their stay at the project which caused them loss to the extent of Rs.1,10,056-26 P.Though this contingency was not contemplated under the contracts the petitioner is entitled to be paid damages that he has suffered on account of the delay for which the petitioner alone is responsible. As long as the delay was not due to any of the laches on the part of the contractor, certainly, it is not only just but also legal that the petitioner shall pay for the extended stay. I do not find, therefore, any error to warrant interference with the award under Sec.30 of the Arbitration Act.

5. Similarly, the learned Judge examined certain other items, such as overhead charges and the claim of interest to conclude that those were the questions not indicating any error of law committed by the Arbitrator, of misconduct of any kind by him.

6. The ambit under which the court can examine the validity of award of this kind is stated in a judgment of the Constitution Bench of the Supreme Court in *Raipur Development Authority v. M/s.Chokramal Contractors, (1989)2 S.C.C. 721.* The Supreme Court has said:

"The scheme of the Arbitration Act is to provide a domestic forum for speedy and substantial justice, untrammelled by legal technicalities, by getting the dispute resolved by a person in whom the parties have full faith and confidence. The award given by such a person under the scheme of the Act can be assailed only on very limited ground like those mentioned in Sec.30 of the Act. The result is that most of the awards at present are made rules of the court despite objections to their validity by the party against whom those awards operate. To have a provision making it obligatory for the arbitrator to give reasons for the award could be asking for the introduction of an infirmity in the award which in most cases is likely to prove fatal. Many honest awards would thus be set

> aside.
>
> Once the arbitrators are compelled to give reasons in support of the award, the inevitable effect of that would be that the validity of most of them would be challenged on the ground that the reasons or at least some of them are bad and not germane to the controversy. Sometimes, if four reasons are given in support of the award and one of the reasons is shown to be not correct or not germane the award would be challenged on the ground that it is difficult to predicate as to how far the bad reason which is not germane has influenced the decision of the arbitrator. Many awards would not survive court scrutiny in such circumstances.
>
> It is also noteworthy that in a large number of cases the arbitrator would be laymen. Although their final award may be an honest and conscientious adjudication of the controversy and dispute, they may not be able to insert reasons in the award as may satisfy the legal requirements and the scrutiny of the court. The arbitrators having been chosen by the parties, it would, in our opinion, be not correct to put extra burden on them of also giving reasons which are strictly rational and germane in the eye of law in support of their award. Once the parties have voluntarily chosen the arbitrators, presumably because they have faith in their impartiality, the law should not insist upon the recording of reasons by them in their award.
>
> The previous experience, in fact, points out that it is awarded incorporating reasons which have generally been quashed in court. The awards not giving reasons have survived the attack on their validity, unless the arbitrator is otherwise shown to have misconducted himself or his award suffers from some other technical defect."

Before we refer to another judgment of the Supreme Court in *M/s.Hind Builders v. Union of India, A.I.R. 1990 S.C. 1340,* we may take notice of the fact that the grounds of attack to the award are based solely on the award having been made for specific items of dispute enumerated therein in the manner extracted by us earlier. Otherwise, it is conceded that the award is not a speaking award. In M/s.Hind Builders the Supreme Court considered the arguments for the Union of India that award having been granted in respect of each item of claim was really a speaking award so far as it specified the amount granted in respect of each item of claim. The Supreme Court rejected the contention stating:

> "We have considered the respective contentions of the parties and we are of the opinion that the Division Bench erred in setting aside the award in so far it related to the sum of Rs.25,96,000. Though the annexure sets out the award of the arbitrators as against various items of claims, the mere enumeration of the heads of claim cannot be equated to an incorporation of the statement of claim by the contractors into the award. At any rate, the award does not relate the claims to the various clauses of the contract and the mere fact that the statement of claim refers to various items in the schedule to the contract does not result in the contract itself being incorporated as part of the award. No error can be found in the award unless one reads into it first the statement of claim and then the relevant clauses of the contract. But this cannot be done unless these documents are treated as incorporated in the award. This cannot be done."

This judgment of the Supreme Court is authority for proposition that merely because award is made for each item of claim, it cannot be treated as a speaking award or award with reasons stated therefor and further that items of claims enumerated in the award will not be related to the various clauses of the contract and conditions of contract will not be read in the award or deemed to have been incoporated in the award. In the instant case, therefore, unless the said declaration of law by the Supreme Court is ignored it will not be permissible to read in the award contents of the various clauses of the contract and then to find out whether there has been any error of law or calculation done by the arbitrator. Learned counsel for the appellant however has placed reliance upon a judgment of the Supreme Court in *Continential Construction Co. Ltd. v. State of U.P., 1988 S.C. 1166,* to contend that in any case the award of interest by the arbitrator and award beyond the claim of the contractor by the arbitrator have to be set aside as atleast in this matter the arbitrator could be said to have misconducted himself. According to the learned counsel, there would always be an inherent objection to any award beyond the cliam of the

party and to the interest which is not stipulated in the contract. The arbitrator will be deemed to have misconducted himself in not deciding the objections in this behalf. In *Continential Construction Co. Ltd. v. State of U.P., 1988 S.C. 1166,* a specific issue had been referred to the arbitrator. The arbitrator however had answered the issue by a non-speaking award, after referring to an earlier judgment of the Supreme Court in *Seth Thawardas v. Union of India, (1955)2 M.L.J. (S.C.) 23: 1955 S.C.T. 445: (1955)2 S.C.R. 48: A.I.R. 1955 S.C. 468,* the court observed:

> "If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does, he can be set right by the Court provided his error appears on the face of the award. In this case, the contractor having contracted, he cannot go back to the agreement simply because it does not suit him to abide by it."

The Supreme Court also rejected the contention that if specific issues referred to the arbitrator are answered by a non-speaking award, there is no mistake of law apparent on the face of record. The Supreme Court approved the view of the District Judge saying:

> "this being a general question, in our opinion, the District Judge rightly examined the question and found that the appellant was not entitled to claim for extra cost in view of the terms of the contract and the arbitrator misconducted himself by not considering this objection of the State before giving the award."

This is evidently distinguishable on facts. Since there were specific issues framed and referred by the District Judge to the arbitrator, the terms of the contract were very much incorporated in the reference and the consequent award. Moreover to answer a general objection, it had become necessary to refer to the terms of the contract and once the Court referred to the terms of contract and found that any claim for extra cost was not contemplated and also that such objection has been raised before the arbitrator, there was no other conclusion possible. We are afraid if we permit any reference to the terms of the contract to find out whether the arbitrator has misconducted himself or not, we shall be committing a serious error of law. We also think that any examination of the question of interest in the award therefore is not possible in the instant case. The only inhibition which courts have recognised upon the jurisdiction of the arbitrator to award interest is that interest could not be awarded for the period prior to the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive law entitling the plaintiff to recover interest and that it must be assumed that the arbitrator will have the same power to award interest as the court - see *Nachiappa Chettiar v. Subramaniam Chettiar, A.I.R. 1960 S.C. 307, Satindar Singh v. Umarao Singh, A.I.R. 1961 S.C. 909, Union of India v. Sungo Steel Furniture Pvt. Ltd., A.I.R. 1967 S.C. 1032* and *State of Madhya Pradesh v. Saith and Skeleton Pvt. Ltd., A.I.R. 1972 S.C. 1507.* In *M/s.Hind Builders v. Union of India, A.I.R. 1990 S.C. 1340,* however, Supreme Court has added:

> "While this is the position in cases which arose prior to the coming into force of the Interest Act, 1978 in cases arising after the coming into force of the Acts, the position now is that though the award of *pendente lite* interest is still governed by the same principles, the award of interest prior to the suit is now governed by the Interest Act, 1978. Under the Interest Act, 1978, an arbitrator is by definition, a court and may now award interest in all the cases to which the interest Act applies."

Thus, it is not a case in which without reference to the contents of the contract and various terms and conditions therein, it will be possible to say that award of interest has been illegal and thus the arbitrator misconducted himself in making such an award. In view of the above, we do not find any force in the contentions of the learned counsel for the appellant that there are questions of any legal misconduct of the arbitrator to be examined with reference to the various terms of the contract. The award for all purposes is final. The learned single Judge has committed no error of law in rejecting the objections of the appellant. There is no merit in the appeal. The appeal is accordingly dismissed. However, on the facts and in the circumstances of

the case, there will be no order as to costs.

B.S. ---- *Appeal dismissed.*

[Full Bench]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram, Actg.C.J., Srinivasan* and *Somasundaram, JJ.*

W.P.No.6191 of 1990 *22nd January, 1992.*

Philip Jeyasingh ...*Petitioner*

v.

The Joint Registrar of Co-operative Societies, Chidambaranar Region, Tuticorin and others ...*Respondents.*

(A) Precedents - Judgments of Full Benches - Binding nature of.

It is common knowledge that Full Benches are constituted specially for deciding specific questions referred to them. The Judgment of the Full Bench is binding precedent as it expresses the collective opinion of the Court as such. It is binding on a single Judge as well as a Division Bench until it is reversed by a higher court. Mere expression of dissatisfaction by their Lordships of the Privy Council about the principles decided by a Full Bench of a High Court was not sufficient to take away their authority until the Privy Council expressed a definite disagreement with them. A Full Bench is a final court of Appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law and if the later Bench does not accept as correct the decision of the earlier Bench, the only right and proper course to adopt is to refer the matter to a Full Bench. *[Para 2]*

(B) Precedents - Law of - Principles - Exceptions to rule of precedents.

The following principles can be culled out from the myriad case laws. (a) A single Judge is bound by the decision of a Division Bench and if he does not agree with it he shall refer it to a larger Bench (b) *a fortiori*, he is bound by the judgment of a Full Bench and if he does not agree with its ratio, he shall place the papers before the Chief Justice to consider whether a larger Bench should be constituted for considering the question (c) A Division Bench is bound by the decision of another Division Bench and if it wants to differ, it shall refer the matter to the Full Bench (d) A *fortiori* a Division Bench is bound by the decision of a Full Bench and if it wants to differ, it shall place the papers before the Chief Justice to consider whether a larger Bench should be constituted for reconsidering the question (e) the decision of a Full Bench is binding on the court including a subsequent Full Bench until it is overruled by a larger Bench specially constituted by the Chief Justice for deciding the question. (g) Even the *obiter dicta* of a Full Bench is entitled to great weight. (h) The binding effect of a prior decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided (i) the decision of the Supreme Court is binding on the High Court and the latter cannot ignore it on the ground that some relevant provisions of law were not brought to the notice of the Supreme Court or some aspects of the matter in question were not considered by the Supreme Court. *[Para 19]*

Halsbury's Laws of England sets out three exceptions to the rule of precedents. (1) The Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow (2) it is bound to refuse to follow a decision of its own which although not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords and (3) the Court of Appeal is not bound to follow a decision of its own if given *per incuriam*. Courts in this country have followed the same principles and recognised the same three exceptions to the rule of precedent. *[Paras 21 and 24]*

(C) Per incuriam - Meaning of - Principles of.

The literal meaning of the expression 'Per incuriam' is 'through want of care'. (1) A judgment is *per incuriam* if it is rendered in ignorance of a binding authority. (2) A judgment is *per incuriam* if it is rendered in ignorance of a statute or a rule having the force of a statute. (3) A judgment is not *per incuriam* because it is based on a wrong understanding of the law or a binding precedent and (4) A judgment is not *per incuriam* because the reasoning is wrong in the opinion of the subsequent

Bench. *[Paras 27 and 46]*

(D) Obiter dictum - Meaning of.

The expression 'obiter dictum' means 'that which is said in passing'. In Mozley and Whitely's Law Dictionary, 7th Edition at page 240, it is defined as 'a dictum of a Judge on a point not directly relevant to the case before him'. If a Court expresses its opinion on a point which has not arisen for consideration in the case, it is not binding as a precedent. What is binding in a judgment is only the '*ratio decidendi*' which means the reason or principle on which a case is decided. *[Para 47]*

(E) Full Bench decision in Tamilarasan's case, (1989)1 L.L.J. 588, if per incuriam or *obiter dicta.*

It was contended that the judgment of the Full Bench is *per incuriam* as it has not expressly referred to the provisions of the Tamil Nadu Co-operative Societies (Appointment of Special Officers) Act (XXV of 1976), whereunder the Boards of Management of Co-operative Societies were superseded and Special Officers were appointed by the Government to manage the societies. In para. 11 of its judgment, the Full Bench referred expressly to the reliance placed by one of the Counsel on the provisions of Tamil Nadu Act XXV of 1976, in particular the preamble to the Act and Secs.3 and 4 thereof. That argument was rejected by the Full Bench in paragraph 24 of its judgment. The said Act has substituted only the Board of Management by the Special Officer and has not changed the character or status of a Co-operative Society. Thus the question has been specifically considered and decided. The fact that sections of the Act are not extracted and that they have not been referred to in paragraph 24 or any other part of the judgment would not mean that the Full Bench acted in ignorance of the provisions of the said Act or forgot about the same. *[Para 54]*

It is contended that the facts the *Dhanoa's case, A.I.R. 1981 S.C. 1395,* were distinguishable and the judgment of the Supreme Court was wrongly understood and invoked by the Full Bench. A careful perusal of the judgment in *Dhanoa's case, A.I.R. 1981 S.C. 1395,* does not warrant such distinction. The basic principle on which *Dhanoa's case, A.I.R. 1981 S.C. 1395,* was decided was that a Co-operative Society was not a statutory body as it was not created by a statute. The change in the management of the society by supersession of the entire Board of Management, statutorily or otherwise or placing the management in the hands of a Government servant without superseding the Board of Management would not make any difference in the eye of law in view of the basic principles that a society is not a statutory body as it is not a creature of a statute. Even assuming for the sake of argument without admitting that the reliance placed by the Full Bench on S.S.Dhanoa was erroneous, it would not make the judgment *per incuriam.* It would at worst be only an erroneous understanding of the judgment of the Supreme Court by the Full Bench. That will not certainly render it *per incuriam.* *[Para 55]*

A comparison of the provisions of Tamil Nadu Act (XXV of 1976) with that of the Bihar Act as found in the judgment in *Brij Bihari Singh's case, (1989)37 B.L.J.R. 219,* shows that the two Acts are entirely different and they are not *pari materia.* The Division Bench is, therefore in error in holding that the reasoning in *Brij Bihari Singh's case, (1989)37 B.L.J.R. 219,* would hold good with reference to Tamil Nadu Act XXV of 1976 and that the Full Bench is *per incuriam* as it has not adopted that reasonings. *[Para 59]*

The judgment of the Full Bench is not invalidated by the *sub-silentio* rule also. No argument or separate reasoning is needed to say that the decision of the Full Bench is not *obiter dicta.* It was necessary for the Full Bench to decide the question of whether a society managed by a Special Officer was amenable to the jurisdiction under Art.226 of the Constitution of India. The Court is inclined to characterise the contention that the judgment of the Full Bench is *obiter dicta* as unintelligible. *[Paras 56 and 57]*

Therefore, this Court has no hesitation in holding that the judgment of the Full Bench in *R.Tamilarasan v. Director of Handlooms and Textiles, (1989)1 L.L.J. 588,* is not *per incuriam* or *obiter dicta* and the views taken by the Division Bench in *A.Natarajan v. Registrar of Co-operative Societies,* is not correct. The Court also holds that the judgment of the Full Bench is a valid precedent binding on the Division Bench and Single Judges of this Court as well as subordinate Courts. *[Para 63]*

(F) Constitution of India (1950), Art.136 - Petition for Special Leave - Dismissal by a non-speaking order - Effect of.

It is elementary principle that the dismissal of a special leave petition by the Supreme Court by a

non speaking order will be ineffective as an authority or a binding precedent. Such dismissal without indicating the grounds or reasons therefor, must, by necessary implication be taken to be that the Supreme Court had decided only that the case was not fit for grant of special leave. *[Para 58]*

Cases referred to:

R.Tamilarasan v. Director of Handlooms and Textiles, (1989)1 L.L.J. 588; A.Natarajan v. Registrar of Co-operative Societies, (1992)1 M.L.J. 63: (1991)2 L.L.J. 296; Jai Sri v. Raj Dewan, (1962)1 M.L.J. (S.C.) 258: (1962)1 An.W.R. (S.C.) 258: (1962)1 S.C.J. 578: (1962)2 S.C.R. 558: A.I.R. 1962 S.C. 83; Seshamma v. Venkata Narasimharao, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356; Harrisan v. Ridgway, (1925)133 L.T. 238; Bakinsky v. Jacobs, (1929)1 K.B. 24; Philips v. Coppoing, (1935)1 K.B. 15; Bilmoria v. Central Bank of India Ltd. Bombay, A.I.R. 1943 Nag. 340; Virayya v. Venkata Subbayya, A.I.R. 1955 A.P. 215: 1955 An.W.R. 271; Lala Shri Bhagwan v. Ramchand, A.I.R. 1965 S.C. 1767; Eknath v. State of Maharashtra, A.I.R. 1977 S.C. 1177; Brij Bihari Singh v. State of Bihar, (1989)2 B.L.J.R. 219; Assistant Collector v. Dunlop India Ltd., A.I.R. 1985 S.C. 330; Rookes v. Banard, 1964 A.C. 1129; Balakrishna Rao v. Haji Abdulla Sait, (1980)1 M.L.J. 30 (S.C.); Somawanti v. State of Punjab, (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.J. 35: (1963)2 S.C.R. 774: A.I.R. 1963 S.C. 151; Mahadeolal Komodia v. The Administrator General of West Bengal, A.I.R. 1960 S.C. 936; Ningappa v. Emperor, A.I.R. 1941 Bom. 408; Enamullah v. Komsher Ali, 54 Cal. 256; Emperor v. Purushottam Ishwar, 45 Bom. 834; K.R.Sankaralingam Pillai v. Veluchami Pillai, (1942)2 M.L.J. 678: 205 I.C. 1: I.L.R. 1943 Mad. 509: A.I.R. 1943 Mad. 43: 55 L.W. 794; Jai Kaur v. Sher Singh, A.I.R. 1960 S.C. 1118; T.G.Mudaliar v. State of Tamil Nadu, A.I.R. 1973 S.C. 974: (1975)1 S.C.C. 536; Anil Kumar Necotia v. Union of India, A.I.R. 1988 S.C. 1353; Kesho Ram and Company v. Union of India, (1989)3 S.C.C. 151; Kamalammal v. Venkatalakshmi, (1965)2 M.L.J. (S.C.) 122: A.I.R. 1965 S.C. 1349; Lala Shri Bhagwan v. Ram Chand, A.I.R. 1965 S.C. 767; Punam Chand v. Subhakaran, A.I.R. 1969 Cal. 547; Ballabhdas Mathuradas Lakani v. Municipal Committee, Madkapur, A.I.R. 1970 S.C. 1002; Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Company v. The State of Andhra Pradesh, A.I.R. 1972 S.C. 51; Punjab University v. Vijay Singh Lamba, A.I.R. 1976 S.C. 1441; Ekanath Shankarao Mukhawar v. State of Maharashtra, A.I.R. 1977 S.C. 1177; Balakrishna Rao v. Haji Abdulla Sait, (1980)1 M.L.J. (S.C.)20; Pritan Kaur v. Surjit Singh, A.I.R. 1984 P.& H. 113; Ayaswami Gounder v. Munuswamy Gounder, (1984)4 S.C.C. 376: A.I.R. 1984 S.C. 1789; Sonal Sihimappa v. State of Karnataka, A.I.R. 1987 S.C. 2369; S.I.P. Corporation of Tamil Nadu Ltd. v. Arputharaj, A.I.R. 1991 Mad. 116; Sundaradas Kanyalal Bhathija v. The Collector, Thane, A.I.R. 1991 S.C. 1893; Union of India v. Raghubir Singh, A.I.R. 1989 S.C. 1933: (1989)2 S.C.C. 754; Young v. Bristol Aeroplane Company Ltd., (1944)2 All E.R. 293; Worcester Works Finance Ltd. v. Cooden Engineering Company Ltd., (1971)3 All E.R. 708; R v. Cuminghum, (1981)2 All E.R. 863; Paul Wilson and Company v. Bhoumanhal, (1983)1 All E.R. 34; Fitzlert Estates Ltd. v. Cherry Inspector of Taxes, (1977)3 All E.R. 996: (1977)1 W.L.R. 1345; Chancery Lame Safe & Deposit and Offices Company Ltd. v. I.R.C., (1966)1 All E.R. 1: 1966 A.C. 85; Jaisri Sahu v. Rajdewan Dubey, A.I.R. 1962 S.C. 83; Ramashrey Roy v. Pashupati Kumar Pathak, A.I.R. 1968 Pat. 1; Yeshbai v. Ganpat Irappa Jangan, A.I.R. 1975 Bom. 20; Panjumal Hasomal v. Harpal Singh, A.I.R. 1975 Bom. 120; Mamleshwar v. Kanahaiya Lal, A.I.R. 1975 S.C. 907; Rama Rao v. Shantibai, A.I.R. 1977 M.P. 222; Sitaram Hari Shankhe v. Laxman Rambodh Dubey, A.I.R. 1980 Bom. 55; Thuraka Onuramma v. Tahsildar, Kadiri, A.I.R. 1980 A.P. 267; Pritam Kaur v. Surjit Singh, A.I.R. 1984 P.& H. 113; Syed Mohideen v. Government of Tamil Nadu, A.I.R. 1986 Mad. 188; A.R.Antulay v. R.S.Nayak, A.I.R. 1988 S.C. 1531; Municipal Corporation of Delhi v. Gumam Kaur, (1989)1 S.C.C. 101; Punjab Land Development and Reclaim Corporation Ltd. v. Presiding Officer, Labour Court, (1990)2 L.L.J. 70; Krishnakumar v. Union of India, (1990)4 S.C.C. 207; State of U.P. v. Synthetics and Chemicals Ltd., (1991)4 S.C.C. 139; Abdul Malick v. The Collector of Dharmapuri, (1968)1 M.L.J. 9; Morelle Ltd v. Wakeling, (1955)2 Q.B. 379; Farrell v. Alexander, (1976)1 Q.B. 345; Zinuerman v. Grossman, (1972)1 Q.B. 167; Zimmeman v. Gnosswan, (1972)1 Q.B. 167; Industrial Properties v. Associated Electrical Industries Ltd., (1977)2 All E.R. 293; Brwner Vilcan v. South India Shipping Corporation, (1981)1 All E.R. 289; Virayya v. Venkata Subbayya, A.I.R. 1955 A.P. 215; Ramashrey Roy v. Pashupati Kumar Pathak, A.I.R. 1968 Pat. 1; Yeshbhai v. Ganpat Iruppa

Jangan, A.I.R. 1975 Bom. 20; Panjumal Hassomal v. Harpal Singh Abanshi Singh, A.I.R. 1975 Bom. 120; Mamleshwar Prasad v. Kanhaiya Lal, A.I.R. 1975 S.C. 907; Rama Rao v. Shantibai, A.I.R. 1977 M.P. 222; Sitaram Hari Sahunkhe v. Laxman Rambodh Dubey, A.I.R. 1980 Bom. 55; Nayagarh Co-operative Central Bank Ltd. v. Narayan Rath, A.I.R. 1977 S.C. 112; S.S.Dhanoa v. Municipal Corporation of Delhi, A.I.R. 1981 S.C. 1395; Municipal Corporation of Delhi v. Gumman Kaur, (1989)1 S.C.C. 101; Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust, A.I.R. 1978 S.C. 1283; Indian Oil Corporation Ltd. v. State of Bihar, A.I.R. 1986 S.C. 1780: (1986)4 S.C.C. 146; Employees Welfare Association v. Union of India, A.I.R. 1990 S.C. 334.

V.Shanmugham, for Petitioner.

G.Rajagopalan, Special Government Pleader (Writs), for Respondent Nos.1 and 2.

C.Chinnaswami, Senior Counsel, for *M/s.T.N.Vallinayagam, P.Govindarajan* and *C.Jayakumar* for Respondent No.3.

The Order of Reference was made by

D.Raju, J. (27.9.1991): The above writ petition though originally filed as one for a writ of *mandamus* was allowed to be converted as one for the issue of a writ of *certiorari* to quash the order of dismissal dated 14.5.1991 made by the third respondent, the Special Officer of the Nazreth Urban Co-operative Bank Ltd., Tirunelveli District. It is not necessary for me to dwell into the details of the case or the merits of the respective claims of the parties. Suffice it to point out that the respondents have filed a counter affidavit raising a preliminary objection that in view of the Full Bench decision of this Court, since reported in *R.Tamilarasan etc. v. Director of Handlooms and Textiles and others, (1989)1 L.L.J. 588,* the writ petition is not maintainable. On the other hand, the learned counsel for the petitioner relies upon a subsequent decision of a Division Bench of this Court dated 3.7.1991 in W.P.No.12811 of 1984 *A.Natarajan and others v. Registrar of Co-operative Societies and others since reported in (1991)2 M.L.J. 63: (1991)2 L.L.J. 296,* and contended that the Full Bench decision referred to supra does not stand in the way of the writ petitioner maintaining this writ petition under Art.226 of the Constitution of India.

2. Heard the learned counsel and gone through both the judicial pronouncements referred to above. In my view, judicial propriety and decorum counsel me to place the above matter before My Lord, the Honourable the Chief Justice for a solution and if found necessary by my Lord to form a larger Bench for an appropriate consideration of the matter, both on the competency of Division Bench claiming the authority to declare decision of Full Bench to be not binding on the principle of *per incuriam* or *obiter dicta* as well as on the question of maintainability of a writ petition under Art.226 of the Constitution of India against a Co-operative Society, administered by the Board of Management or a special officer appointed in the place or in substitution of the said Board of Management of the Society.

3. With great respect and deepest deference to the learned Judges of the Division Bench who decided the case reported in *A.Natarajan and others v. Registrar of Co-operative Societies and others since reported in, (1991)2 M.L.J. 63: (1991)2 L.L.J. 296,* I am unable to subscribe to the course of action adopted by the Division Bench. The reasons which propel me to adopt this course are as hereunder. There can be no controversy over the position that we are still following the law of precedents and the same is recognised and approved to be the law of this land, and consequently we have to abide by certain well settled principles. A Constitution Bench of the Apex Court, in the decision reported in *Jai Sri v. Raj Dewan, A.I.R. 1962 S.C. 83: (1962)1 M.L.J. (S.C.) 258: (1962)1 An.W.R. (S.C.) 258: (1962)1 S.C.J. 578: (1962)2 S.C.R. 558,* has laid down the position to be thus:

> (10) Considering this question, a Full Bench of the Madras High Court observed in *Seshamma v. Venkata Narasimharao, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356 at 362 (F.B.)*:
>
> "The Division Bench is the final Court of appeal in an Indian Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England, where there is the Court of Appeal, Division Courts follow the decisions of other Divisional Courts on the grounds of judicial comity: See the *Vera Cruz (No.2), (1884)9 P.D. 96, Harrison v. Ridgway, (1925)133 L.T. 238, Ratkinsky v. Jacobs, (1929)1 K.B. 24* and *Philips v. Copping, (1935)1 K.B. 15.* If a Division Bench does not accept as correct the

decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this Court provide. If this course is not adopted, the courts subordinate to the High Court are left without guidance. Apart from the impropriety of an appellate Bench refusing to regard itself bound by a previous decision on a question of law of an appellate Bench of equal strength and the difficulty placed in the way of subordinate Courts administering justice, there are the additional factors of the loss of money and the waste of judicial time."

"Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions, and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled. It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question, and a contrary decision is given without reference to the earlier decision. The question has also been discussed as to the correct procedure to be followed when two such conflicting decisions are placed before a later Bench. The practice in the Patna High Court appears to be that in those cases, the earlier decision is followed and not the later. In England the practice is, as noticed in the judgment in *Seshamma v. Venkata Narasimharao, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356 (F.B.)*, that the decision of a Court of Appeal is considered as a general rule to be binding on it. There are exceptions to it, and one of them is thus stated in Halsbury's Laws of England. Third Edition Vol. 22, para 1687 pp.799-800:

"The Court is not bound to follow a decision of its own if given *per incuriam*. A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of a co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords." In the former case it must decide which decision to flow, and in the latter it is bound by the decision of the House of Lords."

In *Virayya v. Venkata Subbayya, A.I.R. 1955 A.P. 215: 1955 An.W.R. 271*, it has been held by the Andhra High Court that under the circumstances aforesaid the Bench is free to adopt that view which is in accordance with justice and legal principles after taking into consideration the views expressed in the two conflicting Benches, *vide* also the decision of the Nagpur High Court in *D.D.Bilimoria v. Central Bank of India Ltd. Bombay, A.I.R. 1943 Nag. 340. The better course would be for the Bench hearing the case to refer the matter to a Full Bench in view of conflicting authorities without taking upon itself to decide whether it should follow the one bench decision or the other.*

We have no doubt that when such situations arise, the Bench hearing cases would refer the matter for the decision of a Full Bench." (Emphasis supplied)

4. In *Lala Shri Bhagwan and another v. Ramachand and another, A.I.R. 1965 S.C. 1767*, where Chief Justice, P.B.Gajendragadkar spoke for the Court, it has been laid down as follows:

"It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry stating as a single Judge, *but should refer the matter to a Division Bench or in a proper case place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question.* That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and choose to examine question himself." *(Emphasis mine)*

5. In *Eknath v. State of Maharashtra, A.I.R. 1977 S.C. 1177*, P.K.Goswami, J. speaking for the bench observed as follows:

"When there was a decision of a co-ordinate Court, it was open to the learned Judge to differ from it but in that case the only judicial alternative was to refer it to a larger Bench and not to dispose of the appeal by taking a contrary view. Judicial discipline as well as decorum should suggest that as the only course."

6. The Division Bench has chosen to come to the

conclusion that the judgment of the Full Bench of this High Court is *per incuriam* because it does not take notice of the law as laid down by the Patna High Court in *Brij Bihari Singh v. State of Bihar, (1989)2 B.L.J.R. 219*, which was said to have been affirmed by the Supreme Court of India in the sense that after notice in the special leave petition, the petition for leave was dismissed and also for not taking into account the relevant provisions of the Tamil Nadu Co-operative Societies (Appointments of Special Officers) Act, 1976. The Division Bench was also of the view that the decision of the Full Bench is an *obiter dicta* because according to the Division Bench the only question before the Full Bench was whether writ would be against a co-operative society under Art.226 of the Constitution of India. Apart from the fact that the view that because the special leave petition against a decision of a High Court is dismissed, though after notice, it amounts to an affirmation of the law laid down by the Division Bench of the Patna High Court, by the Supreme Court is a debatable proposition by itself, would the judgment of the Full Bench be rendered *per incuriam* only because a judgment of another High Court is not noticed? The consideration by the Full Bench in paras 8, 15 and 24 of its decision would go to show that the Full Bench was not oblivious to the position of the Special Officers and on the other hand, the Full Bench was of the view that it did not make any difference to the question to be decided by it. The absence of reference to the provisions of the 1976 Act does not mean that it was not in the consideration of the Full Bench when it decided the issue. The ground of *obiter dicta* also, in my view, does not appear to be appropriate having regard to the larger nature of the issue actually before the Full Bench, the nature of consideration at length and the ultimates specific and definite conclusion rendered.

7. In my considered view, where there is a decision of the Full Bench, a Division Bench or a learned single Judge of the very same court cannot afford to take a different view either on the ground of *per incuriam* or *obiter dicta* but the only judicial alternative for such a Bench would be to refer the matter to the Hon'ble the Chief Justice for having the same considered by a larger Bench and a judgment of the larger Bench cannot be avoided to take a contrary view unless there is a direct and categorical pronouncement of the Supreme Court on the point and the mandate of Art.141 of the Constitution of India intervenes. The decision of this Court in, *Syed Mohideen v. Government of Tamil Nadu, A.I.R. 1986 Mad. 188 (F.B.)*, was one rendered in a case which came before the Full Bench on a reference by the Division Bench consisting of learned Chief Justice Mr.M.N.Chandurkar and T.Sathiadev, J., when the learned Judges doubted the correctness of an earlier Division Bench Judgment on the ground that vital statutory Rules made under Art.309 were not considered by the earlier Division Bench, while rendering its decision and that the rules which were omitted to be noticed made all the difference to the actual determination of the issue. Aspects like the principle of *per incuriam* or *obiter dicta* are in my view only reasons justifying deviation from a decision without overruling it and it is not given to a smaller Bench of a Court to avoid the decision of a larger Bench which is otherwise binding upon such smaller Bench even for such reasons.

8. For the matter now under consideration by me it would be appropriate to refer to in support of my conclusions supra the decision of the Apex Court in *Assistant Collector C.E. v. Dunlop India Ltd., A.I.R. 1985 S.C. 330*, and particularly the observations at page 334 onwards as hereunder:

> "We desire to add and as was said in *Cassel and Co. Ltd. v. Broome, 1972 A.C. 1027*, we hope it will never be necessary for us to say so again that in the hierarchical system of Courts which exists in our country, it is necessary for each lower 'tiers, including the High Court, 'to accept loyally the decisions of the higher tiers'. "It is inevitable in a hierarchical system of Courts that there are decisions of the Supreme Appellate Tribunal which do not attract the unanimous approval of all members of the Judiciary.....But the judicial system only works if someone is allowed to have the last word and that last word, once spoken, is loyally accepted. Observations of Lord Hailsham and Lord Diplock in *Broome v. Cassell.* The better wisdom of the court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system. In *Cassel v. Broome*, commenting on the Court of Appeal's comment that *Rookes v. Barnard, 1964 A.C. 1129*, was rendered *per incuriam*, Lord Diplock observed:
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> "The Court of Appeal found themselves able

to disregard the decision of this house in *Rookes v. Barnard, 1964 A.C. 1129,* by applying to it the label *per incuriam*. That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to this right to disregard a decision of a higher appellate court or to the right of judge of the High Court to disregard of the High Court to disregard a decision of the Court of Appeal."

It is needless to add that in India under Art.141 of the Constitution the law declared by the Supreme Court shall be binding on all courts within the territory of India and under Art.144 all authorities, civil and judicial in the territory of India shall act in aid of the Supreme Court.

9. In yet another decision of the Apex Court reported in *Balakrishna Rao and others v. Haji Abdulla Sait and others, (1980)1 M.L.J. 20 (S.C.),* the Court emphatically laid down the position as follows:

"(20) From the facts of *Mool Chand Gupta's Case, 88 L.W. 410,* it is clear that the Division Bench of the Madras High Court had held that a tenant whose tenancy had been terminated with effect from 31st October, 1960 and against whom a decree for eviction had been passed prior to the date on which Sec.3 of the Amending Act came into force was entitled to be treated as a tenant by virtue of the said provision since he had continued to remain in possession of the property even after the termination of the tenancy. The only ground on which the Division Bench which heard the present case did not follow the ruling in *Mool Chand Gupta's Case, 88 L.W. 410,* is that the effect of the termination of tenancy prior to the date on which Tamil Nadu Act XI of 1964 came into force had not been considered in that case. The binding effect of a decision, as observed by this Court in *Smt.Somawanti and others v. State of Punjab and others, A.I.R. 1963 S.C. 191: (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.J. 35: (1963)2 S.C.R. 774,* does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. On going through the decision in *Mool Chand Gupta's Case, 88 L.W. 410,* we are of the view that the appropriate procedure which the Division Bench should have followed in this case was to refer it to a Full Bench instead of by-passing the said decision in the manner in which it has been done in this case. The well-settled practice to be followed in such cases is succinctly put by Das Gupta, J. in *Mahadeolal Konodia v. The Administrator General of West Bengal, A.I.R. 1960 S.C. 936,* as follows:

"Before we part with this appeal, however, it is our duty to refer to one incidental matter. We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajan's case, (1953)58 C.W.N. 64,* was cited before the learned Judges who hear the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision of referring the question to a larger Bench. Judicial decorum not less than legal propriety forms the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of co-ordinate jurisdiction in a High Court start overruling one another's decision. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgment of their own High Court."

As far as we are aware it is the uniform practice in all the High Courts in India that if one Division Bench differs from an earlier view on a question of law of another Division Bench, a reference is made to a larger Bench.

10. The position and past experience being thus, there could not be much difference to the same even when there is a need for proper development of law and justice. On this view, I direct that these

papers may be placed before My Lord The Honourable the Chief Justice for consideration of both the issues adverted to by me *supra* in such appropriate form or manner as My Lord the Honourable the Chief Justice deems fit to avoid doubt and uncertainty on this vital aspect of law. The Order of the Full Bench was delivered by *Srinivasan, J.* on *22.1.1992*: *I. Question:* The question referred to us is:

"Can the judgment of the Full Bench in *R.Tamilarasan v. Director of Handlooms and Textiles, (1989)1 L.L.J. 588,* be characterised as one *per incuriam* or *"obiter dicta"*, as opined by the Division Bench of this Court in *A.Natarajan v. Registrar of Co-operative Societies, (1991)2 M.L.J. 63: (1991)2 L.L.J. 296*?"

II. Full Benches.

2. This is the first time in the long history of this Court, the judgment of a Full Bench is thrown over-board with the label *per incuriam* and brushed aside as *'obiter dicta'* by a Division Bench. It is common knowledge that Full Benches are constituted specially for deciding specific questions referred to them. The judgment of the Full Bench is binding precedent as it expresses the collective opinion of the Court as such. It is binding on a single Judge as well as a Division Bench until it is reversed by a higher court. Mere expression of dissatisfaction by their Lordships of the Privy Council about the principles decided by a Full Bench of a High Court was not sufficient to take away their authority until the Privy Council expressed a definite disagreement with them. *Vide Anant Ram and others v. Khushal Singh and others, A.I.R. 1927 All. 244.* In *Gundavarapu Seshamma v. Kornepati Venkata Narasimha Rao and others, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356 (F.B.)* a Full Bench is a final court of Appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law and if the later Bench does not accept as correct the decision of the earlier Bench, the only right and proper course to adopt is to refer the matter to a Full Bench. The Full Bench pointed out that if the said course was not adopted, the courts subordinate will be left without guidance and there would be loss of money and waste of judicial time. In *Ningappa v. Emperor, A.I.R. 1941 Bom. 408,* Beamont C.J., observed that a later Full Bench cannot overrule an earlier Full Bench merely because the later Bench comprised of more Judges. He expressed himself thus:

"There can be no doubt that a Full Bench can overrule a Division Bench, and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely because the later Bench consists of more Judges than the earlier. If that were the rule, it would mean that a bench of seven Judges, by a majority of four to three, could overrule a unanimous decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In *Enamullah v. Kowsher Ali, 54 Cal. 266,* Sanderson, C.J. stating the practice in Calcutta seems to have been of opinion that a decision of a Full Bench could only be reversed by the Privy Council or by a bench specially constituted by the Chief Justice. Even if this be the true rule, there is nothing to show that the Chief Justice acted upon it in *Emperor v. Purushottam Ishwar, 45 Bom. 834.* I do not recollect myself over to have constituted Special Bench to consider the ruling of a Full Bench, though I have constituted many Full Benches to consider rulings of Division Benches."

In *K.R.Sankaralingam Pillai and another v. Veluchami Pillai and others, (1942)2 M.L.J. 678: 205 I.C. 1: I.L.R. 1943 Mad. 509: A.I.R. 1943 Mad. 43: 55 L.W. 794,* a Full Bench of this Court went to the extent of holding that an obiter dictum of a Chief Justice delivering the judgment of a Full Bench was entitled to great weight.

III. Precedents.

3. In *Mahadeolal Komadia v. The Administrator General of West Bengal, A.I.R. 1960 S.C. 936,* it was ruled thus:

"We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajan's case, (1953)58 C.W.N. 64: A.I.R. 1954 Cal. 119,* was cited before the learned Judges who heard the present appeal they took on themselves to say that the previous decision was wrong, instead of following the usual procedure in case of difference of opinion with an earlier decision, of referring the question to a larger Bench. Judicial decorum no less than legal propriety forms the basis of judicial procedure. If one thing is more

necessary in law than any other thing it is the quality of certainty. That quality would totally disappear if judges of co-ordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court."

(20) As far as we are aware it is the uniform practice in all the High Courts in India that if one Division Bench differs from an earlier view on a question of law of another Division Bench, a reference is made to a larger Bench. In Calcutta High Court a rule to this effect has been in existence since 1867. It is unfortunate that the attention of the learned Judges was not drawn in the present case to that rule. But quite apart from any rule, considerations of judicial propriety and decorum ought never to be ignored by courts in such matters."

4. In *Jai Kaur v. Sher Singh, A.I.R. 1960 S.C. 1118*, the Supreme Court held that a subsequent Division Bench cannot disagree with a previous decision of the Full Bench of the same Court. Referring to the above ruling in *Mahadeolal Komadia v. The Administrator General of West Bengal, A.I.R. 1960 S.C. 936*, the Court observed.

"If, as we pointed out there, considerations of judicial decorum and legal propriety require that Division Benches should not themselves pronounce decisions of other Division Benches to be wrong, such considerations should stand even more firmly in the way of Division Benches disagreeing with a previous decision of the Full Bench of the same court.

5. Reiterating the ruling in *Mahadeolal Komadia v. The Administrator General of West Bengal, A.I.R. 1960 S.C. 936*, the Supreme Court in *Jaisri Sahu v. Rajdewan Dubey and others, A.I.R. 1962 S.C. 83*, observed as follows after quoting with approval a passage in the judgment of the Full Bench of this Court in *Seshamma's case, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356 (F.B.)*:

"Law will be bereft of all its utility if it should be thrown into a state of uncertainty by reason of conflicting decisions and it is therefore desirable that in case of difference of opinion, the question should be authoritatively settled."

6. In *Somawanti v. State of Punjab, (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.J. 35: (1963)2 S.C.R. 774: A.I.R. 1963 S.C. 151*, it is held that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. This principle is reiterated in *T.G.Mudaliar v. State of Tamil Nadu, A.I.R. 1973 S.C. 974: (1975)1 S.C.C. 536; Anil Kumar Neotia v. Union of India, A.I.R. 1988 S.C. 1353* and *Kesho Ram and Company v. Union of India, (1989)3 S.C.C. 151.*

7. In *Kamalammal v. Venkatalakshmi, (1965)2 M.L.J. (S.C.) 122: A.I.R. 1965 S.C. 1349*, the Supreme Court deprecated the course taken by a single Judge of a High Court in refusing to follow the judgment of a Full Bench and ruled that not merely convention but rules framed by several High Courts require that where a learned single Judge or a Division Bench does not agree with a Full Bench decision, he or they either make a reference to the Full Bench or place the papers before the Chief Justice for such a reference being made. A similar ruling was rendered in *Lala Shri Bhagwan and another v. Ram Chand and another, A.I.R. 1965 S.C. 1767.*

8. In *Punam Chand v. Subhakaran, A.I.R. 1969 Cal. 547*, a Division Bench held that a Full Bench decision is always binding on a Division Bench unless and until the same is overruled by the Supreme Court.

9. In *Ballabhdas Mathuradas Lakani and others v. Municipal Committee, Malkapur, A.I.R. 1970 S.C. 1002*, it is held that the decision of the Supreme Court was binding on the High Court and the latter could not ignore it because they thought that relevant provisions were not brought to the notice of the Supreme Court.

10. In *Sri Venkateswara Rice, Ginning and*

Groundnut Oil Mill Contractors Company, etc. v. The State of A.P. and others, A.I.R. 1972 S.C. 51, it was observed:

"It is strange that a co-ordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judges who decided the latter case overlooked the fact that they were bound by the earlier decision."

11. In *Punjab University v. Vijay Singh Lamba, A.I.R. 1976 S.C. 1441,* though the Court recognised that judicial consistency was not the highest state of legal bliss, law must grow and it cannot afford to be static, observed that precedents should be stepping stones and not halting places; but at the same time cautioned that the weekly change in the composition of the court ought not to be accompanied by changes in its rulings.

12. In *Eknath Shankarrao Mukhawar v. State of Maharashtra, A.I.R. 1977 S.C. 1177,* it was held that judicial discipline as well as decorum suggested only one course when a Bench wanted to differ from the decision of a co-ordinate court and that was to refer to a larger Bench.

13. In *Balakrishna Rao v. Haji Abdulla Sait, (1980)1 M.L.J. (S.C.) 20: (1980)93 L.W.9 (S.N.),* the Supreme Court frowned upon the Division Bench of this Court which bypassed the ruling of an earlier Division Bench on the ground that a particular argument was not considered in the earlier case. Reiterating the principles laid down in *Somawanti v. State of Punjab, (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.J. 35: (1963)2 S.C.R. 774: A.I.R. 1963 S.C. 151* and *Mahadeolal Komadia v. The Administrator General of West Bengal, A.I.R. 1960 S.C. 936,* the Court observed that the Division Bench should have followed the procedure of referring the matter to a Full Bench in that case.

14. In *Pritam Kaur v. Surjit Singh, A.I.R. 1984 P. & H. 113,* Sandhawalia, C.J. presiding over a Full Bench traced the law of precedents in detail. Referring to the decisions of English Courts and the Supreme Court of India he observed,

"9. It would thus follow that once a precedent is held to be a binding one, then no deviation therefrom is permissible within the judicial polity except in the well accepted categories of cases enumerated hereafter in para 12 of this judgment.

10. It is equally necessary to highlight that the binding nature of precedents generally and of Full Benches in particular is the kingpin of our judicial system. It is the bond that binds together what otherwise might well become a thicket of individualistic opinions resulting in a virtual judicial anarchy. This is a self-imposed discipline which rightly is the envy of other Schools of Law. Because of the legal position here being axiomatic and well-settled it is unnecessary to elaborate the issue on principle.

11. Now apart from Full Benches and the precedents of the Superior Court, it would appear that even judgments of the Benches of the same High Court in a limited way are binding in the sense that a judgment cannot be rendered contrary to the earlier decision of co-equal Bench. At the highest, an equivalent Bench can seek reconsideration of the same by a larger Bench.

12. From the above, it would follow as a settled principle that the law specifically laid down by the Full Bench is binding upon the High Court within which it is rendered and any and every veiled doubt with regard thereto does not justify the reconsideration thereof by a larger Bench and thus put the law in a ferment afresh. The ratios of the Full Benches are and should be arrested on surer foundations and are not to be blown away by every side wind. *It is only within the narrowest field that a judgment of a larger Bench can be questioned for reconsideration. One of the obvious reasons is, where it is unequivocally manifest, that its ratio has been impliedly overruled or whittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court. Secondly, where it can be held with certainty that a co-equal Bench has laid the law directly contrary to the same. And, thirdly, where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam by altogether failing to take notice of a clear-cut statutory provision or an earlier binding precedent. It is normally within these constricted parameters that a smaller Bench may suggest a reconsideration of the earlier view and not otherwise. However, it is best in these matters to be neither dogmatic nor exhaustive yet the aforesaid categories are admittedly the well-accepted ones in which an otherwise binding*

precedent may be suggested for reconsideration. (Emphasis supplied)

14. However, it is equally apt to elaborate what cannot be a valid ground for questioning or reconsidering, the law settled by a larger Bench. The very use of the word 'binding' would indicate that it would hold the field despite the fact that the Bench obliged to follow the same may not, itself be in agreement at all with the view. It is a necessary discipline of the law that the judgments of the superior courts and of larger Benches have to be followed unhesitatingly whatever doubts one may individually entertain about their correctness. The rationale for this is plain because to seek a universal intellectual unanimity is an ideal too Utopian to achieve. Consequently, the logic and the rationale upon which the ratio of a larger Bench is rested, are not matters open for reconsideration. Negatively put, therefore, the challenge to the rationale and reasoning of a larger Bench is not a valid ground for unsettling it and seeking a re-opening and re-examination of the same thus putting the question in a flux afresh.

16. The argument aforesaid is plainly untenable on principle. If the ratios of larger Benches and the judgments of superior courts were to be merely rested upon the quicksands of the ingenuity of the counsel to raise some fresh or novel argument (which had not been earlier raised or considered) in order to dislodge them, then the hallowed rule of the finality of binding precedent would become merely a teasing mirage. It seems unnecessary to elaborate this aspect because it is clearly concluded by binding precedent."

15. In *Ayyaswami Gounder v. Munuswamy Gounder, (1984)4 S.C.C. 376: A.I.R. 1984 S.C. 1789,* it was held that a single Judge of a High Court not agreeing with earlier decision of single Judge of the same Court, should refer the matter to a larger Bench and propriety and decorum do not warrant his taking a contrary view.

16. In *Sonal Sihimappa v. State of Karnataka and others, A.I.R. 1987 S.C. 2359,* it was observed,

"In a precedent-bound judicial system, binding authorities have got to be respected and the procedure for developing the law has to be one of evolution."

17. In *S.I.P. Corporation of Tamil Nadu Ltd. v. Arputharaj, A.I.R. 1991 Mad. 116,* a Division Bench comprising two of us reiterated the law of precedents in the following words:

"In such a contingency, sitting as we do, as Judges of a Division Bench of this Court, we are bound by the interpretation and preference given by the Full Bench of this Court. This will be in consonance with the decorum of our judicial functioning. It is well settled that an interpretation (and equally a misinterpretation) by a larger Bench of the High Court, of a decision or decisions of the Supreme Court is binding on a smaller Bench of the same Court, and the latter cannot refuse to follow the decision of larger Bench, on the ground that the larger Bench has wrongly understood or construed the decisions of the Supreme Court. Taking note of this principle, we are obliged to hold that the appellants could not be held to have *locus standi* to prefer and prosecute these writ appeals."

18. In *Sundaradas Kanyalal Bhathija v. The Collector, Thane, A.I.R. 1991 S.C. 1893,* the law is stated thus:

"17. It would be difficult for us to appreciate the judgment of the High Court. One must remember the pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is subversion of judicial process not to follow this procedure."

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20. The Chief Justice Pathak, in a recent decision stressed the need for a clear and consistent enunciation of legal principle in the decisions of a Court. Speaking for the Constitution Bench *Union of India v. Raghubir Singh, A.I.R. 1989 S.C. 1933: (1989)2 S.C.C. 754,* learned Chief Justice said: (S.C.C. p. 766: A.I.R. p. 1939)

The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic

development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

Cardozo propounded a similar thought with more emphasis:

I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical justice as I must be impartial, and upon like grounds, it will not do to decide the same question one way between another. (The Nature of the Judicial Process by Benjamin N.Cardozo p.3).

Judicial Process by Benjamin, N.Cardozo p.3).

21. In our system of judicial review which is a part of our constitutional scheme, we hold it to be the duty of Judges of superior Court and Tribunals to make the law more predictable. The questions of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma whether to obey or not to obey such law and it ultimately falls into disrepute.

22. Judge Learned Hand has referred to the tendency of some judges who win the game by sweeping all the chessmen off the table. (The Spirit of Liberty by Alfred A Knopf, New York, (1953) p.131). This is indeed to be deprecated. It is needless to state that the judgment of superior courts and Tribunals must be written only after deep travail and positive vein. One should never let a decision go until he is absolutely sure it is right. The law must be made clear, certain and consistent. But certitude is not the test certainty and consistency does not mean that there should be no word of new content. The principle of law may develop side by side with new content but not inconsistencies. There could be waxing and waning the principle depending upon the pragmatic needs and moral yearnings. Such development of law particularly, is inevitable in our developing country. In *Union of India v. Raghubir Singh, A.I.R. 1989 S.C. 1933: (1989)2 S.C.C. 754,* learned Chief Justice Pathak had this to say *(1989)2 S.C.C. 754 at p.767: (A.I.R. 1989 S.C. 1933 at 1939*:

Legal compulsions cannot be limited by existing legal propositions, because, there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogma. The search for solutions responsive to a changed social era involves a search not only among competing propositions of law, or competing versions of a legal proposition, or the modalities of an indeterminacy such as fairness or reasonableness, but also among propositions from outside the ruling law, corresponding to the empirical knowledge or accepted values of present time and place, relevant to the dispensing of justice within the new parameters."

And he continued:

"The universal problem presented for judicial choice-making at the growing points of the law is an expanding universe. The areas brought under control by the accumulation of past judicial choice may be large. Yet the areas newly presented for still further choice, because of changing social, economic and technological conditions are far from inconsiderable. It has also to be remembered, that many occasions for new options arise by the mere fact that no generation looks out on the world from quite the same vantage-point as its predecessor, nor for that matter with the same perception. A different vantage-point or a different quality of perception often reveals the need for choice making formerly no alternatives, and no problems at all, were perceived."

Holmes tells us:

"The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at the end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely

consistent only when it ceases to grow."

(Holmes the Common Law, p.36 (1881).

19. Thus, the law of precedents has been uniform throughout the country for over a century. Occasional aberrations by Judges sitting singly or in Division Benches have not only been frowned upon, but condemned outright by higher Courts. The following principles can be culled out from the myriad case laws, (a) A Single Judge is bound by the decision of a Division Bench and if he does not agree with it, he shall refer the matter to a larger Bench (b) *A fortiori*, he is bound by the Judgment of a Full Bench and if he does not agree with its ratio, he shall place the papers before the Chief Justice to consider whether a larger Bench should be constituted for considering the question (c) A Division Bench is bound by the decision of another Division Bench and if it wants to differ, it shall refer the matter to the Full Bench (d) A *fortiori* a Division Bench is bound by the decision of a Full Bench and if it wants to differ, it shall place the papers before the Chief Justice to consider whether a larger Bench should be constituted for reconsidering the question (e) the decision of a Full Bench is binding on the court including a subsequent Full Bench until it is overruled by a higher Court or a larger Bench. (f) A decision of a Full Bench can be reconsidered only by a larger Bench specially constituted by the Chief Justice for deciding the question. (g) Even the *obiter dictum* of a Full Bench is entitled to great weight. (h) The binding effect of a prior decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided (i) the decision of the Supreme Court is binding on the High Court and the latter cannot ignore it on the ground that some relevant provisions of law were not brought to the notice of the Supreme Court or some aspects of the matter in question were not considered by the Supreme Court.

20. The law in England has been the same and is succinctly set out in Halsbury's Laws of England, Fourth Edition, Vol.26, at 296 to 302, Paragraphs 577 to 580. It is sufficient to extract the following passages found therein for the purpose of this case:

"A decision of the House of Lords occasioned by members of the House being equally divided is as binding on the House and on all inferior Tribunals as if it had been unanimous. Decisions of the House of Lords are binding on every court inferior to it. It is not open to the Court of Appeal to advise judges to ignore House of Lords decisions on the ground that they were decided *per incuriam* or are unworkable. But if there is no discernible *ratio decidendi* the Court of Appeal may adopt any reasoning which appears to it correct provided it supports the actual decision of the House. (Paragraph 577)

"The decisions of the Court of Appeal upon questions of law must be followed by Divisional Courts and Courts of first instance, and as a general rule, are binding on the Court of Appeal until a contrary determination has been arrived at by the House of Lords. Unlike the House of Lords, the Court of Appeal does not have liberty to review its own earlier decisions. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake. A decision of the Court of Appeal occasioned by the members of the Court being equally divided is not binding on the court of Appeal, as there is no common law or statutory rule to oblige a court to bow to its own decisions, and a court only does so on grounds of judicial comity, which does not exist where a court is equally divided. It is undesirable that different divisions of the Court of Appeal should say different things in relation to the same matter.

A full Court of Appeal has no greater powers than a division of the court and, except in the cases mentioned above, has no power to overrule a previous decision of a division of the court. Where, however, there is an apparent conflict between two previous decisions of the court, it is not uncommon for the matter to be argued before a full court as the decision of such a court carries greater weight." (Paragraph 578)

A Divisional Court is bound by its own previous decisions, regardless of how many judges are sitting, with limited exceptions in criminal cases, subject always to the *per incuriam* rule. Faced with conflicting earlier decisions the court is free to decide which to follow. Divisional Court decisions bind judges of first

instance, even of a different division, but not the Employment Appeal Tribunal".

(Paragraph 579)

"There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance as a matter of Judicial Comity usually follows the decision of another judge of first instance unless he is convinced that that judgment was wrong. Where there are conflicting decisions of courts of co-ordinate jurisdiction the later decision is to be preferred if reached after full consideration of earlier decisions." (Paragraph 580).

IV. Exceptions.

21. Halsbury's Laws of England sets out only three exceptions to the rule of precedents and the following passage is found in paragraph 578 of Vol. 26, Fourth Edition.

"...... There are, however, three and only three, exceptions to this rule; thus (1) the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) it is bound to refuse to follow a decision of its own which although not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords and (3) the Court of Appeal is not bound to follow a decision of its own if given *per incuriam.*

In the footnote at page 299, reference is made to *Young v. Bristol Aeroplane Company Ltd., (1944)2 All.E.R. 293, where the exceptions are set out. It is added there, "These are the only exceptions: (1978)1 All.E.R. 1132 (H.L.). This must be taken as nullifying earlier attempts to spell out further exceptions, i.e., in Worcester Works Finance Ltd. v. Cooden Engineering Company Ltd., (1971)3 All.E.R. 708 (C.A.), (liberty to depart from earlier decision which had been disapproved by the Privy Council.)"*

22. In *Young v. Bristol Aeroplane Company Ltd., (1944)2 All.E.R. 293,* Lord Greene M.R., set out the law on the subject in unequivocal terms in the following passage:

"The Court of Appeal is a creature of statute and its powers are statutory. It is one court though it usually sits in two or three divisions; each division has co-ordinante jurisdiction, but the full court has no greater powers or jurisdiction than any division of the court, Its jurisdiction is mainly appellate, but it has some original jurisdiction. To some extent its decisions are final (for example, in appeals in bankruptcy and from the country courts), But in the majority of cases there is an appeal from its decisions to the House of Lords either with the leave of the Court of Appeal or of the House of Lords. Neither in the statute itself nor (save in two cases mentioned hereafter) in decided cases is there any suggestion that the powers of the Court of Appeal sitting with six or nine or more members are greater than those which it possesses when sitting as a division with three members. In this respect, although we are unable to agree with certain views expressed by Greer, L.N., as will presently appear, we think that he was right in saying that what can be done by a full court can equally well be done by a division of the Court. The corollary of this is, we think, clearly true, namely, that what cannot be done by a division of the Court cannot be done by the full court. In considering the question whether or not this court is bound by its previous decisions and those of courts of co-ordinate jurisdiction, it is necessary to distinguish four classes of case. The first is that with which we are now concerned, namely, cases where this court finds itself confronted with one or more decisions of its own or of a court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of this court or of a court of co-ordinate jurisdiction. The second is where there is such a conflicting decision. The third is where this court comes to the conclusion that a previous decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords. The fourth (a special case) is where this court comes to the conclusion that a previous decision was given *per incuriam.* In the second and third classes of case it is beyond question that the previous decision is open to examination. In the second class, the court is unquestionably entitled to choose between the two conflicting

decisions. In the third class of case the court is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound. The fourth class requires more detailed examination and we will refer to it again later in this judgment." ... ...

On a careful examination of the whole matter we have come to the clear conclusion that this court is bound to follow previous decisions of its own as well as those of courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise: (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*"

23. The rule is that in cases not covered by the exceptions set out above, the principle of judicial precedent is in dispensable, In *R v. Cunningham, (1981)2 All E.R. 863,* Lord Hilsham of St.Marylebone L.C., had had observed,:

"Under the express terms of the practice direction *stare decisis* is still the indispensable foundation of the use by your Lordships of the appellate jurisdiction of the House and its normal practice. Especially must this be so in criminal law, where certainty is indeed a condition of its commanding and retaining respect."

Similarly in *Paul Wilson and Company v. Bhoumanhal, (1983)1 All E.R. 34,* Lord Brandon of Oakbrook observed thus:-

Guidance on the circumstances in which it would or would not be right for this House to depart from a previous decision, albeit a majority one, is to be found in the speech of Lord Wilberforce in *Fitzlert Estates Ltd. v. Cherry Inspector of Taxes, (1977)3 All E.R. 999: (1977)1 W.L.R. 1345 at 1349.*

There is therefore, nothing left to the taxpayer but to contend, as it frankly does, that the 1966 decision *Chancery Lame Safe & Deposit and Offices Company Ltd. v. I.R.C., (1966)1 All E.R. 1: 1966 A.C. 85,* is wrong. This contention means, when interpreted, that three or more of Your Lordships ought to take the view which appealed then to the minority. My lords, in my firm opinion, the 1966 Practice Statement (Note *(1966)3 All E.R. 77), (1966)1 W.L.R. 1234,* was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by a majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.

My lords, that guidance should, in my view, be followed and acted on in the present case. I express no opinion one way or another as to the conclusion which I might have reached if I had been a member of the committee which decided the *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation, (1981)1 All E.R. 289: 1981 A.C. 909,* case. It is sufficient to say that that decision was reached by what Lord Willberforce described as the best way of resolving doubtful issues known to the law, and that no special or unusual circumstances have been put forward as justifying a departure from it.

Dealing specifically with the four points put forward by the sellers to which I referred above, I would say this. With regard to the first point, the fact that a decision of Your Lordships' House is so unpopular with members of courts below that they are led to seek a way to get round it if they can reflect greater credit on their independence of mind that on their loyalty to the established indispensable principle of judicial precedent.

In the same, Lord Roskill observed as follows: "I have reread all the judgments and speeches in the *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping*

Corporation, (1981)1 All E.R. 289: 1981 A.C. 909, case. It is apparent from their perusal that there were two possible views of the correct analysis of the nature of an arbitration agreement. One commanded the greater numerical support. The other commanded the support of the majority in this House. The law of this country is determined in this way and it was the latter view which prevailed." xx xx xx

"In commercial law it is essential that the law should be certain. Your Lordships have recently reasserted this principle on a number of occasions, notably in cases arising from the alleged wrongful withdrawal of time chartered ships for supposedly unpunctual payment of hire. To review the *Bremer Vulkan* decision would create no certainty but uncertainty. Were your Lordships to yield to the sellers' submissions a few years have only to elapse and other litigants might hope to persuade a differently constituted appellate committee once again to reconsider the position and to restore the *Bremer Vulkan* decision to its present role."

Lord Brightman said,

"I turn first to the sellers' invitation that this House should depart from the conclusion which it reached less than two years ago in *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corporation, (1981)1 All E.R. 289: 1981 A.C. 909.* That is an invitation which I would unhesitatingly decline."

24. Courts in this country have followed the same principles and recognised the same three exceptions to the rule of precedent. *Vide*: 1. *Jaisri Sahu v. Rajdewan Dubey and others, A.I.R. 1962 S.C. 83;* 2. *Ramashrey Roy and others v. Pashupati Kumar Pathak and others, A.I.R. 1968 Pat. 1;* 3. *Yeshbai and another v. Ganpat Irappa Jangam and another, A.I.R. 1975 Bom. 20;* 4. *Panjumal Hasomal Advani v. Harpal Singh Abnashi Singh Sawhney and others, A.I.R. 1975 Bom. 120;* 5. *Mamleshwar v. Kanhaiya Lal, A.I.R. 1975 S.C. 907;* 6. *Rama Rao and others v. Shantibai and others, A.I.R. 1977 M.P. 222;* 7. *Sitaram Hari Shankhe v. Laxman Rambodh Dubey and another, A.I.R. 1980 Bom. 55;* 8. *Thuraka Onnuramma and another v. Tahsildar, Kadiri and others, A.I.R. 1980 A.P. 267;* 9. *Pritam Kaur v. Surjit Singh, A.I.R. 1984 P.& H. 113;* 10. *Syed Mohideen v. Government of Tamil Nadu and another, A.I.R. 1986 Mad. 188 (F.B.);* 11. *A.R.Antulay v. R.S.Nayak and another, A.I.R. 1988 S.C. 1531;* 12. *Municipal Corporation of Delhi v. Gurnam Kaur, (1989)1 S.C.C. 101;* 13. *Punjab Land Development and Reclaim Corporation Ltd. v. Presiding Officer, Labour Court, Chandigarh and others, (1990)2 L.L.J. 70;* 14. *Krishnakumar v. Union of India and others, (1990)4 S.C.C. 270;* 15. *State of U.P. and another v. Synthetics and Chemicals Ltd. and another, (1991)4 S.C.C. 139.*

V. Per incuriam

25. We are here concerned with the last of the exceptions, as the question referred to us is to consider whether the judgment of the Full Bench of this Court in *Tamilarasan v. Director of Handlooms and Textiles, (1981)1 L.L.J. 588,* can be characterised as one *per incuriam*. The expression *'per incuriam'* was rarely used five decades ago. When Lord Greene, M.R. set out the exceptions to the rule of precedent in *Young v. Bristol Aeroplane Company Ltd., (1944)2 All E.R. 293,* he took the precaution of observing that branding earlier decisions as *per incuriam* would be of the rarest occurrence. It is worthwhile extracting the relevant passage in his judgment, as it has been repeatedly quoted not only in England but also in this country:

"It remains to consider *Lancaster v. Motor Company (London) Ltd. v. Bremith, Ltd., (1941)2 All E.R. 11,* in which a court consisting of Sir Wilfred Greene, M.R.Clauson and Goddard, L.JJ. declined to follow an earlier decision of a court consisting of Slesser and Romer, L.JJ. This was clearly a case given *per incuriam*. It depended upon the true meaning (which in the late decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the Court was apparently not referred and which it obviously had not in mind. The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statue. Where the court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not

present to its mind. Cases of this description are examples of decisions given *per incuriam.* We do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* in which this court might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of *the rarest occurrence* and must be dealt with in accordance with their special facts. Two classes of decisions *per incuriam* fall outside the scope of our enquiry, namely (i) those where the court of co-ordinate jurisdiction which covers the case before it in such a case a subsequent court must decide which of the two decisions it ought to follow; and (ii) those where it has acted in ignorance of a decision of the House of Lords which covers the point in such a case a subsequent court is bound by the decision of the House of Lords." *(Underlining ours)*

26. But during the last three decades, Courts have found it convenient very often to throw away earlier rulings with the label *per incuriam."* We notice with anguish that at times the meaning of the expression had not been understood properly, which has led to the misuse of the same, if not abuse. One such instance is found in *Abdul Malick v. The Collector of Dharmapuri and others, (1968) 1 M.L.J. 9,* where a single Judge of this Court held that a judgment rendered at the admission stage without notice to the opposite party was *per incuriam.* That is obviously based on a wrong understanding of the term *per incuriam.*

27. The literal meaning of the expression *"per incuriam"* is "through want of care" (*Vide:* Mozley and Whitley's Law Dictionary, 7th Edition, page 255.) In Black's Law Dictionary, 5th Edition, page 1025, it has been defined as "through inadvertence". In Halsbury's Laws of England, Fourth Edition, Volume 26, page 259 - Paragraph 578, it is stated thus:

"A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given *per incuriam,* however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and, as a general rule, the only cases in which decisions should be held to be given *per incuriam* are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake."

In *Morelle Ltd v. Wakeling and another, (1955) 2 Q.B. 379,* Lord Evershed M.R. observed thus:

"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been *per incuriam* on other grounds, we cannot regard this as such a case. As we have already said, it is in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the judgments were based and to say of it: "Here was a manifest slip or error". In our judgment, acceptance of the Attorney-General's argument would necessary involve the proposition that it is open to this Court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide. Such a

proposition would, as it seems to us open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided. Although, as was pointed out in *Young v. Bristol Aeroplane Company Ltd., 1944 K.B. 718,* a "full court" of five Judges of the Court of Appeal has no greater jurisdiction or higher authority than a normal division of the court consisting of three judges, we cannot help thinking that, if the Attorney-General's argument were accepted, there would be a strong tendency in cases of public interest and importance, to invite a "full court" in effect to usurp the function of the House of Lords and to reverse a previous decision of the Court of Appeal. Such a result would plainly be inconsistent with the maintenance of the principle. In conclusion upon this point we would add that we are unable to accept Mr.Shawcross' suggestion that the decision in the first *Morelle Ltd v. Wakeling and another, (1955)1 Q.B. 1,* should be regard as *per incuriam* on the ground that a necessary party to the proceedings, *viz.*, the Crown was not before the court. A decision cannot, in our judgment, be treated as given *per incuriam* simply because of a deficiency of parties. We, therefore, held that the decision in the first *Morelle Ltd. v. Wakeling and another, (1955)1 Q.B. 1,* is binding upon us."

28. In *Broome v. Cassell & Co. Ltd., (1971)2 All E.R. 187,* Lord Denning M.R. characterised the judgment of House of Lords in *Rookes v. Barnard, (1964)1 All E.R. 367,* as *per incuriam.* The matter was taken on appeal and the House of Lords in *Cassell & Co. Ltd. v Broome, (1972)1 All E.R. 801,* disapproved of the view taken by Lord Denning M.R. in strong terms and reversed his conclusion. Lord Hailsham of St.Marylebone L.C. observed at page 809 as follows:

"Moreover, it is necessary to say something of the direction to judges of first instance to ignore *Rookes v. Barnard, (1964)1 All E.R. 367,* as unworkable. As will be seen when I come to examine *Rookes v. Barnard, (1964)1 All E.R. 367,* in the latter part of this opinion, I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard, (1964)1 All E.R. 367,* as decided *'per incuriam'* or 'unworkable' they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decision of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co. Ltd. (1944)2 All E.R. 293,* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question consider decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously.

Lord Reid at page 835 said,

"It seems to me obvious that the Court of Appeal failed to understand Lord Devlin's speech, but whether they did or not I would have expected them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House. That aberation of the Court of Appeal has made it necessary to re-examine the whole subject and incidentally has greatly increased the expense to which the parties to this case

have been put."

Lord Diplock expressed himself thus:

My Lords, there is little that I should wish to add to what Lord Hailsham L.C. and Lord Reid have already said about the way the instant case was treated in the Court of Appeal. It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the Judiciary. When I sat in the Court of Appeal I sometimes thought the House of Lords was wrong in overruling me. Even since that time there have been occasions, of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken is loyally accepted.

The Court of Appeal *(1971)2 All E.R. 187,* found themselves able to disregard the decision of this House in *Rookes v. Barnard, (1964)1 All E.R. 367,* by applying to it the label *per incuriam.* That label is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right to disregard a decision of the Court of Appeal. Even if the jurisdiction of the Court of Appeal had been co-ordinate with the jurisdiction of this House and not inferior to it the label *per incuriam* would have been misused."

29. In *Farrell and another v. Alexander, (1976)1 Q.B. 345,* Lord Denning M.R., held that the case in *Zimmerman v. Grossman, (1972)1 Q.B. 167,* was wrongly decided. But the other two learned Judges who sat with him *viz.*, Lawton and Scarman, L. JJ. took a different view. Lawton, L.J. observed that *Zimmerman v. Grosswan, (1972)1 Q.B. 167,* was not a case where the Court had construed a statute in ignorance of another relevant statutory provision and it was not *per incuriam*. He held that the judgment in the earlier case was binding on the Court. Scarman, L.J. dealt with the question more elaborately and observed as follows:

"But *Zimmerman v. Grosswan, (1972)1 Q.B. 167,* is authority binding on this Court, unless we can truly say that the judgment was *per incuriam*. But was it *per incuriam*? To say that the careful Judgment of Widgery L.J. reviewing as it did the history of the relevant legislation, was *per incuriam* a phrase in a foreign tongue which I translate as *Homer nodded* smacks of absurdity. I do not know, and would not dream of inquiring, whether Secs.13 to 15 were present to his mind: they could not have been decisive in any event. Equally, Secs.86 to 89, whether or not he had them in mind, were relevant only as part of the context, and could not have been decisive. Can one, however, extend the *per incuriam* exception so as to include a case where the only indication that *"Homer nodded"* is that one thinks the court put upon the words of the statute a meaning which they cannot bear, and one which leads to a result that appears to be contrary to the purpose of the statute? For myself I would agree with Lord Denning M.R. that one can, in a proper case. But to do so we must be prepared to say not merely that we prefer another construction to that favoured by the court whose decision is under challenge: we must be able to demonstrate that the words of the statute are capable of only one meaning and that the meaning attributed to them by the previous decision is an impossibility. Mistake, not a difference of opinion, is the criterion. Though I doubt whether the court in *Zimmerman v. Grosswan, (1972)1 Q.B. 167,* was under any necessity to follow *Remmington v. Larchin, (1921)3 K.B. 404,* their reasons for doing so are entitled to respect, and may well be sound. They have been wrong: but they did not fail to face the problem; and their answer, though I think another was open to them, is not to be treated as given for *per incuriam.*" (*Underlining ours*).

At the end of the judgment he observed,

Nevertheless, I have immense sympathy with the approach of the Lord Denning M.R. I decline to accept his lead only because I think it damaging to the law in the long term though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative, adherence to judicial precedent. They could be wrong. Consistency is necessary to certainty, one of the great objectives of law. The Court of Appeal at the very centre of our legal system is responsible for its stability, its consistency and its predictability."

30. Once again in *Industrial Properties (Barton*

Hill) Ltd. and others v. Associated Electrical Industries Ltd. (Ward & Co) (Letters) Ltd. and others, (1977)2 All E.R. 293, Lord Denning M.R., insisted that the Court of Appeal had a right to brand a judgment of the House of Lords as *per incuriam* whenever there was a manifest slip or error.

31. In *Paul Wilson and Company v. Bluementhal, (1983)1 All E.R. 394,* Lord Denning, M.R. refused to follow the decision of House of Lords in *Bremer Vulcan v. South India Shipping Corporation, (1981)1 All E.R. 289.* That case went to the House of Lords and the judgment of the Court of Appeal was reversed. We have already extracted the relevant passages from the speeches of the Law Lords.

32. In *Jaisri Sahu v. Rajdewan Dubey and others, A.I.R. 1962 S.C. 83,* Venkatarama Aiyar, J., after setting out the law of precedents as laid down by the Privy Council in *Buddah Singh v. Laltu Singh, A.I.R. 1915 P.C. 70,* and by the Full Bench of this Court in *Seshamma v. Venkata Narasimharao, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356 (F.B.),* and pointing out the necessity for maintaining a state of certainty in the law, observed as follows:

> "It sometimes happens that an earlier decision given by a Bench is not brought to the notice of a Bench hearing the same question and a contrary decision is given without reference to the earlier decision. The question has also been discussed as to the correct procedure to be followed when two such conflicting decisions are placed before a later Bench. The practice in the Patna High Court appears to be that in those cases, the earlier decision is followed and not the later. In England the practice is, as noticed in the judgment in *Seshamma v. Venkata Narasimharao, (1940)1 M.L.J. 400: I.L.R. 1940 Mad. 454: 51 L.W. 408: A.I.R. 1940 Mad. 356 (F.B.),* that the decision of a Court of Appeal is considered as a general rule to be binding on it. 'There are exceptions to it, and one of them is thus stated in Halsbury's Laws of England, third edition, Vol.22, para 1687, pp. 799-800:
>
> "The court is not bound to follow a decision of its own if given *per incuriam*. A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of a co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords".
>
> "In *Virayya v. Venkata Subbayya, A.I.R. 1955 A.P. 215 at p.217,* it has been held by the Andhra High Court that under the circumstances aforesaid the Bench is free to adopt that view which is in accordance with justice and legal principles after taking into consideration the views expressed in the two conflicting Benches, vide also the decision of the Nagpur High Court in *D.D.Bilimoria v. Central Bank of India Ltd. Bombay, A.I.R. 1943 Nag. 340.* The better course would be noted that the great Judge having referred to the passage in Halsbury's laws of England relating to the principle often such situations arise, the Bench hearing cases would refer the matter for the decision of a Full Court."

33. It is without taking upon itself to decide whether it should follow the one Bench decision or the other. We have no doubt that where course would be for the Bench hearing the case to refer the matter to a Full Bench in view of the conflicting authorities *in curiam*, proceeded to hold that the best course would be to refer the matter for the decision of a Full Court. Obviously, the learned Judge did not think it fit to give liberty to the Benches to overthrow earlier judgments on the ground of *per incuriam.*

34. But, in *Ramashrey Roy and others v. Pashupati Kumar Pathak and others, A.I.R. 1968 Pat. 1.* A Full Bench of the Patna High Court observed that the Division Bench need not have referred the matter to that Full Bench when it was found that the earlier decisions of Division Benches were not correct in view of a later decision of the Supreme Court and in view of Sec.13 of the new Limitation Act of 1963 and the Division Bench could itself have disposed of the matter on the footing that the earlier judgments were not binding on them. The Full Bench referred to the passage in Halsbury's Laws of England setting out the exceptions to the rule of precedents. On the facts of the case, the Full Bench held that Sec.13 of the new Limitation Act did not apply to that case, but the two earlier decisions of the High Court should be deemed to have been overruled by a later Supreme Court decision.

35. In *Yeshbhai and another v. Ganpat Irappa Jangam and another, A.I.R. 1975 Bom. 20,* a

Division Bench of the Bombay High Court referred to the ruling in *Young v. Bristol Aeroplane Company Ltd., (1944)2 All E.R. 293,* and declared the law thus:

"27. Now, a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. The rule apparently applies even though the earlier court knew of the statute in question. If it did not refer to and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such *incuriam* as to vitiate the decision. These are the commonest illustrations of decision being given *per incuriam.* In order that a case can be decided *per incuriam,* it is not enough that it was inadequately argued. It must have been decided in ignorance of a rule of law binding on the court, such as a statute.. (See the observations in "Salmond on Jurisprudence" Twelfth Edition, pages 150 and 169).

The Bench also referred to an argument advanced before it on the principle of *sub silentio* and observed thus:

"30. Mr.Diwan, however, is on stronger grounds in his submission that the said decisions were precedents *sub silentio,* since they were decided without arguments on the basis of the position in law which was assumed by the court. The circumstance in which a decision is said to be arrived at *sub silentio* have been described in "Salmond on Jurisprudence", Twelfth Edition. The learned author observes (at pages 153-154)--

A decision passes *sub silentio,* in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio.* ... ...

"31. On going through the decisions (taking the view that the dispute must be "*bona fide*") rendered by both the single Judges as well as Division Benches of this Court, it does appear that the point was not decided on arguments. It was assumed that the word dispute in Sec.12(3)(a) necessarily implies a "*bona fide*" or a genuine dispute. A question as to whether the word dispute should be given its plain grammatical meaning, as argued by Mr.Diwan, or whether it should be given a restricted meaning was not considered or argued in those cases. Where the case was decided on the position of law which was assumed by the court, the decision is not an authority for what was assumed. In none of the said decisions, the counsel on behalf of the tenant raised a contention on that the word dispute in Sec.12(3)(a) must be given its plain grammatical meaning and the court should not restrict its plain meaning by construing the word "dispute" as a *bona fide* dispute". We do not find that any of the said decisions decided the point of law on argument."

Another Division Bench of the same High Court held in *Penjumal Hassomal Advani v. Harpal Singh Abnashi Singh Sawhney and others, A.I.R. 1975 Bom. 120,* that even the *obite* of the Supreme Court is entitled to the highest respect in the High Courts because of Art.141 of the Constitution of India. It went on to hold that normally one Division Bench of a High Court cannot take a view contrary to the decision given by another Division Bench of that court and relied on *Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractor Company v. The State of Andhra Pradesh, A.I.R. 1972 S.C. 51.* Then it referred to the proposition laid down by the Master of Rolls in *Young v. Bristol Aeroplane Company Ltd., (1944)1 K.B. 718.* Referring to the expression *per incuriam* the Bench observed.

".....A decision cannot be treated as given *per incuriam* merely because the Court had not the benefit of a full and exhaustive argument, and as a general rule the only cases in which decisions should be held to be given as *per incuriam* are those given in ignorance of some inconsistent statutory provision or binding authorities.

In the matter before us it cannot be said that the Division Bench in *Kalavati's case, C.A.No.1699 of 1969, dt.26.4.1973 (Bom.)*, has given its decision either in ignorance of the provisions of any statute or binding authorities *i.e.* the judgment of the Supreme Court. It was, however, contended that the Division Bench in *Kalavati's case C.A.No.1699, dt.26.4.1973 (Bom.)* had wrongly understood *Sabharwal's Case A.I.R. 1972 S.C. 1983,* and thereby erroneously came to the conclusion that the decision in *Satpalsingh Arora's case, (1971) 73 Bom. L.R 777,* which was binding, being a decision of a Division Bench, of the Bombay High Court, was no longer good law. But then, it is equally well settled that an interpretation (and equally a misinterpretation) of a binding decision of the Supreme Court will itself be binding subsequently on co-ordinate courts and must be got corrected by a higher court, and no co-ordinate Court on that ground may refuse to follow an earlier decision, opining that in its view the said earlier decision had wrongly understood or improperly applied a decision of a higher court."

36. In *Mamleshwar Prasad and another v. Kanhaiya Lal, A.I.R. 1975 S.C. 907,* the Supreme Court referred to *Morelle Ltd v. Wakeling, (1955) 2 Q.B. 379,* and declared that the *per incuriam* principle is of limited application and it will not be extended to cases which were merely not fully argued or which appeared to take wrong view of the authorities or to misinterpret a statute. The Supreme Court quoted with approval a passage from The English Legal System by R.J. Walker & M.G. Walker, III Edition, Butterworths, 1972, which reads as follows:

"The *per incuriam* principle is of limited application. Very few decisions have subsequently been regarded as having been reached *per incuriam* and in *Morelle Ltd v. Wakeling, (1955) 2 Q.B. 379,* a Master of the Rolls stated that such instances should be of the rarest occurrence, and should be limited to decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned. Thus the doctrine will not be extended to cases which were merely not fully argued or which appear to take a wrong view of the authorities or to misinterpret a statute."

37. In *Rama Rao and others v. Shantibai and others, A.I.R. 1977 M.P. 222,* a Full Bench of that court held that an earlier decision of a single Judge was given *per incuriam*, as it was contrary to the view taken by that court earlier in several caes, which were not noticed by the single Judge.

38. In *Sitaram Hari Shankhe v. Laxman Rambodh Dubey and another, A.I.R. 1980 Bom. 55,* Dharmadhikari, J. held that the judgment of Joshi, J. in an earlier case was not binding on him as the specific provisions of a statute and the Rules were not noticed. The learned Judge observed that a judgment rendered in ignorance of a statute or a rule having the force of a statute was decided *per incuriam*. He quoted from the rulings in *Yeshabi v. Ganpat Irappa Jangam, A.I.R. 1975 Bom. 20* and *Young v. Bristol Aeroplane Company Ltd., (1944) 2 All E.R. 293.*

39. In *Thuraka Onnuramma and another v. Tahsildar, Kadiri and others, A.I.R. 1980 A.P. 267,* a single Judge of Andhra Pradesh High Court gave a similar ruling that a decision rendered overlooking a statutory provision shall be treated as *per incuriam*. He has extracted a passage from "Salmond on Jurisprudence. It is worthwhile repeating the same here.

"It is now well settled that a decision rendered overlooking a statutory provision shall be treated as *per incuriam* and cannot be regarded a binding precedent. Salmond on Jurisprudence, Twelfth Edition, page 150, says, "A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of a statute *i.e.*, delegated legislation". Salmond cites in support of this proposition High authority of Lord Halsbury in the House of Lords in *London Street Tramways v. London County Council, 1898 A.C. 375* and of Lord Greene M.R. in Court of Appeal in that well known case of *Young v. Bristol Aeroplane Company Ltd., (1944) 1 K.B. 718.* As examples of *per incuriam* judgments Salmond cites a case where the court knew the statute but did not refer to the precise terms of the statutes as well as to a case where the Court knew the statute but failed to appreciate its relevance to the matter in hand. On the extensive scope of the doctrine of *per incuriam* Salmond says that, "Even a court can impugn a precedent on such grounds.":

40. We have already referred to the judgment of Sandhawalia, C.J. in *Pritam Kaur v. Surjit Singh,*

A.I.R. 1984 P.& H. 113, and extracted the relevant passages therefrom. The learned Judge has referred *in extenso* to the three exceptions to the rule of precedent. It is unnecessary for us to repeat it here as it has already been quoted *supra.*

41. A Full Bench of this Court has in *Syed Mohideen v. Government of Tamil Nadu and another, A.I.R. 1986 Mad. 188,* relied on the principle of *per incuriam* and observed as follows:

"23. While referring to the exception to the rule of *stare decisis*, it is observed in 'Precedent in England Law' by Rupert Cross, 1961 Edition, at page 130, as follows:

"No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction), if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision. This exception to the rule of *stare decisis* is probably best regarded as an aspect of a broader qualification of the rule, namely, the courts are not bound to follow decisions reached *per incuriam.*

The proposition that a decision per incuriam need not be followed as a binding precedent is well established."

42. In *A.R.Antulay v. R.S.Nayak and another, A.I.R. 1988 S.C. 1531,* the principle of *per incuriam* has been explained and applied. The relevant passage is as follows:

"44. It appears that when this Court gave the aforesaid directions in 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in *Anwar Ali Sarkar's case, A.I.R. 1952 S.C. 75.* See *Halsbury's Laws of England, 4th Edn. Vol.26 page 297, para 578 and page 300, the relevant notes 8, 11 and 15, Dias on Jurisprudence, 5th Edn. pages 128 and 130, Young v. Bristol Aeroplane Company Ltd., (1944)2 All E.R. 293 at 300.* Also see the observation of Lord Goddard in *Moore v. Hewitt, (1947)2 All E.R. 270 at 272* and *Penny v. Nicholas, (1950)2 All E.R. 89, 92A.* Per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See *Morelle Ltd v. Wakeling, (1955)1 All E.R. 708.* Also see *State of Orissa v. Titaghur Paper Mills Co. Ltd., (1985)3 S.C.R. 26: A.I.R. 1985 S.C. 1293.* We are of the opinion that in view of the clear provisions of Sec.7(2) of the Criminal Law Amendment Act, 1952 and Arts.14 and 21 of the Constitution these directions were legally wrong."

43. In *Municipal Corporation of Delhi v. Gurnam Kaur, (1989)1 S.C.C. 101 at 110,* the Supreme Court observed thus:

"11. pronouncements of law, which are not part of the *ratio decidendi* are classed as *obiter dicta* and are not authoritative. With all respect to the learned Judge who passed the order in *Jamuna Das case* (W.P.Nos.981-82 of 1984) and the learned Judge who agreed with him, we cannot concede that this Court is bound to follow it. It was delivered without argument, without reference to the relevant provisions of the Act conferring express power on the Municipal Corporation to direct removal of encroachments from any public place like pavements or public streets, and without any citation of authority. Accordingly, we do not propose to uphold the decision of the High Court because, it seems to us that it is wrong in principle and cannot be justified by the terms of the relevant provisions. A decision should be treated as given *per incuriam* when it is given in ignorance of the terms of a statute or of a rule having the force of a statute. So far as the order shows, no argument was addressed to the court on the question whether or not any direction could properly be made compelling the Municipal Corporation to construct a stall at the pitching site of a pavement squatter. Professor P.J.Fitzgerald, Editor of Salmond on Jurisprudence, 12th edn. explains the concept of *sub silentio* at p.153 in these words:

A decision passes *sub silentio*, in the technical sense that has come to be attached to that pharse, when the particular point of law involved in the decisions is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in

favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*.

12. In *Gerard v. Worth of Paris Ltd., (1936)2 All E.R. 905 (C.A.)*, the only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the court granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal in *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd., (1941)1 K.B. 675*, the court held itself not bound by its previous decision. Sri Wilfrid Greene, M.R. said that he could not help thinking that the point now raised had been deliberately passed *sub silentio* by counsel in order that the point of substance might be decided. He went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. Precedents *sub silentio* and without argument are of no moment. This rule has ever since been followed. One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an *ex cathedra* statement, having the weight of authority."

44. In *Punjab Land Devt. & Reclamation Corporation Ltd. Chandigarh, etc., and several others v. Presiding Officer, Labour Court, Chandigarh etc., and several others, (1990)2 L.L.J. 70*, the Supreme Court considered the meaning of the expression '*per incuriam*' and explained thus:

"43. We now deal with the question of *per incuriam* by reason of allegedly not following the Constitution Bench decisions. The Latin expression *per incuriam* means 'through inadvertence'. A decision can be said generally to be given *per incuriam* when this Court has acted in ignorance of a previous decision of this Court. It cannot be doubted that Art.141 embodies, as a rule of law, the doctrine of precedents on which our judicial system is based. In *Bengal Immunity Company Ltd. v. State of Bihar, (1955)2 S.C.R. 603*, it was held that the words of Art.141, "binding on courts within the territory of India" though wide enough to include the Supreme Court, do not include the Supreme Court itself, and it is not bound by its own judgment but is free to reconsider them in appropriate cases. This is necessary for proper development of law and justice."

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"....The doctrine of *ratio decidendi* has also to be interpreted in the same line. In England a decision is said to be given *per incuriam*, when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords. In the former case it must decide which decision to follow, and in the latter it is bound by the decision of the House of Lords. It has been said that the decision of the House of Lords mentioned above, refers to a decision subsequent to that of the Court of Appeal. However, a prior decision of the House of Lords inconsistent with the decision of the Court of Appeal will make the later decision of the Court of Appeal of no value as given *per incuriam*. But if the prior decision had been cited to the court of Appeal and that Court had misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave and House to rectify the mistake. In Halsbury's Laws of England 4th Ed. Vol.10 para 745 it has been said:

"While former decisions of the House are normally binding upon it, the House will depart from one of its own previous decisions when it appears right in the interests of justice and of the proper development of the law to do so. Cases where the House may reconsider its own previous decisions are those involving broad policy and questions of legal principle. Only in rare cases will the House reconsider questions

of construction of statutes or other documents. The House is not bound to follow a previous case merely because it is indistinguishable on the facts.

The position and experience in this Court could not be much different keeping in view the need for proper development of law and justice."

45. Recently, in *State of U.P. and another v. Synthetics and Chemicals Ltd. and another, (1991)4 S.C.C. 139,* a Bench of two Judges held that a previous decision rendered by severn Judges was *per incuriam*. In the earlier judgment of seven Judges, a reference was made to Entry 52 of List II in the Seventh Schedule of the Constitution of India and it was observed that the States had no power to charge sales tax on industrial alcohol. It was pointed out by the later Bench that the question which arose before the earlier Bench related only to the power of the State to levy excise duty and vend fee or transport fee by recourse to Entry 51 or Entry 8 in List II in respect of industrial alcohol and it had nothing to do with the levy of sales tax under Entry 52. It was also pointed out that Entry 52 of List II had no application to the fees or charges, the validity of which was questioned in the earlier case. Referring to that aspect of the matter, the Bench observed:

"That was an abrupt observation without a preceding discussion, and inconsistent with the reasoning adopted by this Court in earlier decisions from which no dissent was expressed on the point. Coming, as it does, immediately after a reference to Entry 52 of List II in connection with excise duty and sales tax when neither falls under that entry, the submission of the Advocate General that the observation regarding sales tax in para 86 of the judgment was *per incuriam* assumes great significance."

Again, in paragraph 36 it was observed as follows:

"We are firmly of the view that the decision of this Court in *Synthetics, (1990)1 S.C.C. 109,* is not an authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Orders made by the Central Government under the I.D.R. Act imposed fetters on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or *per incuriam* and has, therefore, no effect on the impugned levy.

Again, in paragraphs 39 to 41, it was stated,

39. But the problem has arisen due to the conclusion in the case of *Synthetic and Chemicals, (1990)1 S.C.C. 109.* The question was if the State Legislature could levy vend fee or excise duty on industrial alcohol. The Bench answered the question in the negative as industrial alcohol being unfit for human consumption the State legislation was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule. While doing so a bench recorded the conclusion extracted earlier. It was not preceded by any discussion. No reason or rationale could be found in the order. This gives rise to an important question if the conclusion is law declared under Art.141 of the Constitution or it is *per incuriam* and is liable to be ignored.

40. Incuria literally means carelessness. In practice *per incuriam* appears to mean *per ignoratium*. English codes have developed this principle in relaxation of the rule of stare decis. The quotable in law is avoided and ignored if it is rendered, *in ignoratium* of a statute or other binding authority. *Young v. Bristol Aeroplane Company Ltd., (1944)1 K.B. 718.* Same has been accepted, approved and adopted by this Court while interpreting Art.141 of the Constitution which embodies the doctrine of precedence as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey, A.I.R. 1962 S.C. 83,* this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of *sub silentio*. A decision passes *sub silentio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not

perceived by the court or present to its mind. *Salmond on Jurisprudence, 12th Edn., p. 153.* In *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd., (1941) 2 All E.R. 11,* the court did not feel bound by earlier decision as it was rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur, (1989) 1 S.C.C. 101.* The Bench held that, precedents *sub silentio* and without arguments are of no moment. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Art.141. Uniformity and consistency are core of Judicial discipline. But that which escapes in the Judgment without any occasion is not *ratio decidendi.* In *B.Shama Rao v. Union Territory of Pondicherry, A.I.R. 1967 S.C. 1480,* it was observed, it is trite to say that a decision is binding not because of this conclusions but in regard to its ratio and the principles, laid down therein.

Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent.

Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

46. An analysis of the above rulings brings out the following principles:

(1) A judgment is *per incuriam* if it is rendered in ignorance of a binding authority.

(2) A judgment is *per incuriam* if it is rendered in ignorance of a statute or a rule having the force of a statute.

(3) A judgment is not *per incuriam* because it is based on a wrong understanding of the law or a binding precedent and

(4) A judgment is not *per incuriam* because the reasoning is wrong in the opinion of the subsequent Bench.

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VI. Obiter Dicta

47. The expression *obiter dictum* means "that which is said in passing". In Mozley and Whiteley's 'Law Dictionary', 7th Edition, at page 240, it is defined as 'a dictum of a judge on a point not directly relevant to the case before him." If a Court expresses its opinion on a point which has not arisen for consideration in the case, it is not binding as a precedent. What is binding in a judgment is only the *ratio decidendi,* which means, the reason or principle on which a case is decided. An interesting and instructive passage is found in the judgment of a Full Bench of this Court in *M.Shaikh Dawood v. Collector of Central Excise, Madras, A.I.R. 1961 Mad. 1: 73 L.W. 491 (F.B.),* expounding the difference between *obiter dictum* and *ratio decidendi.* It reads as follows:

"It is occasionally helpful to remind oneself of basic principles and we therefore make no apology for quoting the following passages from Salmond on Jurisprudence. On pages 223 and 224 of the 11h Edn. The following passages appear;

A precedent, therefore, is a judicial decision which contains in itself, a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi.* The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. The only use of authorities or decided cases says Sri George Jessel, "is the establishment of some principle which the Judge can follow out in deciding the case before him. The only thing says the same distinguished judge in another case, in a Judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided." The only judicial principles which are authoritative are those which are thus relevant in their subject matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true *ratio decidendi* and are distinguished from *dicta,* things said by the way. The prerogative of judges is not to make law by formulating and declaring it pertains to the Legislature but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is not of binding authority."

(14) The footnote is also of interest:

"The weight to be given to *obiter dicta* depends upon the circumstances. Sir Carleton Allen's conclusion is that, "if the eminence of the tribunal, the consensus of judicial opinion, and the degree of deliberation all combine to lend a special weight and solemnity to *dicta,* then their authority is for all practical purposes indistinguishable from that of *ratio decidendi*."

(15) In *Flower v. Ebbw Vale Steel Iron and Coal Co., (1934)2 K.B. 132,* the following passage appears at page 154:

"It is of course perfectly familiar that *obiter dicta*, though they may have great weight as such, are not conclusive authority. *Obiter dicta* in this context mean what the words literally signify namely, statements by the way. If a Judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case and the reasons for the decision."

We should remark in passing that this passage has been incorporated in Stroud's Judicial dictionary under the heading *"Obiter Dicta"*.

48. In *Punjab Land Devt. & Reclamation Corporation Ltd., Chandigarh etc., and several others v. Presiding Officer, Labour Court, Chandigarh etc., and several others, (1990)2 L.L.J. 70,* the Supreme Court analysed the principle of *ratio decidendi* and said thus:

47. An analysis of judicial precedent, *ratio decidendi* and the ambit of earlier and later decisions is be found in the House of Lords decision in *F.A. & A.B. Ltd. v. Lupton, (Inspector of Taxes), 1972 A.C. 634,* Lord Simon concerned with the decision in *Griffiths v. J.P.Harrison (Warford) Ltd., 1963 A.C. 1* and *Finsbury Securities Ltd. v. Inland Revenue Commissioners, (1966)1 W.L.R. 1402,* with their inter-relationship and with the question whether *F.A. & A.B. Ltd. v. Lupton, (Inspector of Taxes), 1972 A.C. 634,* fell within the precedent established by the one or the other case, said:

What constitutes binding precedent is the *ratio decidendi* of a case and this is almost always to be ascertained by an analysis of the material facts of the case that is, generally, those facts which the tribunal whose facts which the tribunal whose decision is in question itself holds, expressly or implicitly, to be material."

It has also been analysed:

"A judicial decision will often be reached by a process of reasoning which can be reduced into a sort of complex syllogism, with the major premise consisting of a pre-existing rule of law (either statutory or judge-made) and with the minor premise consisting of the material facts of the case under immediate consideration. The conclusion is the decision of the case, which may or may not establish new law in the vast majority of cases it will be merely the application of existing law to the facts judicially ascertained. Where the decision does constitute new law, this may or may not be expressly stated as a proposition of law; frequently the new law will appear only from subsequent comparison of, on the one hand, the material facts inherent in the major premise with, on the other, the material facts which constitute the minor premise. As a result of this comparison it will often be apparent that a rule has been extended by an analogy expressed or implied."

48. To consider the *ratio decidendi* of a case we have, therefore, to ascertain the principle on which the case was decided. Sir George Jessel is *Osborne v. Rowlett, (1880)13 Ch. D. 774,* remarked that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided.".

49. The *ratio decidendi* of a decision may be narrowed or widened by the judges before whom it is cited as a precedent. In the process the *ratio decidendi* which the judges who decided the case would themselves have chosen may be even different from the one which has been approved by subsequent judges. This is because Judges, while deciding a case will give their own reasons but may not distinguish their remarks in a right way between what they thought to be the *ratio decidendi* and what were their *obiter dicta*, that is, things said in passing having no binding force, though of some persuasive power. It is said that "a judicial decision is the abstraction of the principle from the facts and arguments of the case". A subsequent judge may extend it to a broader principle of wider application or narrow it down for a narrower application. The submissions of Mr.Venugopal that for the purpose of *ratio decidendi,* the question is not whether a

subsequent Bench of this Court thinks that it was necessary or unnecessary for the Constitution Bench, or the earlier Bench to have dealt with the issue, but whether the Constitution Bench itself thought it necessary to interpret Sec.2(00) for arriving at the final decision has to be held to be untenable in this wide and rigid form.

49. In *Krishnakumar v. Union of India and others, (1990)4 S.C.C. 270,* the Supreme Court observed:

"19. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain propositions wider than the case itself required. This was what Lord Selborne said in *Calendonian Railway Co. v. Walker's Trustees (1882)7 App. Cas. 259,* and Lord Halsbury in *Quinn v. Leathem, 1901 A.C. 495, 502.* Sir Frederick Pollock has also said; Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.

20. In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The *ratio decidendi* is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The *ratio decidendi* has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge-made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it. In the Words of Halsbury, 4th edn., Vol.26, para 573:

"The concrete decision alone is binding between the parties to it but it is the abstract *ratio decidendi,* as ascertained on a consideration of the judgment in relation to the subject matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a *ratio decidendi* in order to be bound by it, an it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio decidendi* of the case. If mere reasons than one are given by a tribunal for its judgment, all are taken as forming the *ratio decidendi.*

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VII. Tamilarasan's Case.

50. Having reminded ourselves of the principles of law applicable, we shall now consider the question referred to us. It can be split into two parts, one relating to *per incuriam* and the other *obiter dictum.* Probably the Division Bench in Natarajan was not sure of its ground and it chose to affix two labels to Tamilarasan. The Full Bench in the earlier case was necessitated by a conflict of opinion as to whether a writ petition will lie under Art.226 of the Constitution of India against a Co-operative Society and Mohan, J. made the order of Reference. The cases posted before the Full Bench comprised of two Writ Appeals and four Writ Petitions. In one of the Writ Petitions, *viz.* W.P.No.6272 of 1986, the Board of Management of the Co-operative Society had been superseded and a Special Officer was managing the Society. Hence, the Full Bench had to consider, (1) whether a society managed by a Board of Directors was amenable to the jurisdiction of this Court under Art.226 of the Constitution of India and (2) whether a society managed by a Special Officer was amenable to the said jurisdiction. It can never be gainsaid that the Full Bench considered both questions and gave its opinion, though in form the question referred to it was a general one, whether a writ would lie against a Co-operative society under Art.226 of the Constitution of India? The Full Bench referred to all the judgments cited and the arguments advanced by counsel on both sides. It culled out the relevant principle mainly from the judgments of the Supreme Court in *Nayagarh Co-operative Central Bank Ltd. v. Narayan Rath, A.I.R. 1977 S.C. 112* and *S.S.Dhanoa v. Municipal Corporation Delhi, A.I.R. 1981 S.C. 1395.* Relevant passages in those judgments were quoted by the Full Bench with emphasis supplied by itself. We will not be guilty of tautology if we extract therefrom as herein:

The Nayagarh Co-operative Central Bank Ltd. v. Narayan Rath, A.I.R. 1977 S.C. 112.

The High Court has dealt with the question whether a writ petition can be maintained against a co-operative society, but are inclined to the view that the observations made by the High Court and its decision that such a writ petition is maintainable are not strictly in accordance with the decision of this Court." (Emphasis supplied).

We should like to observe that the judgment of the High Court should not be treated as an authority for the proposition that a writ petition is maintainable against a co-operative society.

S.S.Dhanoa v. Municipal Corporation Delhi, A.I.R. 1981 S.C. 1395, Whatever has been said with regard to the Council of Scientific and Industrial Research which was a society registered under the Societies Registration Act, equally applies to the Co-operative Store Limited, which is a society registered under the Bombay Co-operative Societies Act, 1925. It is not a statutory body because it is not created by a statute. It is a body created by an act of a group of individuals in accordance with the provisions of a statute. (Emphasis supplied.)

51. The Full Bench went on to refer to the significance of the pronouncement of the Apex Court in S.S.Dhanoa as in that case, the service of a member of the Indian Administrative Service were placed at the disposal of a Co-operative Society and the question was whether he was a public servant within the meaning of Sec.21 of the Indian Penal Code for the purposes of Sec.197 of the Code of Criminal Procedure, which was answered in the negative.

52. The Full Bench made a detailed reference to the judgments of other High Courts including that of a Division Bench of the Patna High Court relating to the Bihar State Co-operative Marketing Union Limited.

53. The ratio of the Full Bench is found in paragraphs 23 and 24 of its judgment, which reads as follows:

"23. The main and important factor that has to be borne in mind in dealing with the issue on hand is the fine distinction that has been pointed out by the Supreme Court on more than one occasion between a body which is created by the statute and a body which after having come into existence is governed in accordance with the provisions of the statute. In other words, a co-operative society does not owe its very existence to any statute which would be the fountain head of its power. Still further, it can be held that even if there is no statute a Co-operative society can have a legal existence. If this is the position, applying the tests laid down by the Supreme Court in the abovesaid two cases, a co-operative society is an institution merely governed by the statutory provisions and it cannot be said to be a statutory body. In this connection, the observations of the Full Bench Judgment of the Kerala High Court, at the risk of repetition can again be extracted."

The Co-operative Societies are not created by the Co-operative Societies Act and they are not statutory bodies. They are only functioning in accordance with the provisions of the Act. These institutions would have legal existence even if the Co-operative Societies Act was not in force. Moreover the Government have no sars in the Co-operative Societies. There is no deep and pervasive State control. The management of the societies does not vest in the Government or in the representatives of the Government Bank. The management is under the effective control of a committee elected by the members of the Societies. The statutory regulations or restriction in the functioning of the Societies is not an imprint of State under Art.12". Hence no writ will lie against a Co-operative Society governed by the Kerala Co-operative Societies Act."

24. The issue can be looked from another angle. The Supreme Court in *Co-operative Central Bank Ltd. v. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad, A.I.R. 1970 S.C. 245,* has held that the Bye-laws of a co-operative society framed in pursuance of the provisions of the Act cannot be held to the law or to have the force of law. This also supports the view that a co-operative society is not a statutory functionary. The fact that whenever the governing body is superseded and in its place a Special Officer or other Government official is appointed to administer the affairs of the society makes any difference has to be considered now. We are of the view that having regard to the decision of the Supreme Court in *S.S.Dhanoa v. Municipal Corporation Delhi, A.I.R. 1981 S.C. 1395,* the position is that it does not make any difference. Any officer appointed in the place of the governing body

stepping into the shoes of the governing body and discharging the functions as such definitely not is a Government servant. In the case referred to above the Supreme Court has clearly held that when the services of an Indian Administrative Officer are placed at the disposal of a co-operative society, he was not discharging the functions as a public servant."

Significantly, the Full Bench extracted the same passage in *S.S.Dhanoa v. Municipal Corporation Delhi, A.I.R. 1981 S.C. 1395,* for a second time in paragraph 24 and observed that the said passage placed beyond doubt that a Co-operative Society was not a statutory body. In fine, the Full Bench concluded that a Co-operative Society is not an authority or instrumentality or agency of the Government to attract Art.12 of the Constitution of India and, therefore, not amendable to Writ jurisdiction under Art.226 of the Constitution of India.

54. It was argued before us that the judgment of the Full Bench is *per incuriam* as it has not expressly referred to the provisions of the Tamil Nadu Co-operative Societies (Appointment of Special Officers) Act, 1976 (Act XXV of 1976), whereunder the Boards of Management of Co-operative Societies were superceded and Special Officers were appointed by the Government to manage the societies. The argument is fallacious. In paragraph 11 of its judgment, the Full Bench referred expressly to the reliance placed by one of the Counsel on the provisions of Tamil Nadu Act XXV of 1976, in particular the preamble to the Act and Secs.3 and 4 thereof. That argument was rejected by the Full Bench in paragraph 24 of its judgment, which we have extracted above. The said Act has substituted only the Board of Management by the Special Officer and has not changed the character or status of a Co-operative Society. Thus, the question has been specifically considered and decided. The fact that the sections of the Act are not extracted and that they have not been referred to in paragraph 24 or any other part of the judgment, would not mean that the Full Bench acted in ignorance of the provisions of the said Act or forgot about the same.

55. It is now contended that the facts in *Dhanoa's case, A.I.R. 1981 S.C. 1395,* were distinguishable and the judgment of the Supreme Court was wrongly understood and invoked by the Full Bench. According to learned counsel, in *Dhanoa's case, A.I.R. 1981 S.C. 1395,* (the Board of Management was not superseded as such, but a member of the Indian Administrative Service was appointed as General Manager of the Co-operative Society in question, which fact would, accordingly to learned counsel, make all the difference and that such a society whose Board of Management was a superseded by Tamil Nadu Act XXV of 1976. A careful perusal of the judgment in *Dhanoa's case, A.I.R. 1981 S.C. 1395,* does not warrant such distinction. The basic principle on which S.S.Dhanoa was decided was that a Co-operative Society was not a statutory body as it was not created by a statute. The change in the management of the society by supersession of the entire Board of Management, statutorily or otherwise, or placing the management in the hands of a Government servant without superseding the Board of Management would not make any difference in the eye of law in view of the basic principles that a society is not a statutory body as it is not a creature of a statute. We do not find any error in the reasoning of the Full Bench in *Tamilarasan v. Director of Handlooms and Textiles, (1981)1 L.L.J. 588.* Even assuming for the sake of argument without admitting, that the reliance placed by the Full Bench on S.S.Dhanoa was erroneous, it would not make the judgment *per incuriam.* It would at worst be only an erroneous understanding of the judgment of the Supreme Court by the Full Bench. That will not certainly render it *per incuriam.*

56. It is next argued that the judgment of the Full Bench is not invalidated by the *sub silentio* rule enunciated by the Supreme Court in *Municipal Corporation of Delhi v. Gurnam Kaur, (1989)1 S.C.C. 101,* and *State of U.P. and another v. Synthetics and Chemicals Ltd. and another, (1991)4 S.C.C. 139.* There is no substance in the argument. The Full Bench has expressly referred to the argument based on the provisions of Tamil Nadu Act XXV of 1976 and given its ruing in paragraph 24 of its judgment by relying on *Dhanoa's case, A.I.R. 1981 S.C. 1395.* The rule of *sub silentio* is nowhere.

57. What is stated above is sufficient to reject the contention that the judgment of the Full Bench in *Tamilarasan v. Director of Handlooms and Textiles, (1989)1 L.L.J. 588,* is *per incuriam.* No argument or separate reasoning is needed to say that the decision of the Full Bench is not *obiter dicta.* We have already referred to the fact that it was necessary for the Full Bench to decide the

question whether a society managed by a Special Officer was amenable to the jurisdiction under Art.226 of the Constitution of India. We are inclined to characterise the contention that the judgment of the Full Bench is *obiter dicta* as unintelligible.

VIII. Judgment of the Division Bench in A.Natarajan v. Registrar of Co-operative Societies, Chepauk and others (1991)2 L.W. 420: (1989)2 L.L.J. 296.

58. The judgment of the Division Bench in *A.Natarajan v. Registrar of Co-operative Societies, Chepauk and others (1991)2 L.W. 420: (1989)2 L.L.J. 296,* is the immediate cause for this reference. Finding that the ruling in *Tamilarasan v. Director of Handlooms and Textiles, (1981)1 L.L.J. 588,* would bind them and prevent them from passing an order to their liking, the Division Bench chose the extraordinary course of characterising the Full Bench as *per incuriam* and *obiter dicta.* One of the reasons given by the Division Bench for labelling the Full Bench as *per incuriam* is so indefensible that learned counsel for the petitioner could not say a word in support of it. That reason is, the Full Bench had not taken notice of the statement of law as found in the case of *Brij Bihari Singh's case, (1989)37 (2) B.L.J.R. 219.* That was a judgment of a Division Bench of the Patna High Court, to which the Senior Judge in the Division Bench of this Court was a party when he was a Judge of that Court. Unfortunately, the learned Judge in his anxiety to get over the binding authority of the Full Bench, failed to note that the judgment of the Patna High Court was delivered on a later date and the Full Bench of this Court could not have had an inkling that a Division Bench of the Patna High Court would later take a different view on the question which was being decided by them. The judgment in *Tamilarasan v. Director of Handlooms and Textiles, (1991)2 L.W. 409: (1981)1 L.L.J. 588 (F.B.),* was delivered on 29.3.1989 by the Full Bench while *Brij Bihari Singh's case, (1989)37 (2) B.L.J.R. 219,* was decided on 18.4.1989, *i.e.*, 19 days after the judgment of the Full Bench. Even if the Division Bench judgment of Patna High Court had been earlier, it was certainly not binding on the Full Bench of this Court and the latter was entitled to ignore it. Naturally, there is no attempt on the part of counsel for the petitioner to support that part of the reasoning of the Division Bench. The Division Bench has also observed that the Patna Judgment in *Brij Bihari Singh's case, (1989)37 (2) B.L.J.R. 219,* has been affirmed by the Supreme Court in the sense that after notice in the special leave petition, the petition for special leave was dismissed. A thorough search in the judgment of the Division Bench for the reasoning of the Supreme Court in the special leave petition, which is said to have been dismissed, is in vain. There is no reference whatever to any part of the judgment of the Supreme Court in the said special leave petition. The judgment does not seem to have been reported anywhere. It is not known how the Division Bench came to possess the knowledge of the order of the Supreme Court in the special leave petition. Nothing appears on record that the same emanated from the Bar. It is elementary principle that the dismissal of a special leave petition by the Supreme Court by a non-speaking order will be ineffective as an authority or binding precedent. Such dismissal without indicating the grounds or reasons therefor, must, by necessary implication, be taken to be that the Supreme Court had decided only that the case was not fit for grant of special leave. Vide *Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust, A.I.R. 1978 S.C. 1283, Indian Oil Corporation Ltd. v. State of Bihar and others, A.I.R. 1986 S.C. 1780: (1986)4 S.C.C. 146* and *Supreme Employees Welfare Association v. Union of India and others, A.I.R. 1990 S.C. 334.* In the last of the case referred to above, the Supreme Court has observed that dismissal of a special leave petition simplicitor without any reason, will not be a declaration of law by the Supreme Court under Art.14 of the Constitution of India. It is very strange that the Division Bench should refer to the dismissal of the special leave petition by the Supreme Court in the case of Brij Bihari Singh without making any reference to the ratio thereof.

59. The Division Bench has taken the view that the provision of the Tamil Nadu Act XXV of 1976 were not noticed by the Full Bench in *Tamilarasan v. Director of Handlooms and Textiles, (1991)2 L.W. 409: (1981)1 L.L.J. 588 (F.B.).* We have already adverted to the relevant facts and pointed out that the Full Bench was fully aware of the provisions of the Act and has given its ruling in the view that they did not make any difference in the basic position that a society is not the creature of a statute. It should be noted that the judgment of the Division Bench suffers from a fundamental

fallacy in that it equates the supersession of the board of Management of a society to the supersession of the society itself. In paragraph 25, a reference is made to *S.S.Dhanoa's case, A.I.R. 1981 S.C. 1395,* and it is observed that it was not a case of a society which had been superseded by the State Government. It is seen that in the judgment in *Brij Bihari Singh's case, (1989)37 (2) B.L.J.R. 219,* the Division Bench of the Patna High Court proceeded on the footing that the relevant Bihar Act had superseded the societies themselves. It is also noted that the management of the society had been vested in the Government under the Bihar Act and administrators were appointed pursuant thereto. But, under the Tamil Nadu Act XXV of 1976, the management of the society has not vested in the Government. We have already noted that the said Act has substituted only the Board of Management by the Special Officer and has not changed the character or status of a co-operative society. Sec.5 of the Act keeps in tact the applicability of the provisions of the Co-operative Societies Act and the Rules made thereunder to a Special Officer except as otherwise provided in Sec.4 thereof. Under Sec.4, the Special Officer shall have the same power to exercise all or any of the functions of the Management Committee or Board of Management of the Society. His remuneration is made payable from the funds of the society and not from Government funds. A comparison of the provisions of Tamil Nadu Act (XXV of 1976) with those of the Bihar Act as found in the judgment in *Brij Bihari Singh's case, (1989)37 B.L.J.R. 219,* shows that the two Acts are entirely different and they are not *pari materia.* The Division Bench is, therefore in error in holding that the reasoning in *Brij Bihari Singh's case, (1989)37 (2) B.L.J.R. 219,* would hold good with reference to Tamil Nadu Act XXV of 1976 and that the Full Bench is *per incuriam* inasmuch as it has not adopted that reasoning.

60. It goes without saying that the Division Bench has exceeded its bounds in characterising the judgment of the Full Bench as *per incuriam.* The other reason given by the Division Bench for not following the Full Bench is that the latter is *obiter dicta.* It is unnecessary for us to repeat what we have stated earlier to reject that reason given by the Division Bench as unsustainable.

61. The Division Bench could well have taken the royal road of making a Reference to a larger Bench if it was not able to agree with the Full Bench. It is a matter for regret that the Division Bench should erroneously brand a binding authority as *per incuriam* and *obiter dicta,* thereby paving way to judicial anarchy, which would only throw the litigants into chaos and confusion.

62. Before concluding, we shall place on record that it was brought to our notice that the Supreme Court has granted Special Leave against the judgment of the Division Bench in *A.Natarajan v. Registrar of Co-operative Societies, Chepauk and others (1991)2 L.W. 420: (1989)2 L.L.J. 296.* It was also pointed out by learned counsel or the third respondent that he is challenging the maintainability of the writ petition in this case on the ground that an efficacious alternative remedy is available to the petitioner and instead of availing the same, he should not have approached this Court. As the reference made to us is of a limited scope in view of the specific question framed, we decided to proceed further and express our opinion. We have considered it unnecessary to decide the question of maintainability of the writ petition on the ground of availability of an efficacious alternative remedy.

63. We have no hesitation in answering the question referred to us in the negative and holding that the judgment of the Full Bench in *Tamilarasan v. Director of Handlooms and Textiles, (1991)2 L.W. 409: (1981)1 L.L.J. 588 (F.B.),* is not *per incuriam* or *obiter dicta* and the views taken by the Division Bench in *A.Natarajan v. Registrar of Co-operative Societies and others, (1991)2 L.W. 420: (1989)2 L.L.J. 296.* is not correct. We hold that the judgment of the Full Bench is a valid precedent binding on the Division Benches and single Judges of this Court as well as subordinate courts.

B.S. ---- *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Arunachalam, J.*

C.R.P.No.232 of 1992 *17th February, 1992.*

K.A.Vadivelu ...*Petitioner*
v.
R.Govindarajalu ...*Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.14(2)(b) - Requirements of - Commencement of new construction within one month of eviction - If necessary - 'Bona fides' - *What is - Production of sanctioned plan - If necessary.*

Bona fides is a question of fact. What will be sufficient evidence will vary from case to case and the Courts will have to carefully scrutinise such material before accepting or rejecting the *bona fides* of the landlord or the landlady, as the case may be. It is a matter of common knowledge that rent control proceedings do take some years before a final decision is arrived at or rendered by the Court at the top in the vertical order. A sanctioned plan obtained necessarily has to be renewed or reobtained depending on the nature of pendency of the Rent Control proceedings. It cannot always be insisted that without a sanctioned plan, the landlord cannot claim *bona fides*. It is in this context, if one refers to Sec.14(2)(b) of the Act, the requirement is clear, that the demolition in material part must be commenced within one month and completed within three months. The second does not speak of commencement of new construction within that period. *[Para 8]*

Cases referred to:

Chandrasekara v. Kakumani Adhikesavulu Chetty's Charity, A.I.R. 1966 Mad. 14; P.Orr. and Sons case, (1990)2 L.W. 547 (S.C.); G.K.Jose and others v. Ramathal, (1979)1 M.L.J. 372: 92 L.W. 315.

Jayaraman for *Ananthakrishnan Nair* and *K.N.Thambi*, for Petitioner.

S.Thiruvenkatasamy and *R.Vijayasankar*, for Respondent.

The Court made the following

ORDER:- The tenant of a non-residential building who was unsuccessful before the Rent Controller as well before the appellate Authority, has preferred this civil revision petition challenging the concurrent findings of both the authorities that he is liable to be evicted from the premises in question. The respondent sought eviction mainly on two grounds *viz.*, wilful default and *bona fide* requirement of the building for demolition and reconstruction. Acts of waste were also mentioned in passing. The case of the petitioner before the Rent Controller was that there was no wilful default and further the building was not in a dilapidated condition needing demolition and reconstruction. On the other hand it was the case of the petitioner that the building was in a sound condition.

2. Learned Rent Controller held that the petitioner was liable to be evicted on both grounds namely, wilful default and *bona fide* requirement of the landlord of the building for demolition and reconstruction. However, on appeal the learned Appellate Authority reversed the finding of the Rent Controller so far as it concerned "wilful default", but concurred with the finding regarding the *bona fide* requirement of the building, by the landlord, for demolition and reconstruction.

3. In this civil revision petition, Mr.Jayaraman, learned counsel appearing on behalf of the petitioner contended, that the landlord had not chosen to file a sanctioned plan which is usually done in every case, to indicate *bona fide* requirement of the building for demolition and reconstruction. He then contended, that the Court Commissioner had inspected the premises in question on two occasions. As far as the second occasion is concerned, clear material is not available.

4. I have carefully considered the contentions of Mr.Jayaraman. To arrive at a conclusion of *bona fides* of the landlord, several circumstances which appear in evidence may have to be taken together and conclusions arrived at on the totality of such material. As a rigid rule, it cannot be stated that in every case without a sanctioned plan, brought on record by the landlord, *bona fides* cannot be held in his favour. In certain cases lack of a sanctioned plan, or evidence regarding sufficiency of funds, may tend to affect *bona fides*, while in other cases, non-marking of the sanctioned plan, may not be sufficient to discard the *bona fides* of the landlord. This is purely a question of fact.

5. A perusal of the evidence of the respondent clearly shows, that he has the funds for putting up a new construction. Further he has filed an undertaking as contemplated under Sec.14(2)(b) of the Tamil Nadu Buildings (Lease and Rent Control)

Act. As far as the *bona fides* are concerned, both the authorities below have gone into this aspect in detail, with meticulous care keeping in view the latest enunciation of law by the Apex Court in *P.Orr. and Sons case, (1990)2 L.W. 547 (S.C.).* Both the authorities had before them the specific fact of the building being 60 years old purely built out of mud paste and unbaked bricks. Roofing was of palmyrah poles supported by thatches and Mangalore tiles. The reports of the Commissioner and his plan Exs.C-1 and C-2 not only disclosed the dilapidated condition of the building, but also the urgent need for demolition of the same. The building appears to be in a rather precarious condition. Since the building was in such a precarious condition, the petitioner himself appears to have undertaken some repairs recently, though there is dispute, whether such repairs were carried out with or without the permission of the landlord. Both the authorities have rendered a finding that there was danger of the building collapsing at any point of time, on unassailable evidence I concur with the said finding.

6. Mr.Jayaraman invited my attention to the decision of Venkatadri, J. in *Chandrasekara v. Kakumani Adhikesavulu Chetty's Charity, A.I.R. 1966 Mad. 14,* wherein the learned Judge has observed as follows:

> "*Bona fide* may be proved in any ordinary way like any other fact in issue or relative fact. It is not a rule of law that *bona fide* being a subjective matter can only be proved by the landlord stepping into the witness-box. Judge has to take every circumstances which affects the interests of the landlord and the tenant as well as the interests of the public on the date of hearing, into consideration. The landlord has to satisfy the court that his requirement is reasonable and *bona fide* one, that he has prepared the plans and necessary estimates for the new building, that he has obtained the necessary sanction from the Corporation or Municipal authorities and that he has got the necessary funds to carry out such reconstructions."

7. The decision of G.Ramanujam, J. in *G.K.Jose and others v. Ramathal, (1979)1 M.L.J. 372: 92 L.W. 315,* was also cited: The learned Judge has observed as follows:

> "The Court could not make out how the obtaining of a plan subsequent to the filing of the eviction petition would show that the requirement of the premises by the landlady for the purpose of demolition and reconstruction was not *bona fide*. On the finding of the Appellate Authority which was based on the materials on record it was not possible to say that the requirement of the respondent (landlady) was not *bona fide* at all. The Court accepted the findings of the authorities below that the landlady required the premises *bona fide* for demolition and reconstruction."

8. Even in the light of both these authorities, it is clear that *'bona fides'* is a question of fact. What will be sufficient evidence, will vary from case to case, and the Courts will have to carefully scrutinise such material before accepting or rejecting the *bona fides* of the landlord or landlady, as the came may be. It is a matter of common knowledge that rent control proceedings do take some years before a final decision is arrived at or rendered by the Court at the top in the vertical order. A sanctioned plan obtained necessarily has to be renewed or reobtained depending on the nature of pendency of the Rent Control proceedings. It cannot always be insisted that without a sanctioned plan, the landlord cannot claim *bona fides*. It is in this context, if one refers to Sec.14(2)(b) of the Act, the requirement is clear, that the demolition in material part must be commenced within one month and completed within three months. The second does not speak of commencement of new construction within that period. I am satisfied that no ground has been made out to interfere in revision. The findings of both the authorities, need no further scrutiny in revision. There is neither a question of law nor error in jurisdiction to admit this civil revision petition. Hence this civil revision petition is dismissed, at the admission stage itself.

9. At this stage, Mr.Jayaraman pleaded for some time to vacate the premises and hand over vacant possession. On this plea I have heard Mr.S.Thiruvenkatasamy, learned Counsel appearing for the caveator/respondent. Keeping in view the condition of the building, in the event of an affidavit of undertaking being filed within one week from to-day, by the petitioner that he will vacate and hand over vacant possession of the premises to the landlord, he shall have one month to vacate the premises, reckoned from to-day.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

O.S.A.Nos.53 and 54 of 1985 *5th February, 1992.*

A.G.Krishnamoorthy ...*Appellant*
v.
V.Kannammal and 6 others ...*Respondents.*

Presidency Towns Insolvency Act (III of 1909). Secs.7, 8 and 36 - Evidence Act (I of 1872), Secs.59, 91 and 92 - Person declared insolvent - Official Assignee filing application for declaration that insolvent was entitled to the sixth share in a property - Title deed for property is in the name of brother of insolvent - Official Assignee and one creditor raising dispute that the title was in some one else - Dispute if can be raised - Benami - Nature of transaction - Rights of ostensible owner. Title deed, if can be ignored.

One 'N' the fourth respondent herein was declared an insolvent. The Official Assignee filed an application under Sec.7 of the Presidency Towns Insolvency Act read with Sec.36 thereof for a declaration that he was entitled to 1/6th share in a certain property and that the same might be vested wit the official Assignee. A creditor moved an appication under Sec.8 of the Act for a review of the order declaring 'N' an insolvent. It was dismissed by a learned Single Judge. The application by the Official Assignee also was dismissed. Both of them filed appeals and contended that though the title deed of the property was in the name of N's mother 'K', the property belonged to N's father 'V' that it was purchased in the name of 'K' and that 'N' was entitled to 1/6th share in the property.

Held:- There can be no dispute that in case of a benami transaction, the most important issue is as to who paid the consideration money/purchase money if at all there was such consideration involved. It is indeed a mistake to imagine a dispute raised by a third party as to the title in some one other than the person in whose name the property stands. Sec.59 of the Evidence Act provides that the contents of documents cannot be proved by oral evidence. Sec.91 of the Evidence Act says that when the terms of a contract or of a grant or any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible subject to the exceptions that are enumerated within Sec.92 excludes evidence as to oral agreement which will have the effect of contradicting, varying or adding to or subtracting from the terms of the document reduced to writing. Benami is a concept derived from the use and practice in India of any immovable property by the real owner, keeping himself in hiding and projecting ostensibly someone else as the owner. The ostensible owner thus has all the rights and privileges of the owner of a property except against the real owner who enjoyed the privilege of asserting his title against ostensible owner. If anyone could assert any right or interest in the property that stood in the name of 'K' in the title deed, that was the real owner viz., the husband, if at all K was only ostensibly the owner and the property in fact had been purchased by 'V'. The Court cannot see any possibility of a creditor who may have a claim against the debtor say that his debtor is the real owner of the property although the property stood in the name of another person. The most vital of the questions that was required to be answered is the source from which the purchase money came and then only the nature of possession of the property after the purchase and the other issues as aforementioned have to be examined. As observed by the Supreme Court in *Gapadibai v. State of M.P., A.I.R. 1980 S.C. 1040,* the title deed is a solemn document. It cannot easily be ignored and no inference drawn against its contents unless, as again observed by the Supreme Court, the person asserting the transaction to be benami is able to show that the ownership although ostensibly shown in the name of a certain person, was in reality with another.

[Paras 4 and 8]

Cases referred to:

Man Mohan v. Mt. Ramdei, A.I.R. 1931 P.C. 175: 34 L.W. 7; Jayadayal Poddar v. Bibi Hazra, A.I.R. 1974 S.C. 171: (1971) 1 S.C.C. 3; Gapadibai v. State of M.P., A.I.R. 1980 S.C. 1040. Dalip Singh v. Nawal Kunwar, (1908) 30 All. 258: 35 I.A. 104 P.C.

S.Jagadeesan, for Respondent.

The Judgment of the Court was delivered by *Mishra, J.*:- V.Natarajan, the fourth respondent herein, was declared an insolvent. The Official Assignee, however, filed an application under Sec.7 of the Presidency Towns Insolvency Act, 1909, read with Sec.36 thereof, for a declaration that Natarajan, the insolvent, was entitled to one-sixth share in petition mentioned property, and that the same be vested with the Official Assignee consequent on the adjudication that he was insolvent. A learned single Judge of this Court summoned Natarajan his mother Kannammal (first respondent in O.S.A.No.53 of 1985) and other persons known or suspected to have been in possession of the petition mentioned property and inquired as to whether there was any interest or share of the insolvent in the said property. He found, however, that the Official Assignee could not establish that Natarajan had 1/6th share in the property, and accordingly dismissed the application. Natarajan, in the meanwhile, also applied for discharge stating *inter alia* that he possessed no property for any further discharge of the credits, and the learned Judge ordered as follows:

> "The insolvent has paid his creditors 0.50 P.in a rupee and he had not concealed anything from the Official Assignee or secreted any assets. In the circumstances, this is a fit case where an order of discharge will have to be made in favour of the insolvent."

The creditor who had moved an application under Sec.8 of the Act for a review of the order declaring Natarajan, the insolvent, and whose application had been dismissed saying that the question would be taken up only at a stage when it was decided to discharge the insolvent of any liabilities however, felt aggrieved, and thus preferred the instant appeals.

2. The only property, however, with respect to which the entire dispute related is the property mentioned in the petition of the Official Assignee. It is not in dispute that the title deed of the said property is in the name of (sic) Kamalammal and that the insolvent is one of the five sons of Kannammal. The case of the Official Assignee before the learned single Judges as well as that of the creditor - appellant before us is that although the title deed stood in the name of (sic Kamalammal, the property belonged to Vedachala Naicker, the husband of the first respondent Kannammal, and it was Vedachala Naicker who had purchased the property in the name of the first respondent as per the three sale deeds Exs.R-1 to R-3. In support of this contention, reliance was placed on Exs.R-1 to R-3, the three mortgage deeds, jointly executed by Kannammal and her sons including the insolvent the recitals whereof indicated that the property had been purchased by Vedachala Naicker in the name of Kannammal, and that on demise of the real owner, Vedachala Naicker, it devolved equally upon Kannammal, the widow and the sons, respondents 2 to 6 including the insolvent. Kannammal, however, maintained that the property in dispute was a house purchased by her absolutely as per the sale deeds, Exts.R-1 and R-3, and contended that the recitals in Exts.P-1 to P-3 were incorporated at the instance of the creditor, and thus never constituted a conscious admission of the title of her husband. The learned single Judge noticed that the burden of proving that the petition mentioned property was purchased benami by Vedachala Naicker was on the Official Assignee, and that to establish the Benami transaction, he must prove (1) that the sale price for Exts.R-1 to Ru-3 was paid by Vedachala Naicker; (2) that there was sufficient motive for Vedachala Naicker to take a sale deed in the name of his wife; (3) that the possession of the property was always with Vedachala Naicker, and afterwards with his sons; and (4) that the custody of the title deeds was always with Vedachala Naicker and his sons.

3. The Official Assignee examined one of the creditors of the insolvent as P.W.1. He, however, could not show any knowledge about the acquisition of the property by sale deeds, Exts.R-1 to R-3. The first respondent Kannammal deposed as R.W.1 and asserted that the property was purchased as per Exts.R-1 to R-3 with her funds, which she earned by vending edibles. She also produced Ex.R-5, licence in her name under Sec.282 of the City Municipal Act for maintaining five heads of cattle, and explained Exts.R-1 to R-3 saying that they were taken for small sums in 1931, 1940 and 1941, which sums she could manage with her own earnings. The learned single Judge has stated:

> "From Ex.P-4 the property tax receipt in respect of the suit property, it is seen that the property stands in the name of Kannammal and that she had been paying the property tax. There is no evidence to show that Vedachala Naicker or his sons paid the property tax for the petition mentioned property at any time.

Hence it cannot be said that Vedachala Naicker or his sons had been in possession of the property. No doubt, R.W.1 has stated that two of her sons had been permitted to reside in portions of the petition mentioned property. The possession of the suit property by her two sons can only be said to be permissive occupation which cannot give any right in the property to the sons."

He has also said:

"There is no evidence let in on behalf of the Official Assignee regarding any motive which might have prompted the 'benami' transaction. On the other hand, R.W.1 had given evidence that she had purchased the property as per Exts.R-1 to R-3 with her own funds and that neither her husband nor her sons had any manner of right at any time in the said property."

He has further said:

"It is seen that R.W.1 had mortgaged the property with the Oriental Benefit Fund and she deposited the title deeds with them. There is no evidence to show that the original title deeds had been with Vedachala Naicker and his sons."

After taking notice of the state of evidence as above, he has dealt with particularly how the recitals in Exs.P-1 to P-3 stand. He had said:

"Apart from the recitals in Exts.P-1 to P-3 that the property was purchased in the name of the 1st respondent 'benami' by her husband, the Official Assignee is not able to let in any evidence to substantiate the case set out in the petition. R.W.1 has stated the circumstances under which the said recital in Exts.P-1 to P-3 came into existence R.W.1 had stated that at the instance of the creditors such recitals were incorporated. The said recitals cannot be taken as conclusive for the following reasons:

(a) If the recital is true, there is no reason for making the 1st respondent as a party to Exts. P-1 to P-3;

(b) There is no semblance of evidence to show that late Vedachala Naicker dealt with the property in any manner; and

(c) There is nothing to show that possession of the property had vested with Vedachala Naicker or his sons after his death. Taking the entire circumstances, much value cannot be attached to the recitals in Exts.P-1 to P-3, and the case of the Official Assignee based upon the said recitals will have to be negatived."

4. There can be no dispute that in case of a benami transaction, the most important issue is as to who paid the consideration money/purchase money if at all there was such consideration involved, followed by the other issues to which the learned single Judge has adverted to carefully. It is indeed a mistake if we say so, with respect, to imagine a dispute raised by a third party as to the title in some one other than the person in whose name the property stands. Sec.59 of the Indian Evidence Act provides that the the contents of documents cannot be proved by oral evidence. Sec.91 of the Indian Evidence Act says that when the terms of a contract or of a grant, or any other disposition of property, have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible, subject to the exceptions that are enumerated under it. Sec.92 excludes evidence as to oral agreement which will have the effect of contradicting, varying, adding to, or subtracting from, the terms of the document reduced to writing. Benami is a concept derived from the use and practice in India of any immovable property by the real owner, keeping himself in hiding and projecting ostensibly someone else as the owner. The ostensible owner thus has all the rights and privileges of the owner of a property, except against the real owner who enjoyed the privilege of asserting his title against the ostensible owner. If any one could assert any right or interest in the property that stood in the name of Kannammal in the title deed, that was the real owner *viz.,* the husband, if at all Kannammal was only ostensibly the owner and the property in fact had been purchased by Vedachala Naicker. We cannot see any possibility of a creditor who may have a claim against the debtor to say that his debtor is the real owner of the property, although the property stood in the name of another person.

5. Learned Counsel for the appellant, however, has placed reliance upon a judgment of the Privy Council in *Man Mohan v. Mt. Ramdei, A.I.R. 1931 P.C. 175: 34 L.W. 7,* which was a case relating to a

dispute as to a deed of gift. Two brothers, Behari Lal and Lala Guza Prasad owner in its entirety a house. The entire interest of Lala Gaza Prasad was purchased by the appellants. Behari Lal sold 4 annas of his 8 annas share to the appellants. Thus, the appellants became owners of 12 annas share in the property. Behari Lal executed a deed of gift of his remaining 4 annas share in favour of his wife. Notwithstanding the gift, later he sold to the appellants the 4 annas share which was the subject matter of the gift to his wife. The appellants thus claimed that they had purchased the entire share of Lala Gaza Prasad as well as the entire share of Behari Lal in the house property, and alleged that the deed of gift was fictitious and invalid. the Privy Council said upon that:

> "In order to determine the question of the validity or invalidity of the deed of gift in question it is of assistance to consider:
>
> "the surrounding circumstances, the position of the parties and their relation to one another the motives which could govern their actions and their subsequent conduct. *"Dalip Singh v. Nawal Kunwar, (1908)30 All. 258: 35 I.A. 104 P.C.*, at p.107 (of 35 I.A.)
>
> always remembering that the onus of proof rests upon the party impeaching the deed.
>
> The terms of the deed itself are not suggestive of a merely colourable document. After reciting the fact of his recent marriage the minority of his wife, the advice of his relation and his own desire to make arrangements for his wife's maintenance, Behari Lal gives the property in question to his wife under his sister-in-law's guardianship, for her life-interest, subject to an elaborate series of conditions, which include *inter alia* a prohibition against alienation, a provision for the reversion of the property to himself should his wife die without male issue, and a forfeiture clause in the event of his wife ceasing to live with him......
>
> The situation of the parties at the time of the execution of the deed renders it probable that it was intended to be a genuine transaction. The learned Subordinate Judge came to the conclusion that the deed was a "farzi" transaction entered into to save the property from his creditors," but although Behari Lal had a sufficiently chequered financial career in which a conveniently shifting date of majority placed a large part, he does not appear to have been at the time of the execution of the deed under any pressure of debt.
>
> The deed of gift was duly registered and the name of the donee entered in the Municipal records."

Besides the above, it is noticeable in the judgment of the Privy Council that Behari Lal had instituted the suit to have the deed of gift set aside and stated that he did so under the advice of his evil companions and due to fear of creditors and described and deed of gift as fictitious. He also alleged somewhat inconsistently that the property had reverted to him under the terms of the deed owing to his wife having ceased to live with him. The Privy Council pronounced:

> "Their Lordships on a consideration of the whole circumstances, of which they have set out the salient incidents, are satisfied that the appellants have failed to discharge the burden incumbent upon them of proving that the deed of gift was fictitious. Apart from general auspicion of Behari Lal, on whose actings as little reliance can be placed as on his word, and who was naturally willing when it suited his purpose, to falsify the facts, there is really no evidence of such a character as would entitle a court to take the serious step of setting aside the deed of gift and depriving the innocent minor respondent of the provisions reasonably made for her."

6. The other case relied upon by learned Counsel for the appellant is again a case of benami transfer of property and a dispute between the real owner and the ostensible owner. In *Jayadayal Poddar v. Bibi Hazra, A.I.R. 1974 S.C. 171: (1971) 1 S.C.C. 3*, it is said:

> "It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner; always rests on the person asserting it to be so. This burden has tc be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the

serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformally applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances; (1) the source from which the purchase money came (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

7. Learned counsel for the appellant also referred to a judgment of the Supreme Court in *Gapadibai v. State of M.P., A.I.R. 1980 S.C. 1040.* This was a case before the Supreme Court, wherein for recovery of sums due to the Government from the husband, a property which has stood in the name of his wife was attached. The wife filed a suit claiming relief on the ground that the house was her personal property and could not be attached to the sums owing by her husband. The defence by the State was that the property belonged to the husband, and that, therefore, the attachment was valid. The wife relied on a registered document which was proved to have been duly executed. She also let evidence to show that she had sufficient means to purchase the house. The Supreme Court, on the basis of the abovesaid:

"In the first place, the State never pleaded that the house in question was purchased by the husband through a benami transaction in the name of his wife. It was also not pleaded clearly that the property belonged to the husband and that it has been sold to the wife with the intention to defeat the creditors of the husband. A vague allegation of this type seems to have been made in the written statement but no evidence whatsoever has been led to show as to whether there was any such intention on the part of defendant No.5. Even the data when the sums sought to be recovered become due has not been proved or indicated to the satisfaction of the court. The trial court, after a very careful consideration of the evidence of the plaintiffs and the documents produced by her found that she had established that the property in question belong to her and not to defendant No.5. In the instant case as the plaintiff relied on a registered document which was proved to have been duly excuted, a finding which has not been reversed by the High Court, the onus lay on the State to prove that what was apparent was not the real. No evidence on behalf of the State was adduced to displace the presumption arising from the registered sale deed in favour of the plaintiff. On the other hand, the plaintiff led evidence oral and documentary, to show that she had sufficient means to purchase the house. The High Court instead of displacing the reasons given by the trial court, has rejected the oral evidence on a general ground that there were some contractions here and there and has also misconstrued the documents produced by the plaintiff which were in the nature of applications to the municipality for purchasing a backyard of the house in dispute and which were allowed on the footing that the house belonged to her..... Once the plaintiff proved by virtue of the registered sale deed that she was the owner of the house and also explained the source of the price paid by her for it, that was sufficient to hold that the property belonged to her and could not be attached for the recovery of dues owing by her husband."

The Supreme Court in that case rejected the plea of benami saying,

"In order to prove the benami nature of the transaction the State could have led evidence to show (1) that defendant No.5 paid the consideration, (2) that he had the custody of the sale deed, (3) that he was in possession of the property and (4) the motive for the transaction. None of those factors has been proved by the State."

8. The discussion that we have made thus of the principles of law clearly shows that the most vital

of the questions that was required to be answered is the source from which the purchaser money came and then only the nature of possession of the property after the purchase and the other issues as aforementioned have to be examined. As observed by the Supreme Court, the title deed is a solemn document. It cannot easily be ignored, and no inference drawn against its contents unless, as again observed by the Supreme Court, the person asserting the transaction to be benami is able to show that the ownership although ostensibly shown in the name of a certain person, was in reality with another. We are satisfied that the learned trial Judge has committed no mistake in coming to the conclusion as above with respect to the property in question.

9. Had there been any assertion before us that the fourth respondent insolvent had any other property or that the Official Assignee and or the learned single Judge were not informed about all the properties of the insolvent, we would have thought to give to the creditor another opportunity to agitate and seek a review of the order discharging the insolvent. Since the only property referred to is one which has been found to belong to the first respondent Kannammal, and in which property it has not been established that the insolvent ever had any interest, we think no interest will be served by making any observation as to the claim of the creditor still surviving and the insolvent still liable and not discharged. It is a case, in our opinion, in which the only possible view is one that has been taken by the learned single Judge. There is no merit in the appeals. The appeals are accordingly dismissed. There shall, however, be no order as to costs.

B.S. ---- *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Pratap Singh, J.*

A.A.O.No.870 of 1985 *2nd April, 1992.*

The Nagapattinam Import and Export Corporation, Nagapattinam, Thanjavur District ...*Appellant*

v.

K.Lakshmi ...*Respondent.*

Workmen's Compensation Act (VIII of 1923), Sec.28 - Scope and object - Worker dying in accident - Wife paid some amount in full settlement of her claim - Not registered under the Act - Cannot be taken cognizance of.

Though the receipt is to evidence payment of Rs.2,500 in full quit, in pith and substance, it amounts to settlement of claim of the applicant for the death of her husband in the course of the employment. Unless such a reasonable interpretation is given regarding the purview of Sec.28 of the Act, the employers would offer a paltry sum to the dependant of the employee who would be in dire need of money and get a receipt in full settlement of the claim and thwart the very object of this Act. Only to save the dependants from such contingency, Sec.28 of the Act has been incorporated in the Act. So, unless such a receipt is registered under Sec.28 of the Act as per procedure laid in the said section, it cannot be used as an answer to the claim of the applicant. *[Para 7]*

Appeal against the order of the Deputy Commissioner of Labour Commissioner for Workmen's Compensation, Tiruchirapalli, dated 14.10.1985, W.C.Application No.37 of 1981.

Neelamegan, for *K.V.Venkatapathy* and *Velmurugan*, for Appellant.

The Court made the following

ORDER:- Opposite Party II in W.C.Application No.37 of 1981 on the file of the Deputy Commissioner of Labour Commissioner for Workmen's Compensation Tiruchirapalli, has filed this civil miscellaneous appeal against the order in the said W.C.Application No.37 of 1981 in which the Authority has fixed the compensation at Rs.16,800 and directed that the said sum shall be deposited by the second opposite party within thirty days from the date of the order:

2. The facts leading to this appeal are:

The respondent has filed W.C.Application No.37 of 1981 under Sec.10 of the Workmen's Compensation Act, 1923, (hereinafter referred to as 'the Act'), claiming compensation from the opposite parties for the fatal accident occurred to her husband Karuna Vijayan, arising out of and in the course of his employment on 27.8.1973, on the following grounds:

She is the wife of Karuna Vijayan. He met with an accident on 27.8.1973 arising out of and in the course of his employment under the opposite parties, resulting in his death. She is the dependant of the deceased. His monthly wages at the time of his death was Rs.200. Hence she has made the claim for Rs.25,000 under the Act. She has also filed a petition with supporting affidavit for condoning the delay in presenting the application for compensation.

3. The first opposite party resisted the claim on the following grounds:

The first opposite party came into existence only in October, 1973. This opposite party does not own the beat involved in the accident. The delay of eight years in filing the petition cannot be excused. The second opposite party resisted the claim on the following grounds:

The delay in filing the petition is inordinate and cannot be condoned. The applicant has no right to claim any compensation as she had received Rs.2,500 on 29.12.1973 in full quit of her claim. Hence the dismissal of the petition is prayed for.

4. After elaborate enquiry, the lower authority had condoned the delay in presenting the application. The lower authority had held that since the payment of Rs.2,500 in full quit was not registered under Sec.28 of the Act, it cannot be taken cognizance of and had fixed the compensation at Rs.16,800 and had directed the second opposite party to deposit the said amount. Aggrieved by the said order, the second opposite party has come forward with this civil miscellaneous appeal.

5. Mr.G.Neelamegan, learned counsel appearing for the appellant, submitted that the accident occurred on 27.8.1973 and the claim application was filed on 20.4.1981, nearly eight years from the date of the accident and no valid reason had been given for condoning the delay and the period fixed under the act is only two years and hence the application ought to have been dismissed on the ground of limitation. He further submitted that the applicant had received Rs.2,500 in full quit as evidenced by Ex.R-1 receipt, and it would not come within the ambit of Sec.28 of the Act and hence the reasoning of the lower Authority that since it was not registered under Sec.28 of the Act, it cannot be taken cognizance of, is not correct, and in view of Ex.R-1 receipt, the claim ought to have been dismissed. There was no representation either in person or through counsel for the respondent. I have carefully considered the two submissions made by Mr.G.Neelamegan.

6. Though under Sec.10 of the Act, the period of limitation is fixed as two years, provision is made for condoning the delay in Sec.10(1) of the Act, and it reads as follows:

> "Provided further that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred in due time as provided in this sub-section if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause."

In the instant case, the applicant had filed the petition on 20.4.1981 with an affidavit in which she has given in detail the reasons for the delay in preferring the application. The lower Authority had referred to it in page 2 of its order. It appears from her affidavit that she is an illiterate widow, without any help, and she could not do things as early as possible and that she had tapped the doors of the concerned Authorities without any success and had resorted to the Legal Aid Committee, Madras, which had transmitted her claim to the District Legal Aid and Advisory Committee, Nagapattinam, and then particulars were asked for and in the process considerable time had lapsed and thus she was constrained to prefer the application belatedly. The lower Authority had accepted the reasons given by the applicant and had condoned the delay. I do not find any ground to interfere with this finding. In page 4 of the order, the lower Authority has considered the question of delay and had found that it has been validly explained. The applicant first approached the Boat Workers' Association, which initiated proceedings in the Labour Court, and due to cyclone in 1977 the entire records were damaged and then she approached the Legal Aid Committee, Madras and took up the matter and after certain particulars were gathered, the application

was filed. The reasoning of the lower authority is very fair and acceptable. Hence, I am unable to accept the submission made by Mr.G.Neelamegan that no sufficient reason was given for the delay in preferring the application.

7. Regarding the payment of Rs.2,500 in full quit as evidenced by Ex.R-1, I am in agreement with the lower authority that it requires registration under Sec.28 of the Act. The relevant part of Sec.28(1) reads as follows:

> "Where the amount of any lump sum payable as compensation has been settled by agreement, whether by way of redemption of a half monthly payment or otherwise, or where any compensation has been so settled as being payable to a woman or a person under a legal disability, a memorandum thereof shall be sent by the employer to the Commissioner, who shall, on being satisfied as to its genuineness, record the memorandum in a register in the prescribed manner."

Though the receipt is to evidence payment of Rs.2,500 in full quit, in pith and substance, it amounts to settlement of claim of the applicant for the death of her husband in the course of the employment. Unless such a reasonable interpretation is given regarding the purview of Sec.28 of the Act, the employers would offer a paltry sum to the dependant of an employee who would be in dire need of money and get a receipt in full settlement of the claim and thwart the very object of this Act. Only to save the dependants from such contingency, Sec.28 of the Act has been incorporated in the Act. So, I am clear that unless such a receipt is registered under Sec.28 of the Act as per procedure laid in the said section, it cannot be used as an answer to the claim of the applicant. In view of the above, I do not accept this submission made by Mr.G.Neelamegan. Both the contentions raised by Mr.G.Neelamegan having failed, this appeal has to be dismissed.

8. At this stage, Mr.G.Neelamegan made a final submission that since Rs.2,500 has already been paid, that amount should be deducted from the amount awarded by the lower authority. He further states that the applicant has admitted having received Rs.2,500 and executed the receipt. So that amount will have to be deducted from the amount awarded as compensation. Except regarding the above direction, namely, deduction of Rs.2,500 from the compensation amount awarded by the lower Authority, the order of the lower authority has to be confirmed, and this civil miscellaneous appeal is disposed of accordingly.

B.S. ---- *Appeal dismissed with directions.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Kanakaraj, JJ.*

C.M.P.S.R.Nos.97339 and 97340 of 1991 in O.S.A.No.179 of 1989 *17th February, 1992.*

E.V.Palanivelu and others ...*Petitioners*

v.

Sri Krishna Talkies, Madras and others ...*Respondents.*

Civil Procedure Code (V of 1908), O.1, Rule 10 and O.22, Rule 10 - Defendants in a suit entering into sale agreement was a third party in respect of property in dispute, after disposal of appeal - Third party filing applications for impleading him as a party to the appeal and to execute a sale deed in favour of the third party - Held not maintainable.

The appellants in O.S.A.No.179 of 1989, as owners of the land on whether the 'Krishna Talkies' had been built filed O.S.No.471 of 1986 against the partners of the Talkies for recovery of possession of the site. Respondents 7 to 21 as defendants claimed rights under the Tamil Nadu City Tenants Protection Act. The trial Court declared the right of the respondents 7 to 21. Respondents 1 to 6 filed an appeal. It was disposed of on 6.10.1989 directing respondents 7 to 21 to pay the value of the site in instalment. The petitioner alleging that the respondents 7 to 21 had entered into an agreement with the petitioner for sale of the suit property, filed petitions for impleading him as a party to the O.S.Appeal and to direct respondents 11 to 16 to execute a sale deed to and in favour of the petitioner as nominee of the first respondent.

Held: The dispute relating to the agreement dated 25.4.1991 is wholly extraneous to the said O.S.No.471 of 1986 and O.S.A.No.179 of 1989 arising therefrom. It is needless to point out that the petitioner has to agitate his right, if any through independent proceedings. It must be remembered that the petitioner in this case is not even a purchaser but

a mere agreement holder. The plaintiffs in O.S.No.471 of 1986 cannot be forced to fight the case of such agreement holders who entered into an agreement with the defendants long after the disposal of the suit. *[Paras 3 and 4]*

Cases referred to:

C.K.R.C.N.K.R.Adhappa Chettiar v. R.M.Meenakshi Achi, 96 L.W. 652; Rathinavel Chettiar v. Sakunthala, 100 L.W. 1011; Nallathambi Goundan v. Vijaya Raghavan, (1972)2 M.L.J. 535: 85 L.W. 648.

S.Sridharan and *K.Sethuraman*, for Petitioners.

Peter Francis and *P.Seshayya*, for Respondents.

The Judgment of the Court was delivered by

Kanakaraj, J.:- These two petitions have been posted for argument on the question of maintainability raised by the Registry. One application is for impleading the petitioner as a party to the O.S.Appeal and the second petition is for the direction to respondents 11 to 16 to execute a sale deed to and in favour of the petitioner as nominee of the first respondent. O.S.Appeal No.179 of 1989 arises under the following circumstances; The appellants in O.S.A.No.179 of 1989 (respondents 1 to 6 in C.M.P.), as owners of the land on which the cinema theatre (Sri Krishna Talkies) had been built filed O.S.No.471 of 1986 against the partners of the "Sri Krishna Talkies" (respondents 7 to 21 in C.M.P.) for recovery of possession of the site. Respondents 7 to 21 as defendants claimed rights under the Tamil Nadu City Tenants Protection Act, 1922. By an order dated 18.8.1988 this Court declared the right of respondents 7 to 21 to purchase the site. This order dated 18.8.1988 was taken up on appeal by respondents 1 to 6 in the above O.S.Appeal. The O.S.Appeal was finally disposed of on 6.10.1989 fixing the value of the site as Rs.63,93,600 and respondents 7 to 21 were directed to pay the said amount in instalments. The entire payment was to be completed by 31.12.1991.

2. The allegation of the petitioner is that respondents 7 to 21 had entered into an agreement with the petitioner and it is with the help of the petitioner that they paid the amount as fixed by this Court on 6.10.1989. The petitioner bases his claim on the terms and conditions of a sale agreement dated 25.4.1991 between respondents 7 to 21 and the petitioner. According to the petitioner, he should be nominated as the purchaser by respondents 7 to 21, in the event of the decree in O.S.No.471 of 1986 being given effect to. The warrant for filing this petition to implead the petitioner as a party in the O.S.Appeal, is the difference of opinion that has developed between respondents 7 to 21 and the petitioner in respect of the said agreement dated 25.4.1991. While respondents 7 to 21 are treating the amounts as a loan, the petitioner is treating the amount as payment of price under the sale agreement dated 25.4.1991.

3. We have no doubt in our mind that the dispute relating to the agreement dated 25.4.1991 is wholly extraneous to the said O.S.No.471 of 1986 and O.S.A.No.179 of 1989 arising therefrom. It is needless to point out that the petitioner has to agitate his right, if any, through independent proceedings. Apparently the petitioner apprehends that if respondents 7 to 21 get the sale deed executed in their favour as per the decree in O.S.No.471 of 1986 his rights will be prejudiced. It is for the petitioner to work out his rights if any, by taking separate proceedings.

4. Learned counsel for the petitioner has cited a decision in *C.K.R.C.N.K.R.Adhappa Chettiar v. R.M.Meenakshi Achi, 96 L.W. 652,* in support of the case of the petitioner. That was a case where the purchaser applied for impleading himself as a party in an appeal which was pending. That decision will not apply to the facts of the present case. Similarly in *Rathinavel Chettiar v. Sakunthala, 100 L.W. 1011,* has no relevance to the issue involved in this case. A perusal of the facts in *Nallathambi Goundan v. Vijaya Raghavan, (1972)2 M.L.J. 535: 85 L.W. 648,* shows that the court has not laid down any proposition that a subsequent agreement holder can implied himself in a suit which has already been disposed of Paragraph 19 of the said judgment does not in any way support the case of the petitioner. It must be remembered that the petitioner in this case is not even a purchaser but a mere agreement holder. The plaintiffs in O.S.No.471 of 1986 cannot be forced to fight the case of such agreement holders who entered into an agreement with the defendants long after the disposal of the suit. We have no hesitation in dismissing this petition.

5. We are however, inclined to direct that the sale deed in favour of respondents 7 to 21 shall be executed by respondents 1 to 5 in accordance with the order in O.S.Appeal No.179 of 1989 only after 30 days from today giving enough time to the petitioner herein to work out his rights if any, under the agreement dated 25.4.1991. We

therefore hold that these petitions are not maintainable.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

A.No.674 of 1985 and Trans.A.No.1084 of 1987 *18th December, 1991.*

Nallathambi Udayar (died) and another ...*Appellants*

v.

Jayaraman and another ...*Respondents.*

(A) Civil Procedure Code (V of 1908), O.22, Rule 5 - Scope of enquiry under - Summary in nature - Question whether a person should be admitted as legal representative of deceased plaintiff to continue the suit - Not question arising for decision in the suit - Question has to be relegated to decision in independent proceedings.

(B) Civil Procedure Code (V of 1908), Sec.47 and O.22, Rule 5 - Order under O.22, Rule 5 if can be equated with an order under Sec.47(3) - Terms 'representative' and 'legal representative' - Meanings of.

After the 1976 amendment, an order passed under Sec.47, C.P.C. is not a decree and is appealable only if it falls under Sec.104(1), C.P.C. Otherwise only a revision would lie. However, on that ground alone an order under O.22, Rule 5, C.P.C. cannot be equated with an Order under Sec.47(3), C.P.C. At the time when fruit of any decree has to be given to the decree-holder, it has necessarily to be conclusively determined whether any party claiming to be the representative of the decree-holder is entitled to claim the fruit of the decree. Therefore, the determination under Sec.47(3), C.P.C. is a conclusive one and cannot be called a summary determination as it is a case in enquiry under O.22, Rule 5, C.P.C. Further it must be noted the term used in Sec.47(3), C.P.C. is 'representative' of a party while the term used in O.22, Rule 5, C.P.C. is 'legal representative' of a deceased plaintiff or a deceased defendant. This latter term 'legal representative' has been given a specific definition in the C.P.C. While it is not so in the case of the term 'representative'. The term 'legal representative' is defined under Sec.2(11), C.P.C. According to the said definition, the said term means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. Thus, even a person who intermeddles with the estate of the deceased comes under the definition. So when a party to a proceeding dies, even a person who intermeddles with the estate of the deceased party could be brought on record as legal representative for prosecuting the proceeding further without allowing it to be abated. But this legal position cannot be attributed to the term 'representative' used in Sec.47(3), C.P.C. *[Para 9]*

Cases referred to:

Sivagurunathan v. Balasubramaniam, (1988)1 L.W.277; Pakkran v. Pathumma, 25 M.L.J. 279; Balabai v. Ganesh, (1902) I.L.R. 27 Bom. 162; Purushotam Rao v. Janki, (1905) I.L.R. 28 Bom. 109; Koneridoss v. N.Subbiah Naidu, (1974)2 M.L.J. 253: A.I.R. 1975 Mad. 124; Appavoo Pillai v. Vijayambal, A.I.R. 1973 Mad. 64; Rangaswami Naicker v. Rangammal, (1968)2 M.L.J. 610: A.I.R. 1969 Mad. 271; Krishnakumar v. N.C.Naidu, A.I.R. 1975 Mad. 174: (1974)2 M.L.J. 158; Mohinder Kaur v. Piara Singh, A.I.R. 1981 P. & H. 130; Daya Ram v. Shyam Sundari, A.I.R. 1965 S.C. 1049; Kair Mohideen v. Muthu Krishna Ayyar, (1903) I.L.R. 26 Mad. 230; M.Girimallappa v. R.Yellappagounda, A.I.R. 1959 S.C. 906; Krishnan v. Ramaswami, (1984)2 M.L.J. 133. Venkatakrishnan Reddi v. Krishna Reddi, A.I.R. 1926 Mad. 586 (F.B.).

R.Sekar, for Appellants.

M.N.Padmanabhan, for Respondents.

The Court delivered the following

JUDGMENT:- These two appeals are by the same appellants, A.S.No.674 of 1985 arises out of the judgment and decree in O.S.No.90 of 1981 and the 1st appellant is the 1st defendant therein. In the said suit, the plaintiff Jayaraman, who is the 1st respondent in both the appeals herein claimed 1/4th share in the suit properties described in plaint schedules B, C, D & E on the ground that the said properties are joint family properties of the family of the 1st appellant and the said Jayaraman and two other sons Parvatha Udayar and Margasahayam, who are defendants 2 and 3 in the said suit.

2. A.S.No.1084 of 1987 arises out of O.S.No.23 of 1982 filed by the 1st appellant against his abovesaid three sons. In the said suit, the 1st appellant claimed that the abovesaid properties belonged to him exclusively and on that footing he prayed for the relief of declaration and injunction with reference to those properties.

3. According to the 1st appellant, the said properties are his own separate properties, excepting items 5, 6 and 7 of B Schedule properties which he admitted as joint family properties.

4. Since common issues were involved, both the suits were tried together and the trial court came to the following conclusions; (1) Items 4, 9, 14 and 16 of B Schedule do not belong to the said family at all (2) The case of 1st appellant regarding items 8, 10, 13 and 15 of B Schedule has not been proved and those items are the properties of the family (3). The further case of the 1st appellant that items 1 and 2 of B Schedule and items 18 and 19 of D schedule are not joint family properties was not accepted.

5. Therefore, a preliminary decree was passed by the trial Court in O.S.No.90 of 1981 with reference to (1) all the properties in B Schedule excepting the abovesaid items 4, 9, 14 and 16 therein (2) C schedule properties (3) D schedule properties and (4) items 1 to 3 in E schedule properties. Consequently O.S.No.23 of 1982 was dismissed. Hence the abovesaid two appeals by the 1st appellant.

6. While these appeals were pending, on 12.9.1988 the 1st appellant died. But, the abovesaid Parvatha Udayar filed C.M.P.Nos.5589 and 5590 of 1989 for transposing him as the 2nd appellant in the two appeals on the ground that his father has executed a registered will Ex.B-39, dated 25.6.1985, bequeathing all his interest in the abovesaid properties to him alone. Since the truth and validity of the said will was opposed by Jayaraman, this Court passed an order dated 18.8.1989, calling for a finding from the trial court with regard to the truth and validity of the said will. Accordingly, the trial court went into the question, and after recording the evidence of both the parties on the truth and validity of the abovesaid will, has submitted its finding. As per the said finding, the abovesaid will is held to be true and valid. No doubt Jayaraman has filed objection to the said finding. However, by order dated 20.2.1990, this Court allowed the said C.M.Ps. with the following observations:

"In view of the *prima facie* finding given by the trial court, these petitions are to be allowed on the basis of the registered will. It is open to the parties to agitate with regard to the genuineness of the will at the time of final hearing of the appeal. The petitions are allowed with the above observation."

7. Now before me, though the learned counsel appearing for Jayaraman contends that the said finding was erroneous, he submits that he has no objection that if the said Parvatha Udayar is only allowed to represent the deceased 1st appellant in these two appeals for the only purpose of prosecuting these appeals. But the learned counsel for the 2nd appellant Parvatha Udayar however contends that this Court, in the light of the abovesaid finding should go into the question of genuineness and validity of the said will conclusively in this proceeding itself and give a decision accordingly. But, the learned counsel for Jayaraman contends that the said course suggested by the learned counsel for the 2nd appellant will not be a proper course in view of the scope of an enquiry under O.22, Rule 5, C.P.C. under which alone the present enquiry in which the finding has been given would come, since only on the death of the original appellant, the said Parvatha Udayar, one of the respondents in both the appeals, sought to transpose himself as the 2nd appellant on the ground that he is the sole legatee under the abovesaid will executed by the original appellant and that consequently he is his legal representative. Both the counsel agree that the abovesaid finding has been given pursuant to O.22, Rule 5, C.P.C.

8. O.22, Rule 5, C.P.C. says that where a question arises before an appellate court as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, that court may, before determining the question direct any subordinate court to try the question and to return the record together with evidence, if any, recorded at such trial, its findings and reasons therefor and the appellate court may take the same into consideration in determining the question. The learned counsel for Jayaraman contends that the finding given in the enquiry under O.22, Rule 5, C.P.C. could be only for prosecuting the appeals. On the other hand, the learned counsel for the 2nd appellant contends that this Court should go into the correctness of the said finding given by the court below and conclusively

determine the truth and validity of the Will. In this connection he drew my attention to the recent decision in *Sivagurunathan v. Balasubramanian, (1988)1 L.W.277.* In the said decision, in a similar situation, it was observed as follows:

"It is not possible to keep alive and relegate the controversy to a later stage or to an independent proceeding. The controversy has got to be solved in the present application only and that has got to be done conclusively and finally and not collaterally and incidentally."

The said decision also arose in a suit for partition where a preliminary decree for partition had been made and the suit was at the stage of passing of a final decree. One Swaminatha Pillai who continued the said suit and whose share was countenanced as 2/5th of the estate, died after the preliminary decree. The trial court, dealing with the question as to who was his legal representative, based on the rival contentions of the parties, before it on the basis of two alleged wills said to have been executed by the said Swaminatha Pillai, passed an order in favour of one of the claimants and against the said order, the aggrieved party came on revision to this Court and this Court in the said decision observed as follows:

"However, Mr.B.Kumar, learned counsel for the respondent would submit that an enquiry into the question as to who should be brought on record as the legal representative of a deceased party to the litigation is of a summary nature and and order thereon decides only a matter which is collateral an incidental to the decision of the suit and such a decision would not operate as *res judicata* as between the parties and the aggrieved party can seek independent proceedings to establish his rights. I am unable to accept this line of thinking by the learned counsel for the respondent on the facts of this case for the simple reason, here the claimants are sharers to the estate and the suit is one for partition and the question as to who is entitled to what share must be decided giving a quietus to the controversy in this suit itself and it is not possible to relegate the controversy for a full-fledged decision to some other proceeding as the learned counsel for the respondent would suggest. It is true that the mere admission of person as a legal representative of a deceased party for the purposes of further prosecution of the suit will not conclusively establish his right as such if that legal and factual question is one of the main or vital issues in the suit itself and the decision in the application to bring on record the legal representatives is only collateral to the decision in the suit. In such a case, the controversy has got to be left open for a decision in the suit itself. The court itself can make it clear that there is no conclusiveness about the order bringing on record the legal representative and relegating the controversy for a decision in the main suit itself. Here, as stated above, the suit is one for partition. The question as to who should be the legal representative of a sharer and what share the parties would be entitled to are all main and vital issues in the suit itself. The preliminary decree has been passed. The stage for passing the final decree has come. It is not possible to keep alive and relegate the controversy to a later stage or to an independent proceeding. The controversy has got to be solved in the present application only and that has got to be done conclusively and finally and not collaterally and incidentally."

9. But, I find a Division Bench of this Court has held in *Pakkran v. Pathumma, 25 M.L.J. 279;* as follows:

"The question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit *cannot be regarded as one of the questions arising for decision in the suit itself.* It is really a matter collateral to the suit and one that has to be decided before the suit itself is proceeded with. The Civil Procedure Code does not provide for an appeal against an order deciding the question though the repealed C.P.C. did. The view is in accordance with the opinion of the Bombay and Allahabad High Courts. See *Balabai v. Ganesh, (1902) I.L.R. 27 Bom. 162* and *Purushotam Rao v. Janki, (1905) I.L.R. 28 Bom. 109,* [*Emphasis supplied*]

Further, a Full Bench of this Court has also held in *Venkatakrishna Reddi v. Krishna Reddi, A.I.R. 1926 Mad. 586 (F.B.).* that no appeal lies against the order passed under O.22, Rule 5, C.P.C. In view of these two decisions, one by a Division Bench and another by a Full Bench, I am unable to share the view of the learned Judge, who decided the case in the above referred to *Sivagurunathan v. Balasubramaniam, (1988)1 L.W. 277.* Further, in

Koneridoss v. N.Subbiah Naidu, (1974)2 M.L.J. 253: A.I.R. 1975 Mad. 124, also, a learned single Judge of this Court has held as follows distinguishing an earlier Division Bench judgment of this Court in *Appavoo Pillai v. Vijayambal, A.I.R. 1973 Mad. 64.* "The enquiry made under O.22, Rule 5, C.P.C. is only summary in character. Even though witnesses might be examined in support of the contention of either party to that proceeding, still the proceeding is only summary in character." Then, dealing with the abovesaid *Appavoo Pillai v. Vijayambal, A.I.R. 1973 Mad. 64,* the learned Judge who decided the abovesaid *Koneridoss v. N.Subbiah Naidu, (1974)2 M.L.J. 253: A.I.R. 1975 Mad. 124,* observes as follows:

> "In the above decision, the Division Bench has observed that the decision of the court regarding who among the rival claimants is the legal representative would operate as constructive *res judicata* in a subsequent suit. But that is a case where the dispute as to who is the legal representative of a deceased person arose in execution proceeding. Therefore the decision of the court regarding who among the rival claimants was the legal representative become an appealable order by virtue of Sec.47, C.P.C. It should be noted that under Sec.47(3) where a question arises as to whether any person is or is not a representative of the party such question shall for the purpose of that section be determined by the court. Therefore if an executing court decides as to who among the rival claimants is the legal representative of a party, that decision is appealable. In *Rangaswami Naicker v. Rangammal, (1968)2 M.L.J. 610: A.I.R. 1969 Mad. 271,* Venkataraman, J. has also taken the same view. Even though the Division Bench which decided *Appavoo Pillai v. Vijayambal, 85 L.W. 936: A.I.R. 1973 Mad. 64,* had not stated so. I am clearly of the view that because the order regarding legal representative in that case was appealable, the Division Bench has held that under such circumstances it would operate as *res judicata* in a subsequent suit. If such a view is not taken of the above decision of the Division Bench it would be going counter to the decision of this Court in, *Pakkran v. Pathumma, 25 M.L.J. 279,* already referred to which is also a decision by a Division Bench. When there is a Bench decision directly on the point, a subsequent Bench, unless it is a larger Bench cannot possibly take a different view."

In this way, the said *Appavoo Pillai v. Vijayambal, A.I.R. 1973 Mad. 64,* has been distinguished in *Koneridoss v. N.Subbiah Naidu, (1974)2 M.L.J. 253: A.I.R. 1975 Mad. 124.* I also think that the learned Judge is right in so distinguishing *Appavoo Pillai v. Vijayambal, A.I.R. 1973 Mad. 64.* No doubt, the position of Sec.47, C.P.C. is little different now after the amendment of C.P.C. in 1976. Any order passed under Sec.47, C.P.C. was formerly a decree within the meaning of Sec.2(2) C.P.C. and hence an appeal itself would lie against the decree. But, now after the 1976 amendment, it is not a decree, and is appealable only if it falls under Sec.104(1), C.P.C. Otherwise only a revision would lie. However, on that ground alone an order under O.22, Rule 5, C.P.C. cannot be equated with an Order under Sec.47(3), C.P.C. At the time when fruit of any decree has to be given to the decree-holder, it has necessarily to be conclusively determined whether any party claiming to be the representative of the decree-holder is entitled to claim the fruit of the decree. Therefore the determination under Sec.47(3), C.P.C. is a conclusive one and cannot be called a summary determination as it is the case in enquiry under O.22, Rule 5, C.P.C. Further, it must also be noted the term used in Sec.47(3), C.P.C. is 'representative' of a party while the term used in O.22, Rule 5, C.P.C. is 'legal representative' of a deceased plaintiff or a deceased defendant. This latter term 'legal representative' has been given a specific definition in the C.P.C., while it is not so in the case of the term 'representative'. The term 'legal representative' is defined under Sec.2(11), C.P.C. According to the said definition, the said term means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased. Thus, even a person who intermeddles with the estate of the deceased comes under the definition. So, when a party to a proceeding dies, even a person who intermeddles with the estate of the deceased party could be brought on record as legal representative for prosecuting the proceeding further without allowing it to be abated. But this legal position cannot be attributed to the term 'representative' used in Sec.47(3), C.P.C., so, on this ground, I distinguish the above referred to *Appavoo Pillai v. Vijayambal, A.I.R. 1973 Mad. 64 (D.B.),* from the

present case.

10. I may also add that S.Natarajan, J. as he then was, has expressed the same view as that of the view expressed in the above referred to *Pakkran v. Pathumma, 25 M.L.J. 279* in *Krishnakumar v. N.C.Naidu, A.I.R. 1975 Mad. 174: (1974)2 M.L.J. 158,* thus:

> "It is needless to say that though a duty is cast by Rule 5 of O.22 on the court to determine who is the legal representative of a deceased plaintiff or deceased defendant, there need not be a comprehensive and exhaustive enquiry to determine the person who could be properly designated the legal representative of a deceased party in a pending action, for the simple reason that any decision so rendered by a Court in pursuance of an enquiry under O.22, Rule 5, C.P.C. has its inherent limitations. The recognition of a rival contender as the legal representative of a deceased party in a pending action is only to facilitate the early disposal of the pending action. Any recognition of right given by a court in such a proceeding will not confer rights on the recognised representative in the estate or property of the deceased person, nor will such a finding operate as *res judicata* in subsequent proceedings. The very fact that no appeal is provided from an order passed under O.22, Rule 5, C.P.C. will go to show that the order cannot be characterised as one 'finally decided by a Court' as contemplated in Sec.11, C.P.C."

Further, a Full Bench of Punjab and Haryana High Court in *Mohinder Kaur v. Piara Singh, A.I.R. 1981 P. & H. 130,* also has expressed the same view and reiterated that the appointment of a legal representative is only for the purpose of the proceeding in question. In this connection, it has observed thus:

> "At least one of the reasons that the appointment of a legal representative is only for the purposes of that suit alone noted by us above, has met the approval of the Supreme Court in *Daya Ram v. Shyam Sundari, A.I.R. 1965 S.C. 1049.*"

So, the Supreme Court also has approved this position. In fact, in the said Supreme Court decision, *viz.*, the above referred to *Daya Ram v. Shyam Sundari, A.I.R. 1965 S.C. 1049,* the Supreme Court approved this Court's decision reported in *Kair Mohideen v. Muthu Krishna Ayyar, (1903) I.L.R. 26 Mad. 230,* particularly the following passage in the above referred to *Kair Mohideen v. Muthu Krishna Ayyar, (1903) I.L.R. 26 Mad. 230*:

> "....there can be no hardship in a provision of law by which a party dying during the pendency of a suit, is fully represented for the purpose of the suit, but *only for that purpose,* by a person whose name is entered on the record in place of the deceased party........." (*emphasis supplied*)

11. Further, even though in the present case, even though enquiry was held by the trial court on the truth and validity of the abovesaid will in an elaborate manner, examining several witnesses, and a finding has been given after analysing the legal position also, it must be noted that there are admittedly other heirs to the deceased who is said to have executed the will, *viz.*, his five daughters, who were not given an opportunity to participate in the said enquiry. So, for this reason also, it cannot be said that the finding arrived at therein is conclusive.

12. In the light of the above discussion I feel that I am bound to follow the view expressed in the Division Bench of this Court in the above referred to *Pakkran v. Pathumma, 25 M.L.J. 279* and in the Supreme Court in the abovesaid *Daya Ram v. Shyam Sundari, A.I.R. 1965 S.C. 1049,* approving the abovesaid *Daya Ram v. Shyam Sundari, A.I.R. 1965 S.C. 1049,* above referred passage in *Kair Mohideen v. Muthu Krishna Ayyar, (1903) I.L.R. 26 Mad. 230,* rather than the view expressed by Nainar Sundaram, J., in the above referred to *Sivagurunathan v. Balasubramaniam, (1988)1 L.W.277.*

13. Anyway, in view of the above referred to order dated 20.2.1990 in the abovesaid C.M.P.No.5589 and 5590 of 1989 that it is open to the parties to agitate, with regard to the genuineness of the will, at the time of final hearing of the appeal, and since both the parties also have advanced their rival arguments before me on the abovesaid finding. I may also go into the said question even for coming to a *prima facie* conclusion thereto, only to find out whether the said Parvatha Udayar can represent the deceased appellant in this appeal as his legal representative. In this regard, the learned counsel for Parvatha Udayar initially drew my attention, to Jayaraman's own evidence as P.W.1 before the trial court in its enquiry regarding the execution of the Will and also Exs.B-40 and B-41 marked in the said enquiry. Ex.B-41, dated 29.9.1987 is the notice given by the deceased 1st appellant

Nallathambi Udayar to the said Jayaraman and the other son Margasahayam. In Ex.B-41, it is specifically stated as follows:

> *"நீங்கள் இருவரும் எப்படியாவது என் கட்சிக்காரருக்கு தொல்லை கொடுத்து அவருடைய சொத்துக்களை அபகரிக்கும் நோக்குடன் செயல்பட்டு வருவதால் அவருடைய சொத்துக்கள் அனைத்தையும் அவருடைய ஜீவதிசைக்குப் பிறகு அவருடைய மூத்த மகன் பர்வத உடையார் என்பவர் முழு உரிமையுடன் அடைந்து அனுபவித்துவர வேண்டியது என்று 25-6-85 அன்று ஒரு மதிப்பிடப்படாத உயில் சாசனம் எழுதி அது கடலாடி சார்பதிவாளர் அலுவலகத்தில் 3ம் புத்தகம் 1985 ஆம் வருடத்திய ஆவண எண் 32 ஆக பதிவு செய்யப்பட்டுள்ளது. ஆனால் தற்போது நீங்கள் இருவரும் என் கட்சிக்காரருக்கு விரோதமாக உள்ள சிலரின் தூண்டுதல் பேரிலும் அவர்களுடைய உதவியின்பேரிலும், என் கட்சிக்காரரே மேற்கூறிய உயில் பத்திரத்தை ரத்து செய்துவிட்டு ரத்து பத்திரம் எழுதி பதிவு செய்வதுபோல் ஆள் மாராட்டம் செய்து பதிவு செய்ய முயற்சிப்பதாக அறிய வருகிறார். என் கட்சிக்காரர் 25-6-85 அன்று பர்வத உடையார் பேருக்கு எழுதி வைத்துள்ள உயில் பத்திரமே கடைசி உயில் பத்திரம் என்றும் அதை அவர் மாற்றவோ அன்றி ரத்து செய்யவோ எப்பொழுதும் விரும்பியதோ அன்றி நினைத்ததோ கிடையாது என்றும் தெரிவிக்கின்றார்".*

The trial Judge also points out that to Ex.B-41, notice, Jayaraman and the 3rd defendant did not send any reply. Further the learned Judge points out that at the time when Ex.B-41 was marked, there was no objection from Jayaraman and that there was no cross-examination also by Jayaraman regarding Ex.B-41. All these apart, I also find that Jayaraman as P.W.1 in the enquiry regarding the will, admitted that the signature found in Ex.B-40 the postal acknowledgment for having received Ex.B-41 notice is his further, the said P.W.1 has admitted that Nallathambi Udayar himself conducted the case without anybody's aid. Further, he also deposed that in the Court he gave evidence with clarity and that he also came to High Court climbing the staircase therein himself, Further, the attestor to the abovesaid Ex.A-39 will as D.W.3 has also given evidence regarding the execution of the Will. Likewise, D.W.2, the scribe also has given evidence.

14. No doubt, the learned counsel for Jayaraman contends that the will is unnatural, since it disinherits all the other children of Nallathambi Udayar, excepting the legatee. But, on that ground alone, the will cannot be held to be not true and valid, particularly in the light of the abovesaid Ex.B-41 and the evidence given by P.W.1 (Jayaraman) himself. In the circumstances, I hold that for the purpose of prosecuting these appeals alone, the abovesaid Parvatha Udayar is taken as the legal representative of the deceased appellant.

15. Then, the only question to be decided further in these two appeals, is, whether the decision of the Court below that the abovesaid properties are joint family properties, is correct or not. So far as items 5, 6 and 7 of B Schedule, Nallathambi Udayar himself has admitted that they are joint family properties. Then, with reference to items 8, 10 to 13 and 15, the trial Court has held that there is no evidence to establish that the said items originally belonged to Nallathambi Udayar's mother. So, the Court below held that these items are also joint family properties. The learned counsel for the 2nd appellant Parvatha Udayar also fairly represents that since no evidence was produced regarding the above aspect by Nallathambi Udayar, the said finding regarding the abovesaid items, does not call for any interference by this Court. Accordingly, they are also held to be joint family properties.

16. However, the learned counsel for the 2nd respondent contends that the trial Judge committed a mistake in simply accepting the evidence of P.W.1 and holding that items 1 and 2 and B Schedule belongs to the family. Further, according to him, the trial Court also committed an error in holding in paragraph 41 of its judgment that items 18 and 19 of D schedule properties are ancestral properties. He points out that as per the plea in the plaint it is only 4.28 acres of dry land and 0.98 acres of wet land in B schedule are the ancestral properties and that C and D schedule properties were purchased from the nucleus from B schedule properties. Further, according to him, against the said plea and against the sale deed under which the said items 18 and 19 were purchased, *viz.*, Ex.B-8, dated 27.6.1922, the court below decided the said question erroneously, when there is no oral evidence on the side of the plaintiff that the said items are the ancestral properties.

17. But, the learned counsel for Jayaraman drew my attention to paragraphs 47 and 42 of the judgment of the trial court. There, the learned Judge observes that the family admittedly was an agriculturist family, that Nallathambi Udayar did not plead that he purchased the properties from out of

the income from any other business or avocation, that no evidence has been let in that the said Nallathambi Udayar had any other income of his own and that since Nallathambi Udayar got more than 5 acres from his ancestors, it could not be accepted that he worked as a cooly and purchased the properties.

18. The learned counsel for Jayaraman also drew my attention to the decisions in *M.Girimallappa v. R.Yellappagouda, A.I.R. 1959 S.C. 906* and *Krishnan v. Ramaswami, (1984)2 M.L.J. 133,* relied on by the court below. In the above referred to *Krishnan v. Ramaswami, (1984)2 M.L.J. 133,* it was observed as follows:

> "Though Mari Mudaliar had purchased the property in his individual name, the fact remains that he was the manager of a joint family at the time of the purchase. Therefore, this is not a case where the property has been purchased by a junior member of a Hindu joint family in his name or by a female member of a joint family in her names. That is an important fact which has to be taken note of. Two things emerge from the evidence, namely, that Mari Mudaliar was the head of the family and second, the family was possessed of certain items of properties, obviously, those properties must have been yielding income as otherwise, it would not have been possible for Mari Mudaliar to maintain a family consisting of seven or eight members. Therefore, even though the respondents have not proved what was the income derived from the joint family property and what amount would have remained as surplus after the expenses of the joint family had been met, there is a high degree of possibility that there must have been some surplus and that the properties must have been yielding adequate income for supporting all the members of the family. In such circumstances, there is certainly scope for inferring that there should have been a certain amount of surplus, and from out of the surplus the suit property might have been purchased."

19. In view of the above features and the decisions cited, I do not think that the finding of the Court below regarding the joint family character of the above referred to properties can be interfered with.

20. In the result, A.S.No.674 of 1985 is dismissed. Consequently A.S.No.1084 of 1987 is also dismissed. However, in the circumstances of the case, there will be no order as to costs.

B.S. ---- *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *K.M.Natarajan, J.*

W.P.No.15197 of 1989 *10th January, 1992.*

Abdullah Glue Company, represented by Managing Partner, O.S.Abdul Rasheed *...Petitioner*

v.

Government of Tamil Nadu and another *...Respondents.*

Tamil Nadu Urban Land (Ceiling and Regulation) Act (XXIV of 1978), Sec.21 - Possession for over 20 years buying it in contravention of Sec.6 - Applying for exemptions - Claim rejected as sale was in contravention of Sec.6 - Claim as a lessee - Should be considered.

Held:- Under the impugned order the claim of the petitioner for exemption was rejected on the ground that since the sale in his favour is contrary to Sec.6, it is void and that he has no *locus standi* to file the petition for exemption under Sec.21(1)(a) of the Act. There is nothing to show that his claim for exemption as a lease was considered. It is not in dispute that if he is a lessee, he is entitled to claim exemption under Sec.21(1)(a) and (b) of the Act. In the interests of justice, the petitioner should be given an opportunity to substantiate his claim as lessee by adducing necessary documentary evidence, before the Government, in his application under Sec.21 of the Act wherein he claimed exemption. *[Para 5]*

K.M.Srirangan, for Petitioner.

M.Liagat Ali, Additional Government Pleader for Writs, for Respondents.

The Court made the following

ORDER:- This writ petition is filed under Art.226 of the Constitution of India, for the issuance of a writ of *certiorarified mandamus* directing the first respondent to grant exemption under Sec.21 of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978, in respect of the land in S.No.95/2, Pammal Village, within the Madras Urban Agglomeration Category I in the possession of the petitioner, after calling for the records connected with the letter (Ms) No.1382, dated 23.8.1989 of the first respondent and quash the same.

2. The brief facts which are necessary for the disposal of the writ petition can be stated as

follows: One Sakhibai Khiyaram became the owner of 60 grounds of land in S.No.95/2, Pammal Village by a settlement deed dated 26.5.1969. The petitioner-firm was a tenant in respect of the said 60 grounds of land from 1957 under one A.Mohammed Ghouse. It is stated that there was an ancient shed on the land and all the superstructure housing the tannery, factory unit was constructed by the petitioner. Sakhibai Khiyaram entered into an agreement of sale on 9.2.1975 fixing a price of Rs.1,12,500. The petitioner purchased the said land of 60 grounds on 22.6.1979 and 11.8.1979 and filed a statement under Sec.7(1) and also a separate application before the first respondent under Sec.21 for exemption of the excess land of about 35 grounds. Prior to that Sakhibai Khiyaram filed a statement under Sec.7(1) of the Act. The Assistant Commissioner (U.L.T.), Tambaram at Saidapet by notice dated 16.8.1979 summoned the quondam owner and the petitioner, for enquiry, into the violation of Sec.6 of the Act. By the Government's letter dated 17.2.1981 the petitioner was informed that the exemption sought for was rejected as the land was purchased in contravention of Sec.6 of the Act and a similar order dated 23.2.1981 was sent to the quondam owner. Sakhibai Khiyaram filed a reconsideration application on 13.3.1981 which was rejected by the Government on 25.3.1981. Again on 17.7.1981 the petitioner filed a petition under Sec.21 of the Act through his counsel for exempting the land. That was also rejected. He filed a representation before the Honourable Minister for Revenue, Government of Tamil Nadu, on 17.8.1981 invoking the combined benevolence in Sec.21(1)(a) and (b) for exempting the land. By the impugned letter, the Government rejected the petitioner's application for exemption. Further, the second respondent passed an order dated 21.9.1989 under Sec.9(5) in respect of Sakhibai Khiyaram's returns under Sec.7(1) and fixed an extent of 11,469 sq.mt. as excess to be acquired. Only in these circumstances, the writ petition is filed. The main grievance of the writ petitioner is that even though the sale is hit by Sec.6 of the Act, yet by virtue of his possession and enjoyment as a tenant for 20 years, he has got every *locus standi* to seek exemption as a person who is holding the said land and the impugned order which shows that that the petitioner has no *locus standi* is not sustainable in law and on that ground alone, the same has to be quashed and the matter should be remitted back to the Government to consider the question as to whether the petitioner is eligible for exemption as a lessee of the premises who is running an industry in tannery.

3. In the counter-affidavit filed by the respondents while denying the allegations stated in the affidavit filed in support of the petition, it was *inter alia* contended as follows; One Sakhibai Khiyaram filed a statement on 3.10.1978 under Sec.7(1) of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 (Tamil Nadu Act 24 of 1978), hereinafter referred to as the Act, in respect of the lands owned by her. According to her statement, she owned two items of land (1) 15114 sq. mts. of land which consists of building and vacant land in S.No.95/2 in Pammal Village, and (2) 1,105 sq.mts. of land with building in T.S.No.91/144, Block No.9 in Egmore. She also applied to the Government for exemption of the land under Sec.21 of the Act alleging that the lands in Pammal Village were given to Sakhibai Khiyaram by her mother-in-law, that it was leased out to one O.S.Abdul Rasheed for a period of 10 years from 1969 and that tannery has been functioning in the said land and the excess vacant land is required for starting an industry of finished leather goods and for the treatment for effluent of the tannery. According to her, there is no excess vacant land in Egmore village and she furnished the details of the family members. While the exemption application was pending, she sold the land at Pammal Village to one Abdullah Glue Company by virtue of document No.1620, dated 22.6.1979. The said Abdullah Glue Company filed a statement under Sec.7(1) of the Act and applied for exemption. The family of Sakhibai Khiyaram was eligible to hold only 2000 sq.mts. of vacant land. After deducting the family eligibility, the excess vacant land works out to 9,969 sq.mts. The Government in their letter dated 23.2.1981 rejected the request of the applicant for grant of exemption of the land applied by Srimathi Sakhibai Khiyaram on the ground that the sale of the land in Pammal Village in favour of Abdullah Glue Company was in contravention of Sec.6 of the Act. The Government also rejected the exemption applied for by Abdullah Glue Company, in their letter dated 17.2.1981 for the same reason. Accordingly draft statement under Sec.9(1) of the Act, with notice under Sec.9(4) of the Act, was issued to Sakhibai Khiyaram on 7.7.1981 and was served on 3.8.1981. She filed an objection

on 10.8.1981 to the effect that though the sale deed was registered on 22.6.1979, it was in pursuance of an agreement for sale made by her on 9.2.1975 and she has received a token advance of Rs.500 and the purchaser was a lessee for decades under an unregistered agreement dated 9.2.1975 M/s.Abdullah Glue Company filed a re-consideration petition before the second respondent on 7.8.1981. Since the Government did not accept any of the representations made by the land-owner Sakhibai Khiyaram and it rejected the reconsideration petition dated 13.3.1981. It ordered to take action to acquire the excess vacant land. The Government considered the various reasons in detail and came to the conclusion that the different reasons adduced by the urban land owner are far from truth and those reasons were adduced just to invoke the sympathy of the Government and it was deliberate action of violating the provisions of the Act. The alleged written agreement is held to be a faked up one, it was also contended that the tannery was done only by the lessee and the owner was not at any time running any tannery or any other industry. A notice to show cause against action under Sec.39(4) of the Act was issued on 19.11.1981 and it was acknowledged by the owner on 24.11.1981. The reply for the said notice was filed by her on 2.12.1981. It was at this juncture M/s.Abdullah Glue Company again represented to the Government by letter dated 7.8.1981 for grant of exemption. The Government in their letter Ms.No.1382, Revenue, dated 23.8.1989 rejected the request. A copy of the order was served on the company on 29.9.1989. The Competent Authority in its proceedings dated 21.9.1989 passed orders under Sec.9(5) of the Act determining the net excess vacant land as 11,469 sq.mts. and proposing its acquisition to the Government and the said order was served on the owner. The owner has not filed any appeal against the said order as on this date and hence further course of action under Secs.10 and 11 of the Act are to be proceeded with. It is further stated that since the petitioner company is not the owner of the property on the date when the Act came into force, namely, 3.8.1976, the company has no *locus standi* to file the writ petition. It is further submitted that the petitioner has not produced any documentary evidence to show that he is the owner or even the lessee of the land as on 3.8.1976 and only relied on the unregistered sale agreement dated 9.2.1975 which is clearly silent on the period of past occupation by the proposed purchaser as lessee. There was no error of law when the Government held that the writ petitioner as a firm has no *locus standi* to claim exemption as on the date of coming into force of the said Act. It is again reiterated that the alleged sale agreement is not genuine and believable. It is further submitted that the benefit of Sec.21 can be availed only by the land owner who owns the land as on the date when the Act came into force and not to the subsequent purchaser. Since possession of the land as a lessee for 20 years was never established by the petitioner by documentary evidence before the competent authority, the petitioner is a person who has no *locus standi* to claim exemption with reference to the agreement of sale dated 9.2.1975. The petitioner has not sought for any right under the Tamil Nadu City Tenants Protection Act, 1955. Hence the respondents prayed for dismissal of the petition.

4. The learned counsel for the petitioner submitted that the impugned order rejecting the petition for exemption under Sec.21(1)(a) of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978, on the sole ground that the purchase is hit by Sec.6 of the Act and that the petitioner company has no *locus standi* to claim exemption, is not tenable. The learned counsel submits that even though the petitioner is not entitled to claim exemption on the ground that he is the owner of the property in view of the fact that his sale is hit by Sec.6 and it is contrary to the provisions of the Act, yet the petitioner is entitled to claim exemption on the ground that the petitioner is a lessee for a sufficiently long period. Further in the counter it is only submitted that the petitioner has not produced relevant documents to establish the tenancy. Hence, according to him, the matter should be remitted back to the Government to consider the claim for exemption sought for by the petitioner on the basis of his lease. He would submit that the impugned order does not show that his claim as lessee was considered, and the exemption application was rejected only on the ground that the sale is contrary to the provisions of Sec.6 of the Act and as such he has no right to claim exemption. In this connection, the learned counsel for the petitioner drew the attention of this court to the relevant provisions of Sec.21, sub-clauses (1)(a) to (c) and also the definition of the word 'to hold' in Sec.3 of the Act. *Per contra* the learned

Additional Government Pleader for Writs would submit that the right to decide exemption is prerogative of the Government and the Government has rightly exercised the discretion and rejected the exemption under Sec.21(1)(a). The petitioner sought exemption only under Sec.21(1)(a) in view of the fact that he is a purchaser in pursuance of an alleged agreement of sale and the said agreement has rightly been held to be not a genuine and true one and the subsequent sale after 3.8.1976 is hit by Sec.6 of the Act and as such the Government has got every justification to hold that the petitioner has no *locus standi* to file the petition. The learned Additional Government Pleader drew the attention of the court to various proceedings instituted by the owner of the land as well as by the petitioner and submitted that the petitioner has not produced necessary document with reference to leasehold right and as such he is not entitled to ask for considering his claim for exemption on the ground that the petitioner is a lessee. He would submit that except proceeding with the final statement under Sec.10(1), all other proceedings were already completed and as such the request should not be granted.

5. On a careful consideration of the rival submissions made by both parties and on going through the material documents and the relevant provisions of the Act, I find that under the impugned order the claim of the petitioner for exemption was rejected on the ground that since the sale in his favour is contrary to Sec.6, it is void and that he has no *locus standi* to file the petition for exemption under Sec.21(1)(a) of the Act. There is nothing to show that his claim for exemption as a lessee was considered. It is not in dispute that if he is a lessee, he is entitled to claim exemption as is seen from the relevant provisions of the Act. As per Sec.21(1)(a) and (b) of the Act, notwithstanding anything contained in any of the foregoing provisions of Chapter III, any person holds vacant land in excess of the ceiling limit may apply for exemption if it is necessary or in the public interest or if it is satisfied that the application of the provisions of this chapter would cause undue hardship to such person. As Sec.3, sub-clause (1), the word "to hold" is defined as follows:

> "(1) "to hold" with its grammatical variations, in relation to any vacant land, means-
> (i) to own such land, or
> (ii) to possess such land as owner or as tenant or as mortgagee or under an irrevocable power-of-attorney or under a hire-purchase agreement or partly in one of the said capacities and partly in any other of the said capacity or capacities."

Explanation 1 reads as follows:

> "*Explanation 1*: For the purpose of this clause, 'tenant' means any person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter under a tenure agreement, express or implied, and includes--
> (i) any such person who continues in possession of the land after the determination of the tenancy agreement;
> (ii) the heirs, assignees, legal representative of such person or persons deriving rights through such person."

Thus it is seen that the tenant also is entitled to apply for exemption under Sec.21(1)(a) and (b) of the Act. The claim of the petitioner as owner by virtue of the sale has been rejected. Similarly the exemption made by the owner of the land under Sec.21 is also rejected on the ground that during the pendency of the application of the original owner, the sale has been effected and that it is in contravention of Sec.6. Now the only point that is urged in the writ petition is that the petitioner-company has been in occupation of the premises long prior to the Act coming into force as tenant and has been running a tannery and the petitioner-company is entitled to claim exemption as tenant of the premises of the excess land over which they have put up superstructure and they have been running the tannery business. In the counter affidavit it is only reiterated that the petitioner has not adduced necessary satisfactory evidence to prove the tenancy during the enquiry and as such he is not entitled to contend that he has got *locus standi* to claim exemption as tenant. When the petitioner was asked to produce documents to substantiate his claim that he was a lessee of the premises for a sufficiently long period and that he is entitled to claim exemption as such, the learned counsel produced a typed set of papers containing the rent agreement as well as rent receipts from the year 1963 besides the professional tax receipts issued by the Panchayat for carrying on business and the electricity payment receipts and also factory licence for carrying on tannery business in the said premises and exchange of notices with regard

to payment of rent through counsel in the year 1966 and other documents. The learned counsel would submit that *prima facie* the petitioner has got documentary evidence to substantiate his claim for exemption on the basis that he is a lessee and unless an opportunity is given to substantiate the claim as a tenant under Sec.21 of the Act, the petitioner company would be put to serious hardship. Further, the impugned order wherein his claim was rejected as he has no *locus standi* is not sustainable in view of the fact that the petitioner can claim exemption as a tenant. I find much force in the contention of the learned counsel for the petitioner in this regard. The learned counsel in order to substantiate his claim has produced certain documents to show that the petitioner-company was a lessee prior to 3.8.1976 when the Act came into force and that the petitioner company can claim exemption as a lessee under Sec.21(1)(a) and (b) of the Act if he is otherwise able to satisfy the requirements under those provisions. It is submitted by the learned counsel for the petitioner that the petitioner was not given an opportunity to put forth his contentions that he was a lessee by producing necessary documents before the Government and other competent authorities. There is absolutely nothing to show that the petitioner was given an opportunity to put forth his claim as a lessee. But, his claim seems to have been rejected as he is a person who has no *locus standi* to claim exemption since his sale is contrary to Sec.6 of the Act. The petitioner is not pursuing his claim by virtue of sale deed. But he wants an opportunity to put forth his contention as lessee who is carrying on tannery business by putting up superstructure etc. Having regard to the facts and circumstances of the case, I feel that in the interest of justice, the petitioner should be given an opportunity to substantiate his claim as lessee by adducing necessary documentary evidence before the Government in his application under Sec.21 of the Act wherein he claimed exemption. It is only in that view the matter requires re-consideration by the Government and not on the ground that he is the owner of the premises but to consider his claim as a lessee provided he is able to satisfy in the first instance that he is a tenant by producing necessary documents and thereafter to satisfy the requirements of the provisions under Sec.21(a) and (b) of the Act.

6. In the result, the writ petition is allowed, the impugned order of rejection in Letter (MS) No.1382, Revenue Department, dated 23.8.1989 is hereby set aside and the first respondent is directed to give an opportunity to the petitioner to establish that he is a lessee of the premises and that he is entitled to claim exemption and then dispose of the claim according to law as expeditiously as possible. However, in the circumstances of the case, there will be no order as to costs.

B.S. ------ *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

A.A.O.No.996 of 1991 *17th March, 1992.*

Kuttiappa Gounder ...*Appellant*
v.
P.M.Rangasami ...*Respondent.*

Civil Procedure Code (V of 1908), O.5, Rules 17 and 19 - Service of summons - Defendant absent from residence at time when service is sought to be effected - Having no agent empowered to accept summons on his behalf - Procedure to be followed.

Under O.5, Rule 15, C.P.C., if the defendant is absent from his residence at the time when the service of summons is sought to be effected on him, the process service must be satisfied, (1) that there is likelihood of the defendant being found at the residence within a reasonable time, and (ii) he has no agent empowered to accept the service of summons on his behalf and in that event, service may be made on any adult member of the family, whether male or female, who is residing with him. O.5, Rule 17 is to the effect that when the defendant or his agent refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant who is absent from his residence and there is no likelihood of his being found at the residence within a reasonable time and if there is no agent or other person to receive the summons, the Serving Officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house, in which the

defendant ordinarily resides and shall then return the original to the Court with report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and, the name and address of the person by whom the house was identified and in whose presence the copy was affixed. *[Paras 2 and 3]*

Appeal against the order of the Subordinate Judge, Gobichettipalayam, dated 5.8.1991 and made in I.A.No.595 of 1991 in O.S.No.151 of 1991.

A.R.Ramanathan, for Appellant.

K.Kuppusamy, for Respondent.

The Court made the following

ORDER:- The procedure adopted by the court below is not satisfactory. Notice on interim attachment was ordered on 10.7.1991 returnable on 5.8.1991. On 5.8.1991, the court below has made the endorsement as follows:

> "Respondent absent affixed. Properties attached on 12.7.1991. Item I valued at Rs.75,000. Item II valued at Rs.1,25,000. Service sufficient. Respondent called absent set *ex parte*.. Petition is allowed with costs. Attachment is made absolute."

2. The suit is only for Rs.54,360. Learned judge has not even applied his mind as to whether it is necessary at all to attach two items worth about Rs.2,00,000 in all. When the first item is worth, according to the order of the learned Judge Rs.75,000, he need not have directed attachment of item 2. At any rate, learned Judge has not considered the provisions of O.5, Rule 15 and Rule 17, C.P.C. Under O.5, Rule 15, C.P.C., if the defendant is absent from his residence at the time when the service of summons is sought to be effected on him, the process server must be satisfied, (i) that there is likelihood of the defendant being found at the residence within a reasonable time, and (ii) he has no agent empowered to accept the service of summons on his behalf and in that event, service may be made on any adult member of the family, whether male or female, who is residing with him.

3. O.5, Rule 17 is to the effect that when the defendant or his agent refuses to sign the acknowledgment or where the serving officer after using all due and reasonable diligence cannot find the defendant who is absent from his residence and there is no likelihood of his being found at the residence within a reasonable time, and if there is no agent or other person to receive the summons, the Serving Officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house, in which the defendant ordinarily resides, and shall then return the original to the court with report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did and so, the name and address of the person by whom the house was identified and in whose presence the copy was affixed. The order of Learned Judge does not disclose whether the procedure prescribed by O.5, Rule 15 or Rule 17, C.P.C. was followed in the present case.

4. In the circumstances, the order making the interim attachment absolute is unsustainable. It is therefore set aside. I.A.No.595 of 1991 is remanded to the trial court for disposal in accordance with law. As the defendant has entered appearance, it is not necessary for the court to issue fresh notice to him. Defendant shall be permitted to file counter affidavit in that application and if necessary, the parties may be permitted to file additional pleadings and adduce evidence if so advised. The court below shall hear both the parties and pass orders on the application for attachment. The interim attachment effected shall continue to be in force till the disposal of I.A.No.595 of 1991. The civil miscellaneous appeal is allowed on the above terms. There will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Kanakaraj, J.*

S.A.No.217 of 1982 *19th December, 1991.*

Vasuki Ammal ...*Appellant*

v.

R.Joseph ...*Respondent.*

Limitation Act (XXXVI of 1963), Sch.I, Arts.7 and 55 - Suit for arrears of salary - Article applicable - Starting point for limitation.

The appellant was appointed as secondary grade teacher on 7.10.1968. On 21.1.1971 her services were terminated. She filed an appeal to the

District Educational Officer. The termination was set aside by order dated 1.6.1971. There was an order for reinstatement. The respondent filed an appeal before the Chief Educational Officer. The order of the District Educational Officer was confirmed by order dated 17.11.1971. The appellant was reinstated on 7.8.1973. She filed a suit on 26.7.1976 for arrears of salary for the period from 21.1.1971 to 7.8.1973. The suit was decreed by the trial court. On appeal the decree was modified restricting the decree only for the month of July 1973 and for seven days in August 1973. In revision, the petitioner contended that the claim fell under Art.7 of the Schedule I of the limitation Act while the respondent argued that it would fall under Art.55.

Held:- There is not much difference between the two Articles. Under Art.7, the period of limitation starts running from the date when the wages accrue due. Under Art.55, Compensation for breach of contract, the period of limitation starts running from the date of the breach of contract. It has been held that in matters of employment, the employee cannot file a suit unless and until the order of dismissal is set aside by a competent authority. Otherwise, any suit will be dismissed *in limine* on the ground that his service had been terminated and therefore, the question of payment of salary would not arise. In this case, instead of a civil court decree, there is an order of the statutory authority *viz.*, the District Educational Officer holding that the order of termination is illegal and the appellant is liable to be reinstated. Applying the Judgment of the Supreme Court in *S.S.Rathors v. State of M.P., (1989)4 S.C.C. 582,* the court is of the opinion that the right to sue accrues only when the appellate authority passed the order on 17.11.1971 as per Ex.A-2. But this does not result in any benefit to the appellant because the suit was filed only on 26.7.1976. Only the salary for July, 1973 and seven days in August, 1973 are saved because they come within the period of three years anterior to the suit. *[Paras 2, 3 and 4]*

Cases referred to:

S.S.Rathors v. State of M.P., (1989)4 S.C.C. 582; Maimoon Khatun v. State of U.P., (1980)2 S.C.J. 455.

Ravichandra Babu for *R.Gandhi,* for Appellant.

John Vinaya Kumar for *Kumar Rajarathinam,* for Respondent.

The Court delivered the following

JUDGMENT:- The plaintiff is the appellant before me. She filed a suit for recovery of a sum of Rs.6326.62 being the arrears of salary payable to her. The facts leading to the said suit are as follows: The appellant/plaintiff was appointed as a Secondary Grade teacher on 7.10.1968. On 21.1.1971 her services were terminated. Against the said termination of service, the appellant filed an appeal to the District Educational Officer. By an order dated 1.6.1971, exhibited as A-1, the termination was set aside and there was a direction to reinstate the appellant in service. Against the said order of the District Educational Officer, the respondent School filed an appeal to the Chief Educational Officer. By an order dated 17.11.1971 (Ex.A-2) the order of the District Educational Officer dated 1.6.1971 was confirmed. Thereafter, there seems to have been some representations to the Director of School Education which were rejected on the ground that no further appeal was maintainable before the Director of School Education. Therefore, in effect, the final order in the departmental proceedings was the order of the Chief Educational Officer dated 17.11.1971. Though the appellant was making representations ultimately she was reinstated only on 7.8.1973. After adjusting certain payments, she laid a claim for Rs.6326.62 on 26.7.1976 as being the arrears of salary for the period 21.1.1971 to 7.8.1973. The defence of the respondent was that three months salary was received in full quit of the claim of the teacher and in any event, the suit was barred by limitation. The trial court decreed the suit as prayed for. On appeal, the decree has been modified restricting the decree only for the month of July, 1973 and for seven days in August, 1973. According to the appellate court, the claim for the earlier months was barred by limitation. The appellate court held that the cause of action arises from the date of the order of reinstatement made by the District Educational Officer on 1.6.1971. The salary for the month of July, 1973 being payable on the 1st of August 1973, the appellate court held that only the salary for July, 1973 and August 1973 was in time. This is because the suit was filed on 26.7.1976.

2. Learned counsel for the petitioner argues that the Article under which the claim should be considered in Art.7 of the Limitation Act. That Article is as follows:

7. For wages in the case of any other person. | Three years | When the wages accrue due.

Learned counsel for the respondent says that a perusal of the plaint suggests that the suit was one for damages and, therefore, Art.55 alone will apply. Art.55 is as follows:

55. For compensation for the breach of any contract, express or implied not herein specially provided for. | Three years | When the contract is broken or (where there are successive breaches). When the breach in respect of which the suit is instituted occurs (where the breach is continuent when it ceases."

I am inclined to hold that only Art.7 is applicable to the facts of the case because though the word damages" has been used in the plaint, in substance the suit is for arrears of salary. A reading of the entire plaint shows that it is a case of claim for arrears of salary. Further, I do not think that there is much difference between the two Articles. Under Art.7, the period of limitation starts running from the date when the wages accrue due. Under Art.55, compensation for breach of contract, the period of limitation starts running from the date of the breach of contract. It has been held that in matters of employment, the employee cannot file a suit unless and until the order of dismissal is set aside by a competent authority. Otherwise, any suit will be dismissed *in limine* on the ground that his services had been terminated and therefore, the question of payment of salary would not arise.

3. The question therefore, is whether the limitation under Art.7 should be reckoned from the date of the order of the District Educational Officer dated 1.6.1971 or from the date of reinstatement, *viz.*, on 7.8.1973. Though several decisions have been cited before me, I think two decisions of the Supreme Court settle the issue. In *Maimoon Khatun v. State of U.P., (1980)2 S.C.J. 455,* the Supreme Court has laid down the law as follows:

"For these reasons, therefore, we are clearly of the opinion that in cases where an employee is dismissed or removed from service and is reinstated either by the appointing authority or by virtue of the order of dismissal or removal being set aside by a Civil Court the starting point of limitation would be not the date of the order of dismissal or removal but the date when the right actually accrues, that is to say, the date of the reinstatement, by the appointing authority where no suit is filed or the date of the decree where a suit is filed and decreed."

In this case, instead of a civil court decree, there is an order of the statutory authority, *viz.*, the District Educational Officer holding that the order of termination is illegal and the appellant is liable to be reinstated. Therefore, it cannot be disputed that the right to sue accrues from the date of the order of the District Educational Officer. There is a further elaboration on this question by a Constitution Bench of the Supreme Court of India comprising of seven Judges. That was in *S.S.Rathors v. State of M.P., (1989)4 S.C.C. 582.* Though that case related to a suit for declaration that the order of dismissal was illegal, the principles laid down there certainly apply to a case of a suit for arrears of salary. The Supreme Court was concerned with Art.58 and the period of three years started running from the date when the right to sue first accrues. Therefore, interpretation placed on the words "right to sue first accrues" can certainly be applied to the Art.7 which also uses the words when the right to sue accrues. Even in the case of Art.58 where the question was as to when the right to sue first accrues, the Apex Court has pointed out that in service matters, the cause of action will arise only when the highest authority in the hierarchy of officers passes the order. It would be appropriate to notice the rationale of the judgment of the Supreme Court, which reads thus:

"We are of the view the cause of action shall be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, a six months period from the date of preferring of the appeal or making of the presentation shall be taken to be the date when cause of action shall be taken to have first arisen. So, however make it clear that this principle may not be applicable when the remedy availed of has not been provided by law. Repeated unsuccessful representations not provided by law are not governed by this principle."

4. Applying the said Judgment of the Supreme Court, I am of the opinion that the right to sue accrues only when the appellate authority passed

the order on 17.11.1971 as per Ex.A-2. But this does not result in any benefit to the appellant because the suit was filed only on 26.7.1976. As pointed out by the appellate court only the salary for July 1973 and seven days in August 1973 are saved because they come within the period of three years anterior to the suit. In the result, though my finding is that the cause of action arose on 17.11.1971, the judgment and decree of the lower appellate court does not need any correction. Consequently, the second appeal fails and is dismissed. However, there will be no order as to costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.No.8668 of 1991 *19th March, 1992.*

K.Usha *...Petitioner*

v.

Indian Bank represented by its Chairman and Managing Director, and another *...Respondents.*

Industrial Disputes Act (XIV of 1947), Sec.18(1) - Scheme of Amalgamation of the Bank of Thanjavur with Indian Bank - Transferee Bank is liable to provide appointment on compassionate grounds for dependants of deceased employees of erstwhile Bank of Thanjavur.

Held: Under Sec.18(1) of the Industrial Disputes Act, it is well-settled that a settlement entered into under the said section is binding upon the Parties to the settlement only. Though the said settlement binds only the parties to the settlement, it cannot be disputed that the deceased husband of the petitioner was a party to the settlement arrived at between the union and the Management of the Bank of Thanjavur Limited, Thanjavur. Though the husband of the petitioner had expired, she had made an application to the Bank of Thanjavur Limited, Thanjavur as alleged in the affidavit and it is binding on the first respondent-Bank when the Bank of Thanjavur Limited got amalgamated with the first respondent-Bank. For all practical purposes, it has to be viewed that the application for appointment on compassionate ground submitted by the petitioner was pending with the transferor Bank, of course, with certain other applications. Before the application of the petitioner was to be considered by the transferor Bank, the amalgamation had taken place under the Act so as to impose liability on the transferee Bank to give an appointment to the persons like the petitioner on compassionate grounds. *[Para 11]*

The scheme cannot be expected to foresee all the contingencies and that is why the words "....., the liabilities, duties and obligations of the transferor bank shall be and shall become the liabilities, duties and obligations of the transferee bank...." have been used in a very wide manner in Clause (2) of the Scheme. That apart, the transferee Bank is deemed to be a party for all contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting. So, the wording of Clause (2) of the Scheme are couched in such a way to include such a liability of the transferee Bank to provide appointments on compassionate grounds for the dependants of the deceased employees of the erstwhile Bank of Thanjavur Ltd., Thanjavur. Though the petitioner's husband was not in service when the Bank of Thanjavur Ltd., Thanjavur got amalgamated with the first respondent-Bank, the petitioner has a subsisting right under the settlement to get an appointment on compassionate grounds. Had the Bank of Thanjavur Ltd. not been amalgamated with the first respondent under the provisions of the Act, the petitioner would have certainly been considered and given an appointment in the erstwhile Bank of Thanjavur Ltd., itself. On the facts and circumstances of the case and for the foregoing reasons, the petitioner has to be considered for appointment on compassionate grounds by the first respondent-Bank. *[Para 11]*

Cases referred to:

K.I.Shephard v. Union of India, (1988) 1 L.L.J. 162; Smt.Sushma Gosain v. Union of India, A.I.R. 1989 S.C. 1976; Smt.Phoolwali v. Union of India, A.I.R. 1991 S.C. 469; Shri Bhagvar Doss Chopra v. United Bank of India, (1988) 1 L.L.J. 427; Bihar State Road Transport Corporation v. State of Bihar, 40 F.J.R. 571; K.P.Marimuthu v. The Superintendent of

Police, (1986)1 L.L.J. 229.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus*, directing the respondent-Bank to provide the petitioner forthwith compassionate appointment on account of the demise of her husband and award costs.

N.G.R.Prasad, for *M/s.Row & Reddy*, for Petitioner.
Venkatraman, for *M/s.Aiyar & Dolia*, for Respondent No.1.
Poornam for *M/s.King & Patridge*, for Respondent No.2.

The Court made the following

ORDER:- The prayer in the writ petition is as follows:

> "....to issue appropriate writs, orders or directions and in particular issue a writ in the nature of a *mandamus* directing the first respondent-Bank to provide the petitioner forthwith compassionate appointment on account of the demise of her husband....."

2. The petitioner's husband one Balakrishnan was working as a clerk in the Head Office of the Bank of Thanjavur Ltd., Thanjavur and unfortunately he died on 25.3.1989 after having put in 20 years of service in that Bank leaving behind him, the petitioner, (his wife) and a daughter. The Bank of Thanjavur got amalgamated with the first respondent-Bank. In the erstwhile Bank of Thanjavur Limited employment was given to the dependant of an employee who died in harness. Accordingly, the petitioner made an application on 12.4.1989 for appointment on compassionate grounds to the Chairman of the Bank of Thanjavur Limited even before the amalgamation. Having passed S.S.L.C. Examination, the petitioner was 40 years old at that time. When the application was pending, the Bank of Thanjavur Limited got amalgamated with the first respondent on 20.2.1990. Hence, the petitioner renewed her request with the first respondent-Bank by a letter dated 7.6.1990 and the first respondent by a reply dated 10.4.1991 rejected the request of the petitioner on the ground that the husband of the petitioner expired long before the amalgamation of the erstwhile Bank of Thanjavur Ltd., with the first respondent-Bank and as such, the petitioner is not eligible for appointment on compassionate grounds. However, the petitioner sent a reminder on 19.4.1991 followed by a notice of the counsel dated 27.4.1991; but the first respondent sent a reply dated 7.5.1991 rejecting her request on the ground that her husband died while he was employed in the erstwhile Bank of Thanjavur Limited. At this stage, the petitioner has come up before this Court with the above said prayer.

3. The petitioner alleges in the affidavit filed in support of the writ petition that under the Banking Regulation Act, 1949, the Bank of Thanjavur Limited got amalgamated with the first respondent-Bank and under Sec.45 of the said Act, a scheme of amalgamation has been framed. The petitioner relies upon clauses (2) and (10) of the Scheme which state that the assets and liabilities of the Bank of Thanjavur Limited will become the assets and liabilities of the first respondent-Bank and all the employees of the Bank of Thanjavur Limited will continue in the service of the first respondent-Bank and be deemed to have been appointed by the transferee Bank at the same remuneration and on the same terms and conditions of service as were applicable to such employees before the close of business on 19.8.1989. It is alleged in the affidavit that a conjoint reading of those two provisions in the Scheme shows that the liability of the transferor Bank to provide appointment on compassionate ground to the dependant of an employee who dies in harness devolves on the transferee Bank. It is also stated that the liability to provide employment to the dependant of the deceased employee of the transferor Bank is a responsibility of the transferee Bank. It is alleged that but for the amalgamation of the Bank of Thanjavur Limited with the first respondent-Bank, the petitioner would have got an appointment on compassionate grounds, in the erstwhile Bank of Thanjavur Limited. Reference to decisions reported in *Smt.Sushma Gosain v. Union of India, A.I.R. 1989 S.C. 1976* and *Smt.Phoolwali v. Union of India and others, A.I.R. 1991 S.C. 419*, were made to show that there should not be any delay in making appointments on compassionate grounds as they are intended to mitigate the hardships due to death and redeem the family in distress. It is further alleged that the attitude of the first respondent is highly legalistic and shows want of compassion.

4. Originally only the Indian Bank alone was the respondent and when the matter came up for admission, the petitioner was directed to take

notice to Indian Bank and it was adjourned by one week to implead the Reserve Bank of India, Bombay. Accordingly, in W.M.P.No.14135 of 1991, the Reserve Bank of India, Bombay has been impleaded and ranked as the second respondent in the proceedings.

5. By consent of parties, the writ petition has been taken up for final hearing and disposal.

6. The first respondent/Indian Bank has filed a counter affidavit contending that the writ petition is not maintainable in law as the petitioner cannot claim appointment on compassionate ground as a matter of right. It is stated that it is true that in the case of employees of the first respondent-Bank dying in harness, the first respondent-Bank considers the requests for appointment on compassionate grounds subject to the surviving widow/ children conforming to the norms prescribed in the scheme evolved therefor. It is also stated in the counter affidavit that the petitioner's husband died on 25.3.1989 while he was in the service of the erstwhile Bank of Thanjavur, and the petitioner had made a request for appointment on compassionate ground to the management of the Bank of Thanjavur Limited, on 12.4.1989. It is also seen from the counter affidavit that though there was a private settlement between the Bank of Thanjavur Employees' Union and the Management of the erstwhile Bank of Thanjavur Limited in 1982 in this regard, the same was not given effect to and there were 14 cases pending right from 1980 and the previous Bank did not give any such appointment. The erstwhile Bank of Thanjavur got amalgamated with the first respondent on 20.2.1990 pursuant to the notification of the Government of India dated 19.2.1990 and all the assets and liabilities of the erstwhile Bank of Thanjavur were taken over by the first respondent only with effect from 20.2.1990 long after the death of the husband of the petitioner; and thus there is no right available to the petitioner to claim appointment on compassionate grounds. It is stated that though it is admitted that the petitioner made a request to the first respondent on 7.6.1990, it is only a fresh request and the same was considered duly on merits and a reply was sent on 10.4.1991 stating that the husband of the petitioner had expired long before the amalgamation of the erstwhile Bank of Thanjavur Limited, with the first respondent-Bank and therefore she was not eligible for compassionate appointment. It is also stated in the counter affidavit that the Provident Fund account of the deceased husband of the petitioner was settled by the erstwhile Bank of Thanjavur Limited on 30.5.1989 and by the time the gratuity could be paid, the Bank was placed on moratorium on 19.8.1989 and as soon as the erstwhile Bank of Thanjavur Limited was amalgamated with the first respondent-Bank on 20.2.1990, the gratuity part of terminal benefits were paid on 3.4.1990 to the petitioner and the petitioner could not claim to have acquired any right for seeking appointment on compassionate grounds merely because the terminal benefits were settled by the first respondent as transferee Bank. It is further stated in the counter affidavit that there are applications pending from legal heirs of the employees who died as far back as 15.12.1980 and that there are 14 such cases ranging from 1980-1989, and if the application of the petitioner is considered, many more applications under the above category may come and it would not therefore be possible for the first respondent-Bank to consider the applications from all such persons. It is claimed in the counter affidavit that the petitioner is not at all eligible for the appointment on compassionate ground as the petitioner's spouse expired when the Bank was under the control and management of erstwhile Bank of Thanjavur and either Clause (2) or Clause (10) of the Scheme of amalgamation will not apply to the case of the petitioner. It is also stated in the counter affidavit that the assets and liabilities mentioned in the Scheme refer only to the assets and liabilities which could be computed in terms of money alone had devolved on the first respondent-Bank and there is no liability at all to give appointment on compassionate grounds in respect of the employees of the erstwhile Bank of Thanjavur Limited who died when the Bank was under the management of the erstwhile Bank of Thanjavur Limited.

7. The second respondent has filed a counter affidavit wherein it is stated that the Bank of Thanjavur Limited got amalgamated with the first respondent on 20.2.1990 and that the petitioner is not entitled to claim appointment on compassionate grounds on the ground that the first respondent-Bank is obliged to give her such appointment due to the first respondent-Bank taking over all the assets and liabilities of the Bank of Thanjavur Limited. It is stated in the counter affidavit that as per Clause (16) of the Scheme of

Amalgamation, any doubt arising in interpreting any of the provisions of the Scheme, it should be referred to the second respondent and its opinion shall be conclusive and binding on the transferor and the transferee Banks and the petitioner never referred the dispute to the second respondent and the dispute between the petitioner and the first respondent should have been referred to the second respondent. It is submitted in the counter affidavit that the writ petition is premature and that the second respondent is not a necessary party.

8. Mr.N.G.R.Prasad, learned counsel appearing for the petitioner, refers to Sec.45 of the Banking Regulation Act, 1949 (hereinafter referred to as the 'Act'), as well as the scheme of amalgamation of the Bank of Thanjavur Limited, Thanjavur and contends that the "liability" includes the liability of the transferee Bank to give appointments on compassionate grounds to the legal heirs of the deceased employees of the erstwhile Bank of Thanjavur Limited and that since there was a settlement under Sec.18(1) of the Industrial Disputes Act, 1947 in 1982 providing employment for the legal heirs of the deceased employees of the Bank of Thanjavur Limited, on compassionate grounds, the transferee Bank should also be held to be bound by that settlement and as such, the petitioner is entitled to the appointment on compassionate grounds in the transferee Bank, *i.e.*, the Indian Bank, the first respondent herein. Learned counsel relies upon the judgments reported in *Smt.Sushma Gosain and others v. Union of India and others, A.I.R. 1989 S.C. 1976* and *Smt.Phoolwati v. Union of India and others, A.I.R. 1991 S.C. 469*, for the proposition that whenever appointments are to be made on compassionate grounds, there should not be any delay in making such appointments. Learned counsel further refers to a decision of the Supreme Court, reported in *K.I.Shephard and others etc. v. Union of India and others, (1988)1 L.L.J. 162*, for the petitioner that even the excluded employees have a right to be heard. According to Mr.N.G.R.Prasad, learned counsel appearing for the petitioner, the approach of the first respondent is highly legalistic and there is no compassionate approach while considering the appointments to be made on compassionate grounds. Learned counsel also relies upon the judgment reported in *Shri Bhagwan Doss Chopra v. United Bank of India and others, (1988)1 L.L.J. 427*, wherein it has been held that a proceeding which had taken place on the date of the merger is binding on the transferee Bank and the transferee Bank can continue the proceedings thereafter. Reliance is also placed by Mr.N.G.R.Prasad, learned counsel, upon another judgment of the Supreme Court reported in *Bihar State Road Transport Corporation v. State of Bihar and others, 40 F.J.R. 571*, wherein the right of the employee for reinstatement with back-wages with the undertaking which has been taken over by a Corporation has been upheld. Learned counsel appearing for the petitioner further relied on a judgment of a Division Bench of this Court reported in *K.P.Marimuthu (since deceased) Ramayee and others v. The Superintendent of Police, Dharmapuri and others, (1986)1 L.L.J. 229*, which it has been held that the doctrine of personal action dies with the person in the case of relief of reinstatement but with regard to other reliefs such as salary that would have been earned and the benefits which would have accrued, cannot be said to be abated on the ground that these are all personal actions.

9. *Per contra*, Mr.Venkataraman, for M/s.Aiyar and Dolia, learned counsel appearing for the first respondent, contends that if there is any settlement under Sec.18(1) of the Industrial Disputes Act, it will bind the parties to the settlement, only and it is a private settlement and as such, the petitioner cannot claim any right under the said settlement. Further, learned counsel, submits that it is doubtful whether the deceased husband of the petitioner was a member of the Union which entered into the private settlement with the erstwhile Bank of Thanjavur Limited, Thanjavur, and hence it will not bind the first respondent-Bank. Mr.Venkataraman, learned counsel further contends that the husband of the petitioner did not work under the first respondent-Bank and that though there is a scheme in the Indian Bank/the first respondent herein to give appointments on compassionate grounds, the petitioner has no right to claim that appointment since the deceased husband of the petitioner was not in the service of the erstwhile Bank of Thanjavur Limited, Thanjavur when it got merged with the Indian Bank and states that the term "liability" which occurs in the scheme of amalgamation will not take on the right to get an appointment on compassionate ground and hence it cannot be stated as a liability at all.

10. The short point for consideration in this case

is whether the petitioner, as the wife of the deceased employee of the Bank of Thanjavur Limited, Thanjavur, which has got amalgamated with the first respondent-Bank, is entitled to get an appointment on compassionate grounds.

11. The facts are not in dispute. When the second respondent took over the Bank of Thanjavur Limited, Thanjavur under the provisions of the Act, the husband of the petitioner was not in the service of the Bank of Thanjavur Limited, Thanjavur and he had already expired. Under Sec.45(5) of the Act, a scheme of amalgamation has been framed with regard to certain matters. Sec.45(5)(a) of the Act reads as follows:

> "(5) The scheme aforesaid may contain provisions for all or any of the following matters, namely:
>
> (a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities, privileges, the liabilities, duties and obligations of the banking company on its reconstruction or, as the case may be, of the transferee bank,......."

Sec.45(5)(i) of the Act reads thus:

> "(i) the continuance of the service of all the employees of the banking company (excepting such of them as not being workmen within the meaning of the Industrial Disputes Act, 1947 are specifically mentioned in the Scheme) in the banking company itself on its reconstruction or, as the case may be, in the transferee bank at the same remuneration and on the same terms and conditions of service, which they were getting or as the case may be, by which they were being governed, immediately before the date of the order of moratorium; Provided that the Scheme shall contain a provision that--
>
> (i) the banking company shall pay or grant not later than the expiry of the period of three years from the date on which the scheme is sanctioned by the Central Government, to the said employees the same remuneration and the same terms and conditions of service (as are; at the time of such payment or grant, applicable) to employees of corresponding rank or status of a comparable banking company to be determined for this purpose by the Reserve Bank (whose determination in this respect shall be final);
>
> (ii) the transferee bank shall pay or grant not later than the expiry of the aforesaid period of three years, to the said employees the same remuneration and the same terms and conditions of service (as are, at the time of such payment or grant, applicable) to the other employees of corresponding rank or status of the transferee bank subject to the qualifications and experience of the said employees being the same as or equivalent to those of such other employees of the transferee bank; provided further that if any case under clause (ii) of the first proviso any doubt or difference arises as to whether the qualifications and experience of any of the said employees are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status of the transferee bank, (the doubt or difference shall be referred, before the expiry of a period of three years from the date of the payment or grant mentioned in that clause) to the Reserve Bank whose decision thereon shall be final."

A scheme of amalgamation of the erstwhile Bank of Thanjavur Limited, Thanjavur with Indian Bank has been framed by the Central Government on 19.2.1990 under Sec.45(7) of the Act. Clause (2) of the Scheme reads as follows:

> "2. As from the date which the Central Government may specify for this purpose under sub-sec.(7) of Sec.45 of the said Act, (hereinafter referred to as the prescribed date) all rights, powers, claims, demands, interests, authorities, privileges, benefits, assets and properties of the transferor bank, movable and immovable, including premises subject to all incidents of tenure and to the rents and other sums of money and covenants reserved by or contained in the leases or agreements under which they are held, all office furniture, loose equipment, plant apparatus and appliances, books papers stocks of stationery, other stocks and stores, all investments in stocks, shares and securities, all bills receivable in hand and in transit, all cash in hand and on current or deposit account (including money at all or short notice) with banks bullion, all book debts, mortgage debts and other debts with the benefit of securities, or any guarantee therefor, all other if any, property rights and assets benefit of all guarantees in connection with the business of the transferor bank shall, subject to the

other provisions of this scheme, stand transferred to, and become the properties and assets of the transferee bank; and as from the prescribed date all the liabilities, duties and obligations of the transferor bank shall be and shall become the liabilities duties and obligations of the transferee bank to the extent and in the matter provided hereinafter." Clause (1) of the Scheme provides for the protection of the employees of the transferor Bank which is to the following effect;

> "(10) All the employees of the transferor bank shall continue in service and be deemed to have been appointed by the transferee bank at the same remuneration and on the same terms and conditions of service as were applicable to such employees immediately before the close of business on 19th August, 1989.
>
> Provided that the employees of the transferor bank who have, by notice in writing given to the transferor or the transferee bank at any time before the expiry of one month next following the date on which this scheme has been sanctioned by the Central Government, intimated their intention of not becoming employees of the transferee bank, shall be entitled to the payment of such compensation, if any, under the provisions of the Industrial Disputes Act, 1947 and such pension, gratuity, provident fund and other retirement benefits as may be ordinarily admissible under the rules of authorisations of the transferor bank immediately before the close of business on 19th August, 1989.
>
> Provided further that the transferee bank shall in respect of the employees of the transferor bank who are deemed to have been appointed as employees of the transferee bank be deemed also to have taken over the liability for them of retrenchment compensation in the event of their being retrenched while in the service of the transferee bank on the basis that their service had been continuous and has not been interrupted by their transfer to the transferee bank."

If any doubt in interpreting the provisions of the Scheme arises, Clause (16) of the Scheme provides the remedy as follows:

> "(16) If any doubt arises in interpreting any of the provisions of this Scheme, the matter shall be referred to the Reserve Bank of India and its opinion shall be conclusive and binding on both the transferee and transferor banks, and also on all the members, depositors and other creditors and employees of each of these banks and on any other person having any rights or liability in relation to any of these banks."

It is not in dispute that there is a scheme with the first respondent for providing employment for the dependants of the deceased employees on compassionate grounds. The Supreme Court has also repeatedly held that the purpose of providing appointment on compassionate ground is to mitigate the hardship caused due to death of the bread earner in the family and as such, the appointment should, therefore, be provided immediately to redeem the family in distress. But, on the facts and circumstances of the instant case, whether the petitioner is entitled to get an appointment on compassionate grounds is the question. The answer to this question depends upon the construction of the scheme of Amalgamation framed under the Act. Clauses (2) and (10) of the Scheme have been extracted above. Mr.N.G.R.Prasad, learned counsel appearing for the petitioner, relied upon a judgment of the Supreme Court reported in *K.L.Shephard and others etc. v. Union of India and others, (1988)1 L.L.J. 162,* and contends that the principles laid down by the apex Court will apply to the facts of this case. I do not think that that case has any relevance to the subject matter of this case. That was a case where some of the employees of the banking company were intended to be excluded, and the Supreme Court held that the employees to be excluded have to be specifically mentioned in the draft scheme since the Banking Company and the transferee Bank are entitled to object the scheme prepared by the Reserve Bank of India and make suggestions. Under Sec.18(1) of the Industrial Disputes Act, it is well settled that a settlement entered into under the said section is binding upon the Parties to the settlement only. On the ground that the first respondent-Bank is not a party to the earlier settlement under Sec.18(1) of the Industrial Disputes Act, 1947, Mr.Venkataraman, learned counsel appearing for the first respondent, contends that the said settlement is not binding on the first respondent-Bank. In my view, though the said settlement binds only the parties to the settlement, it cannot be disputed that the deceased husband of the petitioner was a party to the

settlement arrived at between the union and the Management of the Bank of Thanjavur Limited, Thanjavur. Though the husband of the petitioner had expired, she had made an application to the Bank of Thanjavur Limited, Thanjavur as alleged in the affidavit and it is binding on the first respondent-Bank when the Bank of Thanjavur Limited, Thanjavur got amalgamated with the first respondent-Bank. For all practical purposes, it has to be viewed that the application for appointment on compassionate ground submitted by the petitioner was pending with the Transferor Bank, of course, with certain other applications. Before the application of the petitioner was to be considered by the Transferor Bank, the amalgamation had taken place under the Act so as to impose liability on the transferee Bank to give an appointment to the persons like the petitioner on compassionate grounds. The purpose of providing such an employment has been succinctly stated by the Supreme Court in *Smt. Sushma Gosain and others v. Union of India and others, A.I.R. 1989 S.C. 1976 at 1977*, as follows:

> "9. We consider that it must be stated unequivocally that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. It there is no suitable post for appointment supernumerary post should be created to accommodate the applicant."

I am of the view that the attitude of the first respondent-Bank should be in consonance with the views expressed above by the Supreme Court with regard to such appointments on compassionate grounds. I am not at all satisfied with the attitude taken by the first respondent-Bank legalistically, as has been contended by the learned counsel for the petitioner, that the deceased husband of the petitioner was not in service when the Bank of Thanjavur Limited, Thanjavur got amalgamated with the first respondent-Bank. If the deceased husband of the petitioner had been alive, clause (10) of the Scheme of amalgamation would have come into operation. Clause (10) of the Scheme will apply to the employees who are alive and in service when the amalgamation took place. The case before me is entirely different. The scheme cannot be expected to foresee all the contingencies and that is why, the words "....., the liabilities, duties and obligations of the transferor bank shall be and shall become the liabilities, duties and obligations of the transferee bank......" have been used in a very wide manner in clause (2) of the Scheme. That apart, the transferee Bank is deemed to be a party for all contracts, deeds bonds, agreements, powers of attorney, grants of legal representation and *other instruments of whatever nature subsisting*. So, in my view, the wording of clause (2) of the Scheme are couched in such a way to include such a liability of the transferee Bank to provide appointments on compassionate grounds for the dependants of the deceased employees of the erstwhile Bank of Thanjavur Ltd., Thanjavur. On the facts and circumstances of the case, there is no doubt that the petitioner has already made an application to the Bank of Thanjavur Limited, Thanjavur and has repeated it by another application to the transferee Bank, the first respondent herein. I am not able to accept the stand taken by the first respondent-Bank that the application of the petitioner is considered and she is given appointment on compassionate grounds, it will amount to opening of the flood gates. But in the counter-affidavit of the first respondent it is admitted that there are only 14 such cases, where the employees died on various dates ranging from 1980-1989. I think it is relevant to refer to the judgment of a Division Bench of this Court reported in *K.P. Marimuthu (since deceased) and others v. The Superintendent of Police, Dharmapuri and others, (1986) 1 L.L.J. 229.* That was a case of a Head Constable who died during the pendency of the writ petition and his legal representatives filed a petition for bringing them on record in the place of the deceased writ petitioner and it was dismissed on the ground that the relief sought for in the writ petition was purely personal and aggrieved by the order of dismissal, writ appeal was filed and allowed. A defence was raised on behalf of the State that the legal representatives cannot pursue the remedy as the relief asked for was purely personal so far as the deceased Government servant was concerned. The Division Bench held at page 234 as under:

> "...A relief of reinstatement undoubtedly cannot be granted after the death of a

Government servant because if it is granted, it would be nugatory because the person who is reinstated in service is no more alive. Therefore, while it could be said that the doctrine that a personal action dies with the person is true in the case of relief of reinstatement, in the case of other reliefs such as salary that would have been earned and the benefits which would have accrued if the order of dismissal would not have been made, they cannot be said to abate on the ground that these are personal actions..."

I am of the view that the very same principle has to be applied to the facts of this case and though the petitioner's husband was not in service when the Bank of Thanjavur Ltd., Thanjavur got amalgamated with the first respondent-Bank, the petitioner has a subsisting right under the settlement to get an appointment on compassionate grounds. When such a scheme is also in vogue with the first respondent-Bank, I do not see why the petitioner should be deprived of an appointment on compassionate grounds. Had the Bank of Thanjavur Ltd., Thanjavur, not been amalgamated with the first respondent under the provisions of the Act, the petitioner would have certainly been considered and given an appointment in the erstwhile Bank of Thanjavur Ltd., Thanjavur itself. There is neither justice nor grace in the first respondent putting forth the objection that the deceased husband of the petitioner was not alive when the erstwhile Bank of Thanjavur Limited, Thanjavur got amalgamated with the first respondent-Bank and hence the petitioner is not eligible for appointment on compassionate grounds. On the facts and circumstances of the case and for the foregoing reasons, the petitioner has to be considered for an appointment on compassionate grounds by the first respondent-Bank. In view of this, I direct the first respondent-Bank to take immediate steps for employing the petitioner in a suitable post commensurate with her educational qualifications within a period of six months from the date of this order. The writ petition will stand allowed. No costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

Appeal No.551 of 1981 *10th January, 1992.*

Indian Oil Corporation Ltd. ...*Appellant*

v.

Damayanthi Devi ...*Respondent.*

(A) Estate Duty Act (XXXIV of 1953), Sec.74(2), proviso - Applicability to sub-sec.(1).

The proviso is only for Sec.74(2) which relates to movable property and it will not apply to Sec.74(1). *[Para 7]*

(B) Estate Duty Act (XXXIV of 1953), Sec.73(5-A) - Garnishee order passed under - Effect.

Once garnishee order is passed, only the Estate Duty Authority can recover the abovesaid amount (rent) from the defendant and the plaintiff (owner of the property) cannot recover it. *[Para 9]*

Cases referred to:

T.T.P.Beepathumma v. Special Deputy Tahsildar, 134 I.T.R. 488; Madan Lal Lohia v. Assistant Controller of E.D., 85 I.T.R. 99.

B.Rajagopalan, for Appellant.

Kishore, for Respondent.

The Court delivered the following

JUDGMENT:- This appeal by the defendant is against the decree for Rs.16,800 with interest at 6% per annum from 18.3.1978 granted by the trial court in O.S.No.3423 of 1978 on the file of XI Assistant Judge, City Civil Court, Madras. The said sum is claimed by the plaintiff as arrears of rent for period ending with 31.8.1977 at the rate of Rs.4,200 per year.

2. The main defence in the suit is that in view of the statutory attachment, by the Estate Duty authority under the Estate Duty Act 1953, of the rents payable by the defendant, to the plaintiff, the suit is not maintainable. The said issue alone is agitated in this appeal by the learned counsel for the appellant. The trial court negatived the said contention of the defendant and decreed the suit. Hence this appeal.

3. The few facts necessary for dealing with the abovesaid issue may be stated as follows:- The plaintiff purchased the suit property from one Sambandam under Ex.A-3 sale deed, dated 17.7.1974. The said Sambandam inherited the said

property from his father Manicka Chettiar, who died in about 1963 and the said Manicka Chettiar's estate was sought to be assessed to Estate Duty under the abovesaid Estate Duty Act. The said Sambandam was the accountable person under the said Act. In the Estate Duty proceedings, the Assistant Controller of Estate Duty issued a notice Ex.B-1, dated 30.11.1973 under Sec.73(5A) of the Estate Duty Act read with Sec.46(5A) of the Income-tax Act, 1922 to the defendant, demanding from the defendant "forthwith" a sum of Rs.1,56,622.90 (the Estate Duty due from the Accountable person Sambandam) " for rent payable" by the defendant to the above estate. The said notice also mentioned that if he (the defendant) discharged "any liability (of his) to the estate of the deceased after receipt of" the said notice, the defendant would be personally liable to the said Estate Duty Authority to the extent of the liability of the estate for tax and penalties. No doubt, the abovesaid attachment or garnishee order is few months prior to the purchase of the suit property by the plaintiff. However, the defendant replied to the Assistant Controller of Estate duty by Ex.B-3 dated 6.12.1973, stating that the rent for the period upto 9.8.1974 had already been paid and the defendant can "commence remitting" to the Assistant Controller of Estate Duty, the rents only from 10.8.1974. The defendant also wrote subsequently by Ex.B-4 dated 9.10.1974 stating that the plaintiff-landlady was asking the defendant to pay the rent to her and that hence the Assistant Controller of Estate Duty might let the defendant know whether the abovesaid sale in favour of the plaintiff was to the knowledge of the said controller and whether the Estate Duty had been cleared by the said Sambandam and whether it would be in order for the defendant to make payment to the plaintiff. The Assistant Controller of Estate Duty replied by Ex.B-6 dated 19.10.1974 stating that the abovesaid sale was void and was in violation of Sec.74(1) of the Estate Duty Act and that hence, it would not be in order for the defendant to pay the rent to the plaintiff without Estate Duty Clearance Certificate. Subsequently by Ex.B-16, dated 13.1.1978, the Assistant Controller of Estate Duty sent another notice under the very same provisions of the Estate Duty Act and Income Tax Act asking the defendant to pay forthwith a sum of Rs.14,300 to meet the abovesaid Estate Duty payable by the said estate. Here again it was specifically mentioned that if the defendant discharged any liability to the estate of the deceased after the receipt of the said notice, the defendant would be personally liable to the Assistant Controller of Estate Duty to the extent of the liability of the estate for tax and penalties. So, this is a second attachment or garnishee order by the Estate Duty Department.

4. In the light of the abovesaid background it has to be seen whether the claim of the plaintiff to recover the abovesaid rents from the defendant is maintainable in the light of the relevant provisions of Estate Duty Act. That is the only question that was argued before me. No doubt, the case of the defendant is that pursuant to the abovesaid second garnishee order Ex.B-16 the defendant has paid a sum of Rs.14,257.44 out of the abovesaid sum of Rs.16.800 due. The learned counsel for the defendant-appellant submits before me now that the defendant is now ready to pay the balance and a decree could be passed for the same.

5. Sec.74(1) and (2) of Estate Duty Act, run as follows:

> "(1) Subject to the provisions of Sec.19, the estate duty payable in respect of property, movable or immovable, passing on the death of the deceased, shall be a first charge on the immovable property so passing (including agricultural land) in whomsoever it may vest on his death after the debts and incumbrances allowable under Part VI of this Act; and any private transfer or delivery of such property shall be void against any claim in respect of such estate duty.
>
> (2) A rateable part of the estate duty on an estate, in proportion to the value of any beneficial interest in possession in movable property which passes to any person (other than the legal representative of the deceased), on the death of the deceased shall be first charge on such interest:
>
> Provided that the property shall not be so chargeable as against a *bona fide* purchaser thereof for valuable consideration without notice."

Further, the above referred to Sec.73 of the Estate Duty Act 1953 provide for notice of demand and recovery of Estate Duty, and particularly sub-sec.(5) of the said Sec.73, provides that the provisions of Sec.47 and certain Sub-sections of Sec.46, of the Indian Income-tax Act, 1922 shall apply as

if the said provisions were provisions of the said Estate Duty Act. Further, it has also been held in *T.T.P.Beepathumma v. Special Deputy Tahsildar, 134 I.T.R. 488 (Kerala)*, that since the provisions of Income Tax Act, 1922, have been incorporated bodily as stated above in the Estate Duty Act, 1953 by reference, the repeal of the said 1922 Act has no effect upon the construction or effect of the said Estate Duty Act and that recovery of Estate duty will be governed by the provisions of 1922 Act, even after the introduction of 1961 Income Tax Act repealing 1922 Income Tax Act.

6. So far as the interpretation of Sec.74 of the Act read with Sec.73 of the Act, the Calcutta High Court held in *Madan Lal Lohia v. Assistant Controller of E.D., 85 I.T.R. 99 (Cal.)*, that where a notice under Sec.73 of the Estate Duty Act was served on the lessee of the deceased against whose estate proceedings were taken for realisation of estate duty and where despite the said notice, the lessee paid rents to his landlord, penalty could be levied on such a lessee for so paying rents since he was bound to comply with the notice under Sec.73.

7. But, the learned counsel for the respondent-plaintiff argues that the above referred to proviso found under Sec.74(2) would apply even to Sec.74(1) and that since the respondent was *bona fide* purchaser of the property, the property purchased by her shall not be a charge for the duty payable. But, I am unable to agree with this contention. The proviso is only for Sec.74(2) which relates to movable property and it will not apply to Sec.74(1). In the text book "Estate Duty in India" by O.P. Chopra, 4th edition, the author also has mentioned at page 68 that the proviso to sub-sec.(2) of Sec.74 governs only that sub-section. Apart from pointing out this passage from the said text book, the learned counsel for the appellant also drew my attention to the following passage in the report of the Select Committee of 1948 referred to at page 867 of the same text book as follows:

> "We also think that there should be no charge on movable property acquired by a *bona fide* purchaser for value without notice."

8. But, despite the abovesaid legal position, I find that there is total absence of evidence regarding the actual payment of the abovesaid sum of Rs.14,257.44 by the defendant to Estate Duty Authority. Though it has been stated in the written statement of the defendant that a sum of Rs.14,257.44 representing the rental for the period from 10.8.1974 to 31.12.1977 has been paid on 10.2.1978, there is no proof of the said payment. Neither there is any document to that effect, nor even D.W.1 did say anything about the said payment.

9. However, the learned counsel for the appellant submits that once garnishee order is passed as stated above, only the Estate Duty Authority can recover the abovesaid amount from the defendant and the plaintiff cannot recover it. So, according to him, even assuming that there is no proof of abovesaid payment, the suit by the plaintiff will not lie for recovery of the abovesaid Rs.14,300. On a reading of the abovesaid garnishee orders and the relevant provisions of the abovesaid Act, I also think it is so. However, the learned counsel for the respondent-plaintiff points out that as per the original garnishee order Ex.B-1, there was a restraint only with reference to the rent payable as on 30.11.1973, but that there was no rental arrears due from the defendant as on that date. (In fact, as already stated, the defendant became the owner of the property only subsequently, that, is on 17.7.1974). So, the learned counsel for the respondent argues that the suit for the rental arrears, which accrued subsequently, could be maintained. This contention has force. But, subsequently the abovesaid Ex.B-16 garnishee order also had been issued. That is dated 13.1.1978. From Ex.B-17, the covering letter, it could be gathered that Ex.B-16 was served in person the same day. But, the suit was filed only subsequent to the said date. *viz.*, on 18.3.1978. So, on the date when the suit was filed, there was a bar, preventing the respondent from filing the suit and recovering the abovesaid arrears. So, the suit laid on 18.3.1978 cannot be maintained with reference to the abovesaid sum of Rs.14,300. But the defendant ought to have paid at least the balance Rs.2,500 to the plaintiff after 13.1.1978. Anyway, now, since the learned counsel for the appellant also states that a decree for the balance could be given and since the said balance now acutally come to Rs.1,542.56 (that is Rs.16,800, minus Rs.14,257.44 said to have been paid by the defendant to the Estate Duty Authority, as per the plaint), a decree could be given now for the said sum of Rs.2,542.56. It is fair that the plaintiff should also be given interest at the rate of 6% per annum from the said date 13.1.1978 till realisation.

10. In the result, the judgment and decree of the

court below are hereby modified by restricting the decree granted by the court below only to the abovesaid sum of Rs.2,542.56 with interest on the said amount at the rate of 6% per annum from 13.1.1978 till realisation. Accordingly, the appeal is allowed in part with proportionate costs.

B.S. ---- *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Janarthanam, JJ.*

O.S.A.No.250 of 1989 *11th September, 1991.*

Tuticorin Alkali Chemicals and Fertilizers Ltd. ..*Appellant*

v.

M/s.Cochin Silicate & Glass Industries, a Partnership firm represented by its Managing Partner Mr.A.J.Shelat and another ...*Respondents.*

(A) Letters Patent (Madras), Clause 12 - Litigant filing suit on the Original Side of High Court claiming that most part of the cause of action had arisen within Madras - Leave, if can be refused only on ground that defendant had pleaded otherwise.

(B) Letters Patent (Madras), Clause 12 - Grant or refusal of leave - Balance of convenience - Duty of court to determine.

Held: The words "determine suits of every description....if the cause of action shall have arisen or, in case the leave of the court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction", in Clause 12 of the Letters Patent clearly establish the right of litigant to institute a suit on the Original Side of this Court if the cause of action would have arisen wholly within the local limits of the Ordinary Original Jurisdiction of the court. The leave of the court is required only in a case in which the cause of action would have arisen in part within the local limits of the Ordinary Original Jurisdiction. It is thus not possible to ignore the case of a litigant who decided to file the suit on the Original Side of the court on the plea that most part of the cause of action had arisen within the City of Madras, only on the ground that the defendant had pleaded otherwise and alleged that no part of the cause of action had arisen in Madras but had arisen at Cochin. *[Para 2]*

In considering the balance of convenience, the court is required to see the plaint and the facts stated therein. The court has to necessarily see the entire bundle of facts and then to determine the question of convenience. It cannot be said that in considering the balance of convenience as to the forum for instituting a suit, it would be necessary (like the principles of injunction) to see the ultimate injury that a party may suffer but in deciding whether to refuse leave or not, it would be necessary to see on facts and not on assumptions, who shall suffer-the plaintiff or the defendant-if the leave is granted or refused, as the case may be.

Cases referred to:

K.Murugesan v. Seethalakshmi, (1992)1 L.W. 277; Bengal Agricultural and industrial Corporation v. Corporation of Calcutta, A.I.R. 1960 Cal. 123; Lakshminarayana Chettiar, In re., (1954)1 M.L.J. 403: 67 L.W. 123; State of Rajasthan v. M/s.Swaika Properties, A.I.R. 1985 S.C. 1289; Seshatri Row v. Nawab Ka Askur Jung Afial Dowlah Mushral Mulk, I.L.R. 30 Mad. 438; Parasaram v. Chitandas, A.I.R. 1952 Cal. 82; Bihar State Agro Industrial Development Corpn. Ltd. v. Ram Chand Khosla, A.I.R. 1982 Cal. 537.

Appeal under Clause 15 of the Letters Patent against the Order of Srinivasan, J., dated 21.7.1989 and made in the exercise of the Ordinary Original Jurisdiction of the High Court in Appeal No.1627 of 1989.

S.G.Prabakaran, for Appellant.

M.K.Kabir, for Respondents.

The Order of the Court was made by

Mishra, J.:- This appeal under Clause 15 of the Letters patent is directed against the order in Application No.1627 of 1989 refusing leave under Clause 12 thereof to sue in this Court, the defendants for recovery in a sum of Rs.3,43,726-30. The plaintiff/appellant has alleged that most part of the cause of action for the suit has arisen within the city of Madras. The defendants, however, have said that the entire cause of action has arisen only at Cochin and not in Madras. Learned single Judge, Srinivasan, in his impugned judgment has said:

> "In my opinion, it is not necessary to consider whether any part of the cause of action has arisen within the City of Madras. I propose to

decide the matter on the assumption that part of the cause of action has arisen within the City of Madras."

2. Clause 12 of the Letters Patent which speaks about the original jurisdiction as to suits, runs as follows:

"And we do further ordain that the said High Court of Judicature at Madras, in exercise of its Ordinary Original Civil Jurisdiction, shall be empowered to receive, try, and determine suits of every description if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen, either wholly, or, in case the leave of the court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause at Madras, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees."

The words "determine suits of every description ...., if the cause of action shall have arisen or, in case the leave of the court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction", clearly establish the right of a litigant to institute a suit on the Original Side of this Court if the cause of action would have arisen wholly within the local limits of the Ordinary Original Jurisdiction of the court. The leave of the court is required only in a case in which the cause of action would have arisen in part within the local limits of the Ordinary Original Jurisdiction. It is thus not possible to ignore the case of a litigant who decided to file the suit on the Original Side of the court on the plea that most part of the cause of action had arisen within the city of Madras, only on the ground that the defendant had pleaded otherwise and alleged that no part of the cause of action had arisen in Madras but had arisen at Cochin. In *K.Murugesan v. Seethalakshmi, reported in (1992)1 L.W. 277,* we had the occasion to examine the scope of Clause 12 of the Letters Patent to find out when this Court shall have jurisdiction to entertain a suit under Clause 12 of the Letters Patent. In our Judgment in the said case we have noticed.

"The chartered High Courts of Calcutta, Bombay besides this Court, are having the original jurisdiction as found in Clause 12 of our Letters Patent. They have to find before a suit is entertained on Original Side that it satisfied the requirements, in the case of suit for land or other immovable property, that the land or other immovable property is situated within the local limits of the ordinary original jurisdiction of the court, and in all other cases whether the cause of action wholly arises within the local limits of extraordinary original jurisdiction, or in case the leave of the court is asked for, whether the cause of action arises in part within the local limits of the ordinary original jurisdiction of the court or not. Besides this, there would be no difficulty in entertaining a suit under Clause 12, if the defendant, at the time of commencement of the suit, dwelt or carried on business or personally worked for gain within the Ordinary Original Jurisdiction of this Court. The court's special jurisdiction under its Letters Patent has been left free from some of the provisions of the Code of Civil Procedure, including Secs.16, 17 and 20 by Sec.120 thereof, for, the Letters Patent has not only fixed a territorial jurisdiction, but has in Clause 12 declared that in the case of suits for land or other immovable property such land or property should be found within its territorial jurisdiction and in all other cases if the cause of action is found either wholly or in part arising within the jurisdiction of the court or the defendant is found at the time of the commencement of the suit dwelling or carrying on business or personally working for gain within such territory."

Although the case in *K.Murugesan v. Seethalakshmi, reported in (1992)1 L.W. 277,* was one in which the question had not directly arisen whether in deciding to grant leave, the pleadings of the defendant would be taken into consideration or not, we took notice of a celebrated judgment of the Calcutta High Court in *Bengal Agricultural and Industrial Corporation v. Corporation of Calcutta, A.I.R. 1960 Cal. 123,* to quote in some detail the law on the subject

including the passage:

"On a correct construction of Clause 12 of the Letters Patent, not all suits in which there are more than one defendants, not all of them being within jurisdiction, are liable to be dismissed as against all including those who reside or carry on business within jurisdiction. Again, it is not correct to say that in a case in which the plaintiff abandons his claim either wholly or in part against some of the defendants, for determining the nature of the suit and the jurisdiction of the court, the court is to look at the plaint as originally filed and not as it stands after the claim has been abandoned as against some of the defendants wholly or in part. Neither reason nor authority warrants such a proposition. If the suit is on a single cause of action and there are more defendants than one, then all the defendants being necessary parties, having regard to the nature of the claim and the reliefs sought, then all the defendants must be within jurisdiction in order that the court can entertain such a suit. In such a suit the court cannot pass a decree against one and dismiss the suit against the other".

3. In that very appeal we also considered as to what a cause of action means and recorded our considered opinion following the decision of a Full Bench of this Court in *Lakshminarayana Chettiar, In re., (1954)1 M.L.J. 403: 67 L.W. 123,* and a judgment of the Supreme Court in *State of Rajasthan v. M/s.Swaika Properties, A.I.R. 1985 S.C. 1289.*

"Cause of action is a fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to relief against the defendant."

The learned single Judge is, however, right in saying that in all cases where a part of the cause of action has arisen within the jurisdiction of one court and the other part within the jurisdiction of some other court, the relevant question will be the balance of convenience, but then has said:

"In paragraph 5 of the counter-affidavit the defendant has stated that the entire evidence whether documentary or witnesses, has to be produced at Madras for conducting the trial which would be highly impossible apart from being expensive. The defendants will be subjected to acute hardship and loss; on the other hand, the plaintiff will not be subjected to any hardship as the plaintiff is having a branch at Mattancherry, Cochin and their distributor Devika Chemicals (P.) Ltd. is also at Cochin. The defendants have also referred to the necessity of summoning the records from Central Excise Department to speak to the supply of goods. Learned counsel for the plaintiff urges that there is no relevance and that it may not call for records from the Central Excise Department. But, it is not a matter which has to be considered at this stage, but, I am of the opinion that the defendants will be put to undue hardship if the suit is filed in this Court. On the other hand, since the plaintiff is having its branch office admittedly at Cochin, it will not be put to any inconvenience if the suit is filed in a competent court at Cochin, where admittedly a part of the cause of action has arisen."

4. The principle of balance of convenience, which is an extension of the doctrine 'forum convenient' has been considered in a judgment of this court in *Seshatri Row v. Nawab Ka Askur Jung Aftal Dowlah Mushral Mulk, I.L.R. 30 Mad. 438.* It has been observed in the said judgment:

"Having regard to the wording of Art.12, it is clear that the fact that the cause of action arises in part within the local limits is not conclusive, and that, notwithstanding that the cause of action arises in part within the local limits, the court may decline to give leave to sue"

xxx xxx xxx

"As regards the law of this country, so far as we are aware, it has never been held that the question of convenience is not a question which may be taken into consideration in dealing with applications under Clause 12, and we are certainly not prepared to hold that this question should be excluded from consideration."

This view has been reiterated in several judgments of the courts having original jurisdiction including the judgments of the Calcutta High Court in *Parasaram v. Chitandas, A.I.R. 1952 Cal. 82* and *Bihar State Agro Industrial Development Corporation v. Ram Chand Khosla, A.I.R. 1982 Cal. 537.* But then, in considering the balance of convenience, the court is required to see the plaint and the facts stated therein. The court has to necessarily see the entire bundle of facts and then to determine the

question of convenience. Stating, though with respect to grant of interlocutory injunctions, in Halsbury's Laws of England, Third Edition, Vol.21 at pages 364 and 365, the balance of convenience is stated as follows:

> "Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."

5. We do not say that in considering the balance of convenience as to the forum for instituting a suit, it would be necessary (like the principles of injunction) to see the ultimate injury that a party may suffer but we do find support to our view and we state in no uncertain terms that in deciding whether to refuse leave or not, it would be necessary to see on facts and not, on assumptions, who shall suffer-the plaintiff or the defendant-if the leave is granted or refused, as the case may be.

6. We would have proceeded ourselves to examine the facts pleaded on behalf of the plaintiff to see whether facts show that most of the transactions took place within the jurisdiction of this Court or a small part of the cause of action arose within the jurisdiction of this Court, for, if most of the transactions were done within the jurisdiction of this Court obviously the defendants found it convenient to transact their business for all purposes within the jurisdiction of this Court but only to defeat the grant of leave on the Original Side of this Court, the plea of convenience is raised. We would also have examined ourselves as to whether keeping in view the nature of the transactions between the parties from which transactions the present suit has arisen, it would be inconvenient to the defendants to defend themselves before this Court or would be inconvenient to the plaintiff if he is asked to go to institute the suit in Cochin as pleaded by the defendants. We, however, refrain for, if we do so, we shall usurp the jurisdiction and discretion of the learned single Judge, who is to decide whether to grant leave or not. Since we are of opinion that a proper adjudication is necessary on all relevant facts of the case before deciding whether to grant leave or not and since it has not been done in passing the impugned judgment we are inclined to interfere with the impugned order. The impugned order, for the said reason, is set aside. The case is remitted to the Original Side of this Court for a re-hearing and decision on the question whether leave should be granted or not, in accordance with law. This appeal is accordingly allowed. No costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Somasundaram, J.*

W.P.No.3941 of 1984 *19th March, 1992.*

Ramasamy Gounder (deceased) and another ...*Petitioners*

v.

The Special Tahsildar (Debt Relief), Tirupattur, North Arcot District and others ...*Respondents.*

Tamil Nadu Debt Relief Act (XIII of 1980) - Suit on mortgage deed pending and later on decreed - Mortgagor, if can seek adjudication before Authorities under the Debt Relief Act claiming relief - Jurisdiction of Authorities to entertain such application.

The third respondent and others executed a mortgage deed in favour of the petitioner for a sum of Rs.7,000 on 13.7.1972. On 19.1.1981, the petitioner filed a suit in O.S.No.1138 of 1951 on the file of the Sub-Court, Vellore for the recovery of a sum of Rs.4,593.63 with future interest. The mortgagors submitted to a decree and a preliminary decree was passed on 27.3.1982. During the pendency of the suit the third respondent filed an application before the Special Tahsildar (Debt Relief) claiming that she was a debtor entitled to

the benefits of the Tamil Nadu Debt Relief Act, 1980. The Special Tahsildar issued a certificate of redemption of the mortgage debt in favour of the 3rd respondent. The petitioner's appeal to the Revenue Divisional Officer failed. He therefore filed a writ petition before the High Court to quash the orders contending that the authorities constituted under the Debt Relief Act had no jurisdiction to entertain an application of such a nature when a suit had already been filed for the recovery of the debt in a civil court.

Held:- In a suit or proceeding initiated by a creditor in a civil court, the Court has to decide the question as to whether the defendant in that suit or proceeding is a debtor as defined under the Act and in such circumstances, the mortgagor cannot seek any adjudication before the authorities under the Act claiming relief under the Act. In these circumstances it has to be held that the respondents 1 and 2 have no jurisdiction to entertain the application of the 3rd respondent, claiming to be a debtor entitled to the benefits of the Act when a suit had already been filed for the recovery of the debt in question and pending before the civil court. Therefore, it has to be held that the orders of the respondents 1 and 2 are illegal and are liable to be set aside. *[Para 3]*

Cases referred to:

Subramaniyan v. Revenue Divisional Officer, (1982)2 M.L.J. 375: I.L.R. (1983)2 Mad. 222: A.I.R. 1983 Mad. 26; Perumal v. Kuppanna, A.I.R. 1981 Mad. 271.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to file No.11273 of 1982, dated 3.12.1982 on the file of the 1st respondent and in K.Dis.273 of 1982, dated 6.1.1984 on the file of the respondents 1 and 2 and quash the said orders and made therein.

M.N.Muthukumaran, for Petitioner.

Veerabadran, Government Advocate, for Respondent Nos.1 and 2.

D.Krishnan for Respondent No.3.

The Court made the following

ORDER:- On 13.7.1972, the 3rd respondent and others executed a mortgage deed in favour of the petitioner for a sum of Rs.7,000. On 19.1.1981, the petitioner filed a suit in O.S.No.1138 of 1981 on the file of the Sub-Court, Vellore against the third respondent and others for the recovery of a sum of Rs.4,593.63 with future interest on the basis of the mortgage deed dated 12.7.1972. The mortgagors submitted to a decree in the suit on 27.3.1982 and a preliminary decree was passed in favour of the petitioner on that day. During the pendency of the mortgage suit O.S.No.1138 of 1981, the third respondent in 1982 filed an application before the first respondent under the provisions of Tamil Nadu Debt Relief Act 13 of 1980 (hereinafter called 'the Act') claiming that she was a debtor entitled to the benefits of the Act and praying for the issue of certificate of redemption with regard to the mortgage debt. The first respondent accepted the case of the third respondent and granted a certificate of redemption of the mortgage debt in favour of the third respondent. Thereafter, the petitioner preferred an appeal before the 2nd respondent and the second respondent by his order dated 6.1.1984 confirmed the order of the first respondent and disposed of the appeal. Aggrieved by the orders of the respondents 1 and 2, the petitioner has filed this writ petition for the issue of a writ of certiorari to quash the orders of the respondents 1 and 2.

2. Mr.M.N.Muthukumaran, the learned counsel appearing for the petitioners would submit that the authorities constituted under the Act will have no jurisdiction to entertain the application of a person claiming to be a debtor when a suit had already been filed for the recovery of the debt in question and pending before the civil court. The learned counsel further submitted that as the 3rd respondent in the present case applied for a certificate of redemption before the first respondent under the provisions of the Act, during the pendency of the suit O.S.No.1138 of 1981, the respondents have no jurisdiction to issue the certificate of redemption under the provisions of the Act. In support of his contention, the learned counsel relied on the decision of a Division Bench of this Court in *Subramaniyan v. Revenue Divisional Officer, (1982)2 M.L.J. 375: I.L.R. (1983)2 Mad. 222: A.I.R. 1983 Mad. 26.* There is force in the contention of the learned counsel for the petitioner. In the decision referred to above, the mortgagee filed two suits in the civil court to recover the mortgage amounts against the mortgagor. The mortgagor filed an application under Sec.6 of the Act, claiming benefits under the Act and seeking a certificate of redemption of the mortgage debt

before the Special Tahsildar (Debt Relief). He granted the certificate. On appeal, the appellate authority confirmed the order of the Special Tahsildar. The Division Bench in that case held that the mortgagor cannot seek an adjudication before the Tahsildar on the question whether he is entitled to the benefits of the Act in pending suits and the mortgagor can seek the relief under the Act only before the Civil Court. The Division Bench while coming to such a conclusion has held as follows:

> "It is no doubt true that Sec.4(1)(b) of the Act says that no civil court shall entertain any suit or other proceedings against the debtor for the recovery of any amount of such debt and Sec.4(1)(c) says that all suits and other proceedings pending at the commencement of the Act against any debtor for the recovery of any such debt shall abate. However, the prohibition of the civil Court to entertain a suit and the abatement of all existing suits and other proceedings will arise only, if the debtor is found entitled to the benefits of the Act. Therefore, the Civil Court wherein suits or other proceedings are pending against the debtor has to come to a conclusion as to whether the debtor is entitled to the benefits of the Act or not. Secs.5 and 6 of the Act do not use a non-abstante clause giving the Tahsildar a power to override the decision of the Civil Court as regards the question whether a party before the civil court is a person entitled to the benefits of the Act, and the Tahsildar, acting under Sec.5 or 6 of the Act cannot be expected to render a decision on the question as to whether the debtor is entitled to the benefits of the Act and call upon the civil court to abide by that decision. As pointed out by Ratnam, J. in *Perumal v. Kuppanna, A.I.R. 1981 Mad. 271*, the Tahsildar acting under Sec.5 or Sec.6 cannot assume the functions of a civil court, which has to necessarily determine as a jurisdictional issue as to whether the party before it is a debtor entitled to the benefits of the Act, for deciding the question of maintainability of the suit or for deciding the question of abatement referred to above. Admittedly there is no express provision taking away the jurisdiction of the civil court to decide the question as to whether a particular person is entitled to the benefits of the Act or not. In a suit or proceeding initiated by a creditor in a civil court, the court has to decide the question as to whether the defendant in that suit or proceeding is a debtor as defined in the Act, as a jurisdictional issue and such jurisdictional issue has to be decided only by the court itself before pronouncing its decision on the question of maintainability of the suit or proceeding or on the question of abatement. In this view of the matter, we have to hold in the present case that as creditor has already filed two suits for recovery of the mortgage amount and those suits are pending the third respondent herein, who is the defendant in those suits, has to seek an adjudication before the civil court on the question as to whether he is entitled to the benefits of the Act and if the court comes to the conclusion that be is entitled to the benefits of the Act, then the court has to dispose of the suits in accordance with Sec.4 of the Act."

3. The present case is directly covered by the decision in *Subramaniyan v. Revenue Divisional Officer, (1982)2 M.L.J. 375: I.L.R.(1983)2 Mad. 222: A.I.R. 1983 Mad. 26.* Admittedly, when the 3rd respondent filed an application before the Tahsildar (debt relief) claiming benefits under the Act and seeking the certificate of redemption of the mortgage debt, the suit O.S.No.1188 of 1981 filed by the petitioner was pending and it was decreed on 27.3.1982. In a suit or proceeding initiated by a creditor in a civil court, the Court has to decide the question as to whether the defendant in that suit or proceeding is a debtor as defined under the Act and in such circumstances, the mortgagor cannot seek any adjudication before the authorities under the Act claiming relief under the Act. In these circumstances it has to be held that the respondents 1 and 2 have no jurisdiction to entertain the application of the 3rd respondent, claiming to be a debtor entitled to the benefits of the Act when a suit had already been filed for recovery of the debt in question and pending before the civil court. Therefore, it has to be held that the orders of the respondents 1 and 2 are illegal and are liable to be set aside. Consequently, the Writ Petition is allowed and the orders challenged in this writ petition are set aside. However, it is open to the third respondent to raise the plea that she is entitled to the benefits of the Act in the execution proceedings, if the law

permits her to do so. No costs.

B.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.Nos.141 and 142 of 1992 *17th February, 1992.*

E.I.D. Parry (India) Ltd. and another ...*Petitioners*

v.

The Presiding Officer, Industrial Tribunal, Madras and another ...*Respondents.*

(A) Industrial Disputes Act (XIV of 1947), Sec.10(4) - Tribunal exercising power under - If can grant interim relief - Grant of interim relief - Matters to be considered.

(B) Industrial Disputes Act (XIV of 1947), Sec.10-B (inserted by Tamil Nadu Act XXXVI of 1982) - Scope of - Whether takes away power of the tribunal to pass interim order under Sec.10(4) - Interpretation of Statutes - Harmonious interpretation - Repeal by implication - Secs.10-B and 10(4) if can co-exist.

The question referred to the Industrial Tribunal was whether the demand for revision of wages and dearness allowance was justified, if so to fix the revised rates..... Before the tribunal, the Union filed a petition praying for the passing of an interim award to direct the Management to pay an increase of Rs.500 per month to each employee and also to pay a lump sum amount of Rs.5,000 to each employee to be adjusted in the final award. The tribunal passed an interim order directing the management to pay Rs.250 as *ad hoc* increase to every employee every month and a lump sum amount of Rs.2000 to each employee to be adjusted in the final award. The petitioner filed a writ petition against the interim award contending (1) that the tribunal had no power to pass the interim award (2) that even assuming that the tribunal had the power to pass interim award, it had not followed certain procedure laid down by certain decisions and (3) that after the introduction of Sec.10-B by the Tamil Nadu Act XXXVI of 1982, no interim order could be passed under Sec.10(4) by the tribunal.

Held:- In view of the decision of the Supreme Court in *Hotel Imperial v. Hotel Workers' Union, A.I.R. 1959 S.C. 1342*, the tribunal exercising the power conferred under Sec.10(4) of the Act can grant the interim relief with respect to matters incidental to the points of disputes for adjudication. *[Para 11]*

A reading of the reference in the present case shows that the scope of the reference is very wide. So the tribunal has come to the conclusion that an increase in wages is necessary and essential. The tribunal has not considered the issue but has passed an order *prima facie* without applying its mind. Though the reference is very wide, the tribunal has to look into the pleadings carefully and the tribunal should have gone into it in detail since what is asked for is settlement of the year 1978 which had culminated in an award by settlement in the year 1985. So these are all matters, *prima facie*, the tribunal should have examined but it has not been done so. The rise of cost in index cannot be a sole criterion. There are many more things to be considered when an increase in wages is asked for. The tribunal has passed a cryptic order without adhering to the principles laid down in *Management, B.S.E. Board v. Workmen, B.S.E. Board, (1971) 1 L.L.J. 389*, and *N.T.C. v. State of Rajasthan, (1989)1 L.L.N. 778*, while passing an order under Sec.10(4) of the Act. A reading of the order of the tribunal clearly shows that it has not applied its mind and has not decided the question as to whether there is any *prima facie* case made out and the existence of the right in favour of the respondent Union. Hence, the order is liable to be set aside. *[Para 12]*

The contention that the introduction of Sec.10-B of the Tamil Nadu Amendment has taken away the power of the tribunal which passed an order under Sec.10(4) of the Act is not convincing. It is well established principle to interpret the provisions of a statute as harmoniously as possible so that there is no conflict of the provisions and likewise that no provision is rendered otiose. It is also well-established that the power of the Government under Sec.10(1) of the Act is purely an administrative function. While referring to a dispute under Sec.10(4) of the Act, the legislature has conferred on the Government a power to issue

an order under Sec.10-B of the Act by Tamil Nadu Act XXXVI of 1982. The insertion of Sec.10-B of the Act has not taken away the power of the tribunal under Sec.10(4) of the Act, to pass an interim order. The power under Sec.10-B is given to the Government to give an interim relief to the workers including the payment of money by the employer. Sub-secs.(2) and (3) of Sec.10-B stated that such an order shall cease to operate on the expiry of a period of six months from the date of the order or on the date of the award of the Labour Court or the tribunal as the case may be, whichever is earlier and that the money which has been paid can be adjusted. So, if the Government, while referring the dispute has passed an order under Sec.10-B of the Act giving an interim relief to the workmen, then the power under sub-sec.(4) of Sec.10 cannot be exercised by the tribunal. For instance, when the adjudication is pending before the tribunal, no interim relief can be asked for, if an order has already been passed under Sec.10-B of the Act granting some interim relief to the workmen under Sec.10-B of the Act. At the same time, if no interim relief has been given while making a reference, the sole authority to decide the dispute and as a matter incidental thereto, the tribunal has got the power before whom the proceeding is pending. So the power of the Government to pass an order under Sec.10-B of the Act has to be exercised immediately after a reference is made under Sec.10(1) of the Act. If it is not made, it cannot be contended that the tribunal has lost its power to grant an interim relief. Apart from that a quasi-judicial power under Sec.10(4) of the Act cannot be taken away by conferring an administrative power on the Government by amendment. It is also settled law that the repeal by implication is not favourable and such interpretation is not to be adopted unless it is inevitable. The presumption is always against the principle of Repeal. Any reasonable construction which offers an escape from implied repeal must be considered in consonance with the true intention of the legislature. So, two provisions can co-exist side by side even though one may to some extent overlap the other. *[Paras 13 and 14]*

Cases referred to:

Valluvar Handloom Textiles v. Government of India, (1981)1 L.L.J. 458; Management, B.S.E. Board v. Workman, B.S.E. Board, (1971) 1 L.L.J. 389; National Textile Corporation v. State of Rajasthan, (1989)1 L.L.N. 778; Hotel Imperial v. Hotel Workers' Union, A.I.R. 1959 S.C. 1342; Gujarat Steel Tubes Ltd. v. G.S.T. Mazdoor Sabha, (1980)1 L.L.J. 137; Telco Convoy Drivers Mazdoor Sangh v. State of Bihar, A.I.R. 1989 S.C. 1565; The Workmen represented by Secretary v. The Management of Reptakos Brett and Company Ltd., (1991)4 S.C.C. 243.

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Ist respondent in M.A.No.62 of 1991 in I.D.No.16 of 1991 and quash the order dated 7.11.1991.

M.R.Narayanasami, Senior Counsel for *M/S T.S.Gopalan, P.Ibrahim Kalifullah* and *S.Ravindran*, for Petitioners.

V.Prakash, for Respondent No.2.

The Court made the following

ORDER:- The petitioner challenges an interim order passed by the first respondent tribunal in M.A.No.62 of 1991 in I.D.No.16 of 1991, dated 7.11.1991. By this order an *ad hoc* relief was given by the first respondent tribunal to the members of the second respondent association.

2. A settlement was arrived at between the second respondent association and the petitioner management under Sec.12(3) of the Industrial Disputes Act, 1947 and was formulated with regard to dearness allowance. According to Clause 21(1) of the Settlement, the settlement came into force on 1.6.1985 and was in force till 31.5.1989 and shall continue to remain in force thereafter until the same is terminated by giving two months notice in writing by other parties. A notice under Sec.19(2) & (6) of the Industrial Disputes Act, 1947 was given by the second respondent Union on 31.3.1989 for termination of the settlement dated 17.5.1985 raising Charter of Demands. A subsequent Charter of Demands was raised on 31.5.1989. Demand No.1(B) was with regard to dearness allowance and the demand of the second respondent Union was that the dearness allowance should be paid every month based on the previous month's index. The question which was referred to the first respondent tribunal runs as follows:

> "...Whether the demand of the workmen for revision of Wages and Dearness Allowance is justified if so to fix the revised rates..."

3. Before the first respondent tribunal, the second

respondent Union filed a claim petition praying to restore the D.A. of what each employee would have drawn if the 1985 settlement had not been concluded in the year 1978 and to restore such revision from 1.6.1989 on which date the 1985 settlement was terminated. An application was taken in I.D.No.16 of 1991 praying to pass an interim award to direct the management to pay a monthly increase of Rs.500 to each employee from the month of May, 1991 and also to pay a lump sum amount of Rs.5,000 to each employee, and such payments may be adjusted in the final award. The said application has been numbered as I.A.No.62 of 1991.

4. A counter affidavit was filed by the petitioner management stating that the demands will have to be adjudicated by applying region-cum-industry principle and the financial status of the petitioner company will have to be assessed before considering the demand with regard to wages and the dearness allowance and that the second respondent Union has to make out a case for revision of wages and other service conditions. It is also pointed out in the counter affidavit that the respondent Union has not disclosed any *prima facie* reason to justify its demands and that whatever may be the merits of the case, it is not possible for the petitioner management to consider an increase of Rs.500 per month and that the demand for lump sum payment of Rs.5,000 is wholly unjustified.

5. When the main dispute was pending, by the impugned order the tribunal, the first respondent herein allowed an application taken out by the second respondent association ordering the petitioner management to pay Rs.250 as *ad hoc* increase every month to each employee commencing from May, 1991 in addition to the existing monthly emoluments and also a lump sum of Rs.2,000 to each employee as interim relief. Against this order, the writ petitions have been preferred.

6. Notice of motion has been ordered by me on 8.1.1992. Mr.V.Prakash, learned counsel appears for the second respondent, has taken notice and filed a counter affidavit.

7. Mr.M.R.Narayanasamy, learned Senior Counsel appearing for the petitioner management, refers to Chapter IV of the Industrial Disputes Act, 1947 wherein the powers and duties of the Conciliation Officer are set out. The learned Senior Counsel also refers to Sec.15 of the Industrial Disputes Act, 1947 and also refers to Sec.16(4) of the Industrial Disputes Act, 1947 wherein the word "award" has been defined. After referring to the above mentioned provisions of the Industrial Disputes Act, 1947, the learned Senior Counsel contends that the power of the Labour tribunal, the first respondent herein, is not like the power of the Civil Court under O.39, Rules 1 and 2, C.P.C. and that there is no power in the Industrial Disputes Act, 1947 (hereinafter referred to as the 'Act') to grant such a relief which has been granted by the tribunal. According to the learned Senior Counsel, assuming that the tribunal has got the power to grant interim relief, the tribunal has not followed certain parameters laid down by certain decisions to grant such an interim relief. According to the learned Senior Counsel the interim relief must have a correlation with the main relief sought for which is pending before the tribunal, the first respondent herein. The learned Senior Counsel also refers to the main disputes of these cases and contends that on the facts of the case on hand and taking note of the fact of the disputes raised, it is not possible to grant such an interim relief. According to the learned Senior Counsel, the settlement entered into in the year 1985 continues under Sec.19 of the Act and also he refers to the decision of this Court in *Valluvar Handloom Textiles v. Government of India, (1981) 1 L.L.J. 458.* With regard to the grant of the interim reliefs, the learned Senior Counsel relies on the decision of the Patna High Court in *Management, B.S.E. Board v. Workman, B.S.E. Board, (1971) 1 L.L.J. 389* and the decision of a Division Bench of the Rajasthan High Court in *National Textile Corporation v. State of Rajasthan, (1989) 1 L.L.N. 778,* apart from referring to the decision of the Supreme Court in *Hotel Imperial v. Hotel Workers' Union, A.I.R. 1959 S.C. 1342,* with regard to the powers of the tribunal under sub-sec.(4) of Sec.10 of the Act. According to the learned Senior Counsel, the parameters set out in the abovementioned decisions have not been followed by the tribunal in the cases on hand and that the tribunal has *prima facie* exercised the power on the facts of the cases which is not correct. The learned Senior Counsel contends that the second respondent Union has not made out a case for *ad hoc* payment and on the facts and circumstances of the case and taking into consideration the question raised in the adjudication, the instant cases are not fit cases for granting interim relief, assuming for a moment that the tribunal has got

the power to grant the same. The learned Senior Counsel further points out that in Tamil Nadu Sec.10-B of the Act has been inserted by Tamil Nadu Act 36 of 1982 and that after the introduction of this section, no interim order can be passed under sub-sec.(4) of Sec.10 of the Act, by the tribunal. It is also pointed out by the learned Senior Counsel that the order passed by the tribunal is not an interim award and that in so far as it is not an interim award, the tribunal has no jurisdiction to pass such an order.

8. Mr.Prakash, the learned counsel appearing for the second respondent Union contends that the tribunal, the first respondent herein, has got power to pass such an interim order under sub-sec.(4) of Sec.10 of the Act and that it is settled law in view of the decision of the Supreme Court in *Hotel Imperial v. Hotel Workers' Union, A.I.R. 1959 S.C. 1342.* According to the learned counsel, it should be "incidental thereto", that is all. The learned counsel points out that ever since 1985 the dearness allowance stands at the same rate and that though a dispute has been referred to and an award has been passed in their favour it was not given effect to and a settlement was entered into in the year 1985. According to the learned counsel para 7 of the order of the tribunal clearly shows that the tribunal has applied its mind and found that *prima facie*, there are reasons to grant the interim relief. According to the learned counsel, no evidence was let in by both parties and the matter was argued on affidavits and materials and as such the discretion exercised by the tribunal is enough to show that it has applied its mind and that having come to the conclusion for granting the interim relief, it had granted the relief. That apart, the learned counsel points out that the cost of living index had been annexed thereto for the year 1985 and this Court may take judicial note of this fact and that in so far the interim order of the tribunal, which is impugned before me, is not perverse, this Court need not interfere with the same under Art.226 of the Constitution of India. With regard to the contention that the settlement of the year 1985 continues till today, Mr.Prakash, the learned counsel contends that an industrial dispute cannot be raised when there is a solidarity settlement, that when such a settlement is terminated under Sec.19 and as such Charter of Demands has been made in this Case. He also points out that a reference has to be read broadly and if the reference is read in that way, there is no scope for the petitioner management to contend that the interim orders are wrong. According to the learned counsel, the Clerks of the management have D.A. ceiling when the managerial staff and peons do not face such a situation. With regard to Sec.10-B of the Act, the learned counsel points out that the power of the Government is only an enabling power and the Legislature has vested the power on the Government. But the insertion of Sec.10-B of the Act does not take away the power of the tribunal under Sec.10(4) of the Act, which is a quasi-judicial power. According to the learned counsel, the field occupied by sub-sec.(4) of Sec.10 is entirely different from the power conferred under Sec.10-B of the Act on the Government. According to the learned counsel appearing for the second respondent Union, the power under Sec.10 of the act has to be taken as an administrative power and also any order passed under Sec.10-B of the Act is an administrative order and it cannot take away the power under Sec.10(4) of the Act. Referring to the decision in *Gujarat Steel Tubes Ltd. v. G.S.T. Mazdoor Sabha, (1980)1 L.L.J. 137,* the learned counsel for the second respondent Union contends that this Court has no power under Art.226 of the Constitution of India to grant certain marginal relief taking into consideration the peculiar facts and circumstances of the cases on hand.

9. Replying to the abovesaid arguments Mr.M.R.Narayanasamy, the learned Senior Counsel points out that the award of the year 1983 is not valid as per Sec.19 of the Act because the life of the award is only for one year. He also points out that the basis of settlement in the year 1985 was that of the award of the year 1983 and points out that a writ petition W.P.No.8986 of 1983 is filed by the second respondent against the award of the year 1976 and that in the said matter quietus was given in the year 1988 by the settlement arrived at in the year 1985, The learned Senior Counsel further contends that what was raised in the year 1973 has been raised once again when the matter has been given quietus. So according to the learned Senior Counsel unless it is decided by the tribunal, as interim relief could be given and on the merits of the case also, the tribunal has not come to the correct conclusion. He points out that the Legislature has vested the power with the Government to pass any interim relief under Sec.10-B of the

Industrial Disputes Act. He further contends that when it is so, the earlier decisions cited on this point as to whether the tribunal has 'incidental power' to pass orders under Sub-sec.(4) of Sec.10 of the Act cannot hold good now especially in Tamil Nadu after the amendment which came into force in the year 1982. He further argues that the power under Sec.10(4) of the Act as an incidental power has been decided only by courts to grant the interim relief and that when the Legislature has stepped in and enacted Sec.10-B of the Act, the earlier decisions based upon sub-sec.(4) of Sec.10 of the Act has got to be ignored. According to the learned counsel, if the tribunal and the Government are vested with the same power to pass interim orders and if a construction is given to that effect such an interpretation will lead to absurdity. The learned Senior Counsel points out that for instance, under Sec.10-B of the Act, if the Government has passed an order, will it be open to the tribunal to pass an order under Sec.10(4) of the Act? He further points out that if such a construction is put forth, it will confer power on two authorities concurrently one on the tribunal and the other on the Government. According to the learned Senior Counsel such an interpretation is not to be adopted but the section has to be construed harmoniously and not to interpret the section which will lead to absurdity.

10. I have considered the arguments of Mr.M.R.Narayanasamy, the learned Senior Counsel appearing for the petitioner management and of Mr.V.Prakash, the learned counsel appearing for the second respondent Union. The short point that arises for consideration is whether the interim order passed by the tribunal, the first respondent herein is correct under Sec.10(4) of the Act. It is also to be decided whether the tribunal has got the power to pass such an order and whether in view of the introduction of Sec.10-B of the Act in the year 1982, such a power has been taken away. Assuming if such a power vests with the tribunal, it is also to be noted as to whether the tribunal has followed certain parameters set out by certain courts.

11. To decide the issue whether the tribunal, the first respondent herein, has got the power to pass an interim order, it would be relevant to extract Sec.10(4) of the Act which reads as follows:

> "...Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court, or the Tribunal or the National Tribunal, as the case may be shall confine its adjudication to those points and matters incidental thereto..."

In *Hotel Imperial v. Hotel Workers' Union, A.I.R. 1959 S.C. 1342,* the Supreme Court has held as follows (at P.1348):

> "...After a dispute is referred to the tribunal under Sec.10 of the Act, it is enjoined on it by Sec.15 to hold its proceeding expeditiously and on the conclusion thereof submit its award to the appropriate Government. An "award" is defined in Sec.2(b) of the Act as meaning "an interim or final determination by a Industrial Tribunal of any industrial dispute or of any question relating thereto." Where an order referring an industrial dispute has been made specifying the points of dispute for adjudication, the tribunal has to confine its adjudication to those points and matters incidental thereto; [Sec.10(4)]. It is urged on behalf of the appellants that the tribunal in these cases had to confine itself to adjudicating on the points referred and that as the question of interim relief was not referred to it, it could not adjudicate upon that. We are of opinion that there is no force in this argument, in view of the words "incidental thereto" appearing in Sec.10(4). There can be no doubt that if, for example, question of reinstatement and/or compensation is referred to a tribunal for adjudication, the question of granting interim relief till the decision of the tribunal with respect to the same matter would be a matter incidental thereto under Sec.10(4) and need not be specifically referred in terms to the tribunal. Thus interim relief where it is admissible can be granted as a matter incidental to the main question referred to the tribunal without being itself referred in express terms.
>
> The next question is as to how the tribunal should proceed in the matter if it decides to grant interim relief. The definition of the word "award" shows that it can be either an interim or final determination either of the whole of the dispute referred to the tribunal or any question relating thereto. Thus it is open to the tribunal to give an award about the entire

dispute at the end of the all proceedings. This will be final determination of the industrial dispute referred to it. It is also open to the tribunal to make an award about some of the matters referred to it whilst some others still remain to be decided. This will be an interim determination of any question relating thereto. In either case it will have to be published as required by Sec.17. Such awards are however not in the nature of interim relief for they decide the industrial dispute or some question relating thereto. Interim relief, on the other hand, is granted under the power conferred on the tribunal under Sec.10(4) with respect to matters incidental to the points of dispute for adjudication..."

In the above mentioned case, the Supreme Court has held that the tribunal exercising the power conferred under Sec.10(4) of the Act can grant the interim relief with respect to matters incidental to the points of dispute for adjudication. In view of that, I am of the view that it is not open to Mr.M.R.Narayanasamy, the learned Senior Counsel appearing for the petitioner management, to contend that the tribunal has no power to pass an interim order.

12. The next question to be decided is whether the tribunal has applied its mind or not and considered the question at the correct perspective when granting the interim order. In *Management, B.S.E. Board v. Workman, B.S.E. Board, (1971) 1 L.L.J. 389,* a Division Bench of the Patna High Court has held that the tribunal has the power to grant interim relief in appropriate cases in the form of an interim award. While holding so, the Division Bench of the Patna High Court had held that the tribunal must determine that there is a good *prima facie* case in favour of the workman for final adjudication and that on the facts of the particular case interim relief by way of interim award is necessary. A Division Bench of the Rajasthan High Court in *National Textile Corporation v. State of Rajasthan, (1989) 1 L.L.N. 778,* has held that the tribunal has got the sole judicial discretion to decide the dispute specified in the order of reference and the matters incidental thereto. In that case, the Division Bench has held that the tribunal is competent to grant interim relief under Sec.10(4) of the Act with respect to matters incidental to the points of dispute for adjudication, and the tribunal is competent to grant an *ad hoc* increase in wages in the matter of industrial dispute with regard to demand for increase in wages, for the adjudication of which reference has been made to it by the State Government. It has also been held that the granting of interim relief is purely within the discretion of the tribunal and while granting such reliefs the tribunal should take note of the following points:

"(1) that there is a *prima facie* case, meaning thereby that there is a serious question to be tried and an existence of a right;

(2) that the tribunal's interference is necessary to protect the party from that species of injury which is regarded by the Courts as irreparable; and

(3) the balance of convenience, *i.e.*, the tribunal should weigh the amount of substantial mischief that is likely to be caused to the party claiming interim relief if the same is refused and compare it with that which is likely to be caused to the other side if the interim relief is granted..."

So if the principles laid down in the abovementioned cases are considered, I am of the view that on the facts of the case on hand, *prima facie* the tribunal has not applied its mind at all to come to the correct conclusion. The question referred to for adjudication is as follows:

"...Whether the demand of the workmen for revision of Wages and Dearness Allowance is justified if so to fix the revised rates..."

A reading of the abovementioned reference shows that the scope of the reference is very wide. So the tribunal has come to the conclusion that an increase in wages is necessary and essential. I do not think the tribunal has considered the issue, but has passed an order *prima facie*, in my view, without applying its mind. Though the reference, extracted hereinabove, is very wide, the tribunal has to look into the pleadings carefully and the tribunal should have gone into in detail since what is asked for is settlement of the year 1978 which had culminated in an award by settlement in the year 1985. So these are all matters, *prima facie*, the tribunal should have examined and that it has not been done so. The rise of cost of index cannot be a sole criterion. There are many more things to be considered when an increase in wages is asked for. In my view, the tribunal has passed a cryptic order without adhering to the principles laid down in the above mentioned decisions, while passing an order under Sec.10(4) of the Act. A reading of the

order of the tribunal clearly shows that it has not applied its mind and has not decided the question as to whether there is any *prima facie* case made out and the existence of the right in favour of the respondent Union. So I am of the view that the contention of Mr.M.R.Narayanasamy, the learned Senior Counsel has to be upheld on the facts and circumstances of the case that the order is liable to be set aside applying the principles laid down in the abovementioned cases.

13. The contention of the learned Senior Counsel appearing for the petitioner management that the introduction of Sec.10-B of the Tamil Nadu Amendment has taken away the power of the tribunal which passed an order under Sec.10(4) of the Act, is not convincing. It is well established principle to interpret the provisions of a statute as harmoniously as possible so that there is no conflict of the provisions and likewise that no provision is rendered otiose. It is also well-established that the power of the Government under Sec.10(1) of the Act is purely an administrative function. It has been held so in *Telco Convoy Drivers Mazdoor Sangh v. State of Bihar, A.I.R. 1989 S.C. 1565.* It has been further observed in that case as follows: (at p.1565)

> "...While exercising power under Sec.10(1) the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Sec.10. It is true that in considering the question of making a reference under Sec.10(1), the Government, is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended. But the formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. Where, as in the instant case, the dispute was whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function under Sec.10(1) of the Act. The order of the Government refusing to refer the dispute on ground that the persons raising the dispute are not workmen is liable to be set aside. As the Government had persistently declined to make a reference under Sec.10(1) the Supreme Court directed the Government to make a reference..."

While referring to a dispute under Sec.10(4) of the Act, the legislature has conferred on the Government a power to issue an order under Sec.10-B of he Act by Tamil Nadu Act 36 of 1982. Sec.10-B of the Act reads as follows:

> "10-B. Power to issue order regarding terms and conditions of service pending settlement of disputes:- (1) where an industrial dispute has been referred by the State Government to a Labour Court or a Tribunal under sub-sec.(1) of Sec.10 and if, in the opinion of the State Government, it is necessary or expedient so to do for assuring the public safety or convenience or the maintenance of public order or supplies and services essential to the life of the community or for maintaining employment or industrial peace in the establishment concerning which such reference has been made, they may, by general or special order, make provisions:
>
> (a) for requiring employers or workmen or both to observe such terms and conditions of employment as may be specified in the order or as may be determined in accordance with the order, including payment of money by the employer to any person who is or has been a workman;
>
> (b) for requiring any public utility service not to close or remain closed and to work or continue to work on such terms and conditions as may be specified in the order; and
>
> (c) for any incidental or supplementary matter which appears to them to be necessary or expedient for the purpose of the order:
>
> Provided that no order made under this sub-section shall require any employer to observe terms and conditions of employment less favourable to the workmen than those which were applicable to them at any time within three months immediately preceding the date of the order..."

On a perusal of this, I am of the view that the insertion of Sec.10-B of the Act has not taken away the power of the tribunal under Sec.10(4) of the Act, to pass an interim order. The power under Sec.10-B is given to the Government to give an interim relief to the workers including the payment of money by the employer. Sub-secs.(2) and

(3) of Sec.10-B state that such an order shall cease to operate on the expiry of a period of six months from the date of the order or on the date of the award of the Labour Court or the tribunal as the case may be, whichever is earlier and that the money which has been paid can be adjusted. So, in any view if the Government, while referring the dispute has passed an order under Sec.10-B of the Act giving an interim relief to the workmen, then the power under sub-sec.(4) of Sec.10 cannot be exercised by the tribunal. For instance, when the adjudication is pending before the tribunal, no interim relief can be asked for, if an order has already been passed under Sec.10-B of the Act granting some interim relief to the workmen under Sec.10-B of the Act. At the same time, if no interim relief has been given while making a reference, the sole authority to decide the dispute and as a matter incidental thereto, the tribunal has got the power before whom the award proceeding is pending. So the power of the Government to pass an order under Sec.10-B of the Act has to be exercised immediately after a reference is made under Sec.10(1) of the Act. If it is not made, in my view, it cannot be contended that the tribunal has lost its power to grant an interim relief.

14. Apart from that, a quasi judicial power under Sec.10(4) of the Act cannot be taken away by conferring an administrative power on the Government by an amendment. It is also settled law that the repeal by implication is not favourable and such interpretation is not to be adopted unless it is inevitable. The presumption is always against the principle of repeal. Any reasonable constructions which offers an escape from implied repeal must be considered in consonance with the true intention of the Legislature. So, in my view, two provisions can co-exist side by side even though one may to some extent overlap the other. So if such a construction is given, in my view, it will be harmonious and it will be in accordance with well accepted principles of rule of constructions as stated above. So I am not able to accept the contention raised by Mr.M.R.Narayanasamy, the learned Senior Counsel appearing for the management that after the introduction of Sec.10-B of the Act, the power of the tribunal to pass an interim order has been taken away completely.

15. The contention raised by Mr.M.R.Narayanasamy, the learned Senior Counsel that the settlement made in the year 1985 is still in force in view of Sec.19 of the Act has no substance since a notice has been given by the respondent Union.

16. Mr.Prakash, the learned counsel appearing for the second respondent Union relies upon the decision in *The Workmen represented by Secretary v. The Management of Reptakos Brett and Company Ltd., (1991)4 S.C.C. 243,* with regard to the concept of wages. I do not think it necessary for me to decide about the question at this stage and it is for the tribunal to go into the question while granting an interim relief after following the principles laid down in the decisions cited supra. In view of my conclusions arrived at, the writ petitions are allowed, the impugned orders are set aside and the matter is remitted back to the tribunal and the tribunal is directed to pass orders afresh expeditiously on or before 31.3.1992, since I am told that the main reference is being heard on day to day basis. The writ petitions are ordered accordingly. However, there will be no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

C.M.A.No.722 of 1984 *20th December, 1991.*

New India Assurance Co., Tuticorin ...*Appellant*

v.

Meenal and others ...*Respondents.*

Motor Vehicles Act (IV of 1939), Sec.95(1) - Motor accident - Compensation - Wrong or tort by owner of vehicle not proved - Master-servant relationship between owners and driver not established - Owner and consequently the insurer held, not, liable.

Held: It is elementary that for maintaining any action for compensation, the wrong or tort committed by the owner of the vehicle must be specifically pleaded. But the claim petition does not show any wrong on the part of the owner of the car. There is absolutely no allegation in the claim petition that the owner of the vehicle has committed any tort. Not only there is no plea that the

owner committed any wrong, there is also no proof to that effect. Further, there is also no plea that there was any master-servant relationship between the owner of the car and the said driver. In such a case, no vicarious liability also will arise or can be foisted on the owner. It is also well-settled law that when the owner/insured is not liable, the insurer cannot be held liable. Taking all these into account, the present claim by the claimants is absolutely misconceived and they cannot claim any compensation from the owner of the vehicle and consequently they cannot have any claim against the insurance company also.

[Paras 5, 6 and 15]

Cases referred to:

Carmarthenshre Country Council v. Lewis, (1955) 1 All.E.R. 565; Rylands v. Fletcher, (1986) L.R. 3 H.L. 330; Gujarat State Road Transport Corporation v. Ramanbhai Prabhabhatbhai, (1987) 3 S.C.C. 234: A.I.R. 1987 S.C. 1690; Govindarajulu v. Govindaraja, A.I.R. 1966 Mad. 332; Bishan Devi v. Sirbaksh Singh, A.I.R. 1979 S.C. 496; New India Assurance Company Ltd. v. Raju Markose, 1989 A.C.J. 643; G.S.R.T. Corporation v. Ramanbhai, A.I.R. 1987 S.C. 1690; K.Nandakumar v. The Managing Director, Thanthai Periyar Transport Corporation Ltd., C.M.A. No. 694 of 1991, decided on 20.9.1991; United India Insurance Company Ltd. v. Kantabai, 1991 A.C.J. 22; Mallika v. Alagarsami, (1981) 2 M.L.J. 329: 1982 A.C.J. 272; Minu B. Mehta v. Ramachandra Nayan, 1977 A.C.J. 118.

K.S.Narasimhan, for Appellant.

V.Sundaravaradhan, Senior Counsel, for *V.Sundar Anandan*, for Respondent Nos.1 to 4.

V.Swaminathan, for Respondent No.5.

The Judgment of the Court was delivered by

Abdul Hadi, J.:- This appeal by the 2nd respondent-Insurance Company is against the order dated 13.9.1984 in M.C.O.P.No.8 of 1984 on the file of Motor Accident Claims Tribunal, Pudhukottai awarding a compensation of Rs.2 lakhs to the respondents 1 to 4 who are claimants in the above said M.C.O.P. The said compensation was awarded on account of the death of one Muthuraman when he himself drove the car MDT.3004 on 5.9.1982 and met with an accident which resulted in his death. The 5th respondent herein is the owner of the said car and the claimants are Muthuraman's wife, two minor children and his mother.

2. The case of the claimants briefly is as follows: The said Muthuraman was driving the said car taking along with him in the said car his relatives and was proceeding in a normal speed. A cyclist, coming in the opposite direction suddenly swerved to the right in front of the car. In order to avert dashing against him and killing him, the said Muthuraman suddenly swerved his vehicle to the left, thereby brought it down to the mud portion of the road and, as the road was slippery the vehicle skidded and went uncontrollable and capsized. Due to this, the deceased sustained grievous injuries in the lower part of the abdomen and after the villagers removed him and other occupants from the car by bringing it to the normal position, he was admitted in Ponnamaravathi Hospital to which he was carried in a town bus. Immediately on admission he succumbed to the injuries. The accident is only due to the slippery condition of the road and the deceased was not in any way responsible for the same. The first respondent is the owner of the car, the deceased was driver in the car as a third party, and the insurer as well as the owner are liable to answer the claim.

3. In the light of the discussion, necessary in the present case, there is no necessity for setting out the further pleadings. The first respondent in the M.C.O.P. (5th respondent herein) remained *ex parte*. The second respondent-Insurance Company (the appellant herein) filed a counter *inter alia* pleading that there is no actionable claim against the Insurance Company, that the accident was caused due to the rash and negligent driving on the part of the deceased, that hence the claimants are not entitled to claim any compensation, that under Sec.95 of the Motor Vehicles Act (hereinafter referred to as the 'Act') a policy is required to indemnify the owner only in respect of a liability incurred by him, traceable under Law of Torts, and in respect of the death or bodily injury, or damages to the property of a third party, arising out of the use of a vehicle in a public place and that the deceased was not a paid driver.

4. The tribunal below has accepted the case of the claimants and has held that the said Muthuraman did not drive the car negligently and that there is no contra-evidence on the side of the Insurance Company which has simply taken the question of maintainability of the petition. Then, on the question whether the petitioners before it are entitled to the compensation, it has observed that the petitioners before it have not claimed the compensation on the ground that the said Muthuraman was a paid driver under the 5th respondent herein, that the claim was not made by the third party against the owner of the vehicle and the Insurance Company, that, since the car was entrusted to the

deceased Muthuraman, he was in possession of the vehicle in the capacity of the owner of the vehicle and that hence the Insurance Company is liable to pay the compensation to the claimants.

5. Even before considering the submissions of the learned counsel for the appellant, we have to see whether the above said claim petition is maintainable at all, even on the very plea of the claim petition itself. It is elementary that for maintaining any action for such compensation, the wrong or tort committed by the 5th respondent must be specifically pleaded. But, we find from the claim petition, (the relevant portion of which has been already extracted) that it does not show any wrong on the part of the owner of the car, the 5th respondent herein. There is absolutely no allegation in the claim petition that the owner of the vehicle has committed any tort. Not only there is no plea that the owner committed any wrong, there is also no proof to that effect. In fact, P.W.2 the brother of the deceased, who was sitting in the front seat of the same car when it met with an accident, and who is also the only eye-witness to the accident, admitted in cross-examination that it was not a rainy season, that he did not tell P.W.1 or his mother about any oil remaining spilt on the said road at the said time when the accident took place, that he saw the cyclist at an 80 feet distance, and that the driver did not apply the brake as soon as he saw the cyclist, that there was a distance of 15 feet between the place where the driver reduced the speed of the car and the place where the car hit the tree. Taking the abovesaid evidence of P.W.2 into account, it cannot be concluded that the accident was an inevitable one. On the other hand, it can be concluded that the said deceased himself was negligent in driving the car.

6. Further, there is also no plea that there was any master-servant relationship between the owner of the car and the said Muthuraman. In such a case, no vicarious liability also will arise or can be foisted on the owner the 5th respondent herein. It is also well-settled law that when the owner/insured is not liable, the insurer cannot be held liable. This position is also accepted by the learned counsel for the claimants.

7. However, the argument of the learned counsel for the claimant is as follows:

The driver in having averted hitting against the cyclist and killing him has saved the owner of the car from the claim for compensation by the said cyclist or his legal representatives. So, the owner must compensate the present claimants who are the legal representatives of the driver Muthuraman, who saved the owner from paying any compensation to the cyclist or his legal representatives.

8. This argument of the counsel cannot be accepted at all. First of all, there is no plea or proof that in order to avoid the alleged liability of the owner, the deceased swerved to his left. Further the deceased was not driving the car on any errand of the owner. Further what has been pleaded itself would also show negligence on the part of the driver himself. If only he had driven the car slowly and cautiously, he could have easily avoided hitting against the above said cyclist. If according to P.W.2, the car after reducing the speed was going in 15 kmph speed, easily the driver could have avoided hitting against the cyclist and at the same time would not have dashed against the tree. The learned counsel could not also establish that such a claim would be a tortious claim. The learned counsel no doubt relied on *Carmarthenshre Country Council v. Lewis, (1955) 1 All.E.R. 565.* But, we don't think that it was any application to the present case since in the said case, the owner of the lorry was not held liable for the death of his driver who drove the lorry and said to have averted hitting against the child coming on the road.

9. After making the abovesaid argument, the learned counsel went on to make another argument taking entirely a different stand, there again, not based on pleading or proof. It is as follows:

This was a case of strict or absolute liability as was in the case of *Rylands v. Fletcher, (1986) L.R. 3 H.L. 330.* For this, he contended that the motor vehicle itself was a dangerous chattel coming within the principle of the said liability. He also cited in this connection *Gujarat State Road Transport Corporation v. Ramanbhai Prabhabhatbhai, (1987) 3 S.C.C. 234: A.I.R. 1987 S.C. 1690.* But there, the Supreme Court only observed thus:

> "In view of the fast and constantly increasing volume of traffic, the motor vehicles upon the roads, *may* be regarded *to some extent* as coming within the principle of liability defined in *Rylands v. Fletcher, (1886) L.R. 3 H.L. 330.*" [*emphasis supplied*].

10. But, from this it cannot be concluded that the motor vehicles are always dangerous chattels coming within the principle of the abovesaid liability. Further, here also, there is neither plea nor proof

that the abovesaid car was such a dangerous chattel which would give rise to the abovesaid strict liability under Law of Torts. That apart in *Govindarajulu v. Govindaraja, A.I.R. 1966 Mad. 332 (D.B.)*, it was held that the motor vehicles are not such dangerous things. The following observations therein are significant, "...there is ample authority for the view that the lorry is not in itself a nuisance or a hazardous chattel so as to attach the doctrine of absolute liability..... At page 665 the learned Law Lord *(in (1909)2 K.B. 652)*, has explained as to why the rule in *Rylands v. Fletcher, (1886) L.R. 3 H.L. 330*, would not apply to the ownership of a motor vehicle."

11. Further in *Bishan Devi v. Sirbaksh Singh, A.I.R. 1979 S.C. 496*, the Supreme Court has held as follows:

> "A liability can be cast on another only if he is in any way responsible for the accident which occasioned the injury. In other words there is no scope for any absolute liability on the owner of the vehicle to compensate the injured. The provisions of the Motor Vehicles Act do not contain any statutory provision to that effect. The act does not provide a new right or a new remedy to a person who is injured by an accident. The provisions of the Act do not in any way interfere with the substantive common law on the subject."

This principle is also followed by Kerala High Court in *New India Assurance Company Ltd. v. Raju Markose, 1989 A.C.J. 643*. There also it is held that proof of negligence is necessary before owner or the insured can be held liable for payment of compensation in a Motor Accident Claim's case. There, the accident occurred, before Sec.92-A of the Act which provided for no fault liability, came into force. It is also explained there that Sec.92-A dispenses with proof of negligence in the matter of award of compensation *to the extent* indicated therein, that the said section indicates that the substantive law is changed only to the extent indicated and that, but for the said modification, the substantive law continues to be in force and no claim for compensation is sustainable without proof of negligence except to the extent such proof is dispensed with by Sec.92-A. It is also so observed in the Supreme Court decision reported in *G.S.R.T. Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690*, while dealing with Sec.92-A of the Act in the newly introduced Chap. VII-A of the said Act providing for "no fault liability". The Supreme Court in the said decision observed as follows:

> "That part of the Act is clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle accident. *To that extent the substantive law* of the country stands modified." [*emphasis supplied*]

This passage of the Supreme Court is also referred to in our judgment in *K.Nandakumar v. The Managing Director, Thanthai Periyar Transport Corporation Ltd., Villupuram, C.M.A.No.694 of 1991, dated 20.9.1991* and we have expressed further as follows:

> "It must be noted here that only to the above extent, the substantive law has been modified in this regard, and not to the extent that, even where the deceased or the injured, as the case may be, is negligent and not the other party, the former can claim compensation. Where the former is negligent, there is no scope at all for himself claiming any compensation from any other party for his owner fault. That is the substantive law. That part of the substantive law has not at all been modified by Sec.92-A of the Act."

12. Further in *United India Insurance Company Ltd. v. Kantabai, 1991 A.C.J. 22*, it was held that even on general principles it was difficult to entertain the contention that the liability in respect of the tort-feasor himself would be covered by the insurance company.

13. Further in *Mallika v. Alagarsami, (1981)2 M.L.J. 329: 1982 A.C.J. 272*, also it has been held that the question of vicarious liability will not arise when the claim is made by the tort-feasor himself or any person claiming under the tort-feasor. There, the deceased, his wife and children accompanied the son of the owner in the car. Due to long driving, the driver of the car felt tired and the deceased relieved him and drove the car. The car dashed against the tree and the deceased sustained fatal injuries. In that context, this court observed as follows:

> "Sec.95(1), Motor Vehicles Act, in so far as it uses the expression "in respect of the death of or bodily injury to any person or damage to any

property of a third party" should be taken to cover any liability which may be incurred by the owner of the vehicle in respect of death or bodily injury to any person or damage to any property of a third party. The presence of two expressions "any person" and "third party" in the same provision would indicate that the expression "any person" has been used in a wide sense and not only in the sense of a "third party". Even if, Sec.95(1) can be construed as including the liability of the owner of the car for the death or bodily injury to any person, this provision cannot be invoked by the claimants in this case unless the claimants are able to establish that the owner has incurred a liability in respect of the death or bodily injury to the deceased which liability has to be insured as per the provisions of Sec.95(1). It cannot be said that the mere ownership of the car creates liability on the part of the owner of the vehicle to pay compensation for the death or injury to any person. The liability can arise only when the owner of the vehicle was in any way responsible for causing the accident which has resulted in that liability. In this case, the accident was caused by the rashness and negligence of the deceased and in such cases there is no legal liability arising either under the law of Torts or any other basis under the common law. Only when there is a legal liability, that liability has to be insured under Sec.95(1). In this view of the matter, we are unable to agree with the learned counsel for the appellants that an absolute liability has been cast on the owner of the vehicle to pay compensation under Sec.95(1) and that absolute liability does not depend on the fact as to who caused the accident and whether the owner of the vehicle is negligent or not."

14. Further in *Minu B. Mehta v. Ramachandra Nayan, 1977 A.C.J. 118,* the Supreme Court also held that the concept of vicarious liability without any negligence was opposed to the basic principles of law.

15. Taking all these into account, we are quite convinced that the present claim by the claimants is absolutely misconceived and they cannot claim any compensation from the owner of the vehicle and consequently they cannot have any claim against the appellant, the Insurance Company. Hence, the order of the Tribunal below is set aside and the appeal is allowed. In the circumstances, no costs. In pursuance of this judgment, the appellant is allowed to withdraw the amount deposited by it.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Janarthanam, JJ.*

O.S.A.No.111 of 1983 *10th October, 1991.*

G.Vaidehi ...*Appellant*

v.

S.Govindarajan ...*Respondent.*

Succession Act (XXXIX of 1925), Sec.63(C) - Evidence Act (I of 1872), Secs.67 to 69 - Will - Proof - Attesting witnesses dead - Evidence of witnesses that attestation was in handwriting of attesting witness - Sufficiency.

It cannot be contended by any stretch of imagination that in cases where attesting witnesses were dead, a Will could not be proved otherwise. The method in such a situation will be one as envisaged under Sec.69 of the Evidence Act. All that is required is to prove the attestation by bringing on record the evidence of a witness that the attestation was in the handwriting of that person who was described as the attesting witness and that he had put his signature. *[Paras 6 and 11]*

Cases referred to:

Ponnuswamy v. Kalyanasundara, A.I.R. 1930 Mad. 770: 125 I.C. 231; Noorudin v. Mohamed Oomer, A.I.R. 1956 Bom. 641; Rajavenkataramayya v. Kamisetti Ghattayya, 53 M.L.J. 216: A.I.R. 1927 Mad. 662.

Appeal under Clause 15 of the Letters Patent against the order of Fakkir Mohammed, J., dated 21.3.1983 and made in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court in T.O.S.No.9 of 1982 (O.P.No.282 of 1981).

R.M.Krishna Raju, for Appellant.

The Judgment of the Court was delivered by

Mishra, J.:- The appellant, herein was the caveator/defendant in a proceeding under Secs.232 and 276 of the Indian Succession Act for the grant of

Letters of Administration regarding the estate of late K.Venkatachary as per his last will dated 9.3.1974. The testator died on 11.7.1976. The defendant/appellant filed a caveat on 24.11.1982. The application filed for Letters of Administration was converted as T.O.S.No.9 of 1982. The plaintiff (executor of the will) claimed that he was the grandson of the testator through his only deceased son. According to him, the testator executed his last will in a sound disposing state of mind, he (plaintiff) being the sole legatee under the will directing him to arrange for the marriage of his two sisters and to maintain his widow. The two attestors of the will however were dead. The plaintiff claimed that he had arranged for the marriages of his two sisters as directed in the will and that the two loans remained payable on the house property.

2. The caveator/defendant/appellant, however, objected to the prayer stating that the testator had left two daughters of whom she was one. The testator's son had pre-deceased him (testator) leaving the plaintiff and his two sisters. Even when the testator was alive, the plaintiff's sister Ambujam was married on 8.5.1974 and the second sister was married in 1980 after his demise. The defendant's mother had also died. The main objection was that the testator never executed any will at all on 9.3.1974 or at any time before his death and that the will was unnatural and improper. The defendant also alleged that no provision had been made by the testator for the defendant as alleged in the will. Elucidating the case of the defendant, it was also said that the testator had no testamentary capacity to write the will. He was affected by paralysis since 1973. The sickness had taken a serious turn in the year 1974 when he completely lost his senses. The signatures in the will were not those of the testator. He had a settled handwriting. The signatures thus might have been forged.

3. In the course of the hearing, three issues were framed, namely:

1. Whether the will dated 9.3.1974 was executed by the testator while he was in a sound and disposing state of mind?

2. Whether the will is vitiated for the reasons stated in the written statement?

3. To what relief, if any, is the plaintiff entitled?

4. Learned trial judge, who considered issue Nos.1 and 2 together has held,

"Hence, it is found on these issues that the will dated 9.3.1974 was executed by the testator while he was in a sound and disposing state of mind and that the will is not vitiated for the reasons stated in the written statement."

Having so answered the first two issues he has concluded on the third issue that the plaintiff was entitled to the grant of Letters of Administration as prayed for, but was not eligible for costs against the defendant in the circumstances of the case and accordingly decreed in favour of the plaintiff for the grant of Letters of Administration of the will.

5. The main challenge before us has been that the plaintiff failed to prove the will, its contents and execution in accordance with law. Learned counsel has drawn our attention to the rule of special proof of a will in Sec.63(c) of the Indian Succession Act, 1925, which reads as follows:

"Sec.63, Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged or a mariner at sea, shall execute his will according to the following rules;

....

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will the presence of the testator but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

6. Learned counsel for the appellant has contended that in the absence of proof of a valid attestation which could come only from the mouth of the attestor, on the set of evidence of the witnesses it should not be held that the document has been properly proved. This argument has been advanced before us even though it is known that the attesting witnesses were dead and were not available to depose. Learned counsel for the appellant made a detailed and strenuous argument on the language of Sec.63 quoted above and Sec.67 of the Evidence Act read with Sec.68 thereof, which together make it obligatory that if a document is alleged to have been signed or to have been

written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting or if that document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and being capable of giving evidence, Sec.69 of the Evidence Act takes care of proof where no attesting witness is found. It reads:

> "If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

All that is required thus in a case in which no attesting witness can be found is to prove the attestation by bringing on record the evidence of a witness that the attestation was in the handwriting of that person, who was described as the attesting witness and that he had put his signature.

7. In one of the earlier judgments of this Court in *Ponnuswamy v, Kalyanasundara, A.I.R. 1930 Mad. 770: 125 I.C. 231,* this aspect of the case has been considered and it is said in a case where the executant denied putting his signature or mark, as follows:

> "No doubt "signature" generally includes "marking" in cases where the person concerned is unable to write his name; but how to prove execution by a marksman when he denies the same? Could it be done only by the evidence of that attesting witnesses or strangers who are able to say the they were present and saw the executant put his mark, or who speak to the admissions made by the executant about his having executed the same. The document in question is not one which is required by law to be attested, though as a matter of fact three witnesses have attested the document as witnesses (two as witnesses, and the third as writer, and possibly also as a witness, as stated by the lower appellate court). Supposing the witnesses are all dead, or have proved hostile, or are not available, and the court is satisfied on independent evidence before it that the writing of the document is that of the writer and that the signatures on the document are the signatures of the attesting witnesses, is it open to the court in these circumstances to presume that the document was properly executed, though the executant denied execution and denies having put his mark, when there is no direct evidence of any person examined in the case who is able to swear that the executant put his mark to the document."

and after extensive examination of the law on the subject, observed:

> "If from the circumstances of the case, the courts are inclined to do so. Whether in any particular case the courts should do so or not would depend upon the nature of the circumstances in each case. While there is the possibility of the attestors colluding together and putting their signatures to a forged document, especially where the executant is a marksman and thus committing fraud on courts, there is the other possibility of a genuine document executed by a marksman and properly attested being found to be impossible to be proved when the attestors are dead. To avoid such extreme cases on both sides, courts have to be guided by all the circumstances of the particular cases before them. All that I am now concerned to point out is, that there appears to be no rule of law which prevents the courts from holding the execution of a document to be proved when the signatures of the attesting witnesses had been proved to their satisfaction, having regard to all the circumstances of the case."

8. *Ponnuswamy v. Kalyanasundara, A.I.R. 1930 Mad. 770: 125 I.C. 231,* was not one in which the document was required by law to be attested. Yet, it lends support to a rule of equity evolved by the courts that in such cases also where attestation is required by law, the courts are not powerless to accept proof of attestation of a document as provided under Sec.69 of the Evidence Act.

9. A learned single judge of the Bombay High Court in *Nooruddin v. Mohamed Oomer, A.I.R. 1956 Bom. 641,* considered in such circumstances the effect of this provision in the Evidence Act and said:

> "The panchanama is signed by the petitioner in Tamil as "S.M.Nooruddin" and it is attested by two witnesses, one Saiyed Shah Mahomed Inayathullah Quadri, Head Kazi of George

Town, Madras Presidency and another Tajammul Hussein Imam. Now, both these attesting witness were dead before the question of the genuineness or otherwise of this document arose. The Kazi died on 1942 and Tajammul in 1943, and M.Mahomed Omar Sayed in whose favour the so-called panchanama has been made and who was the father of the opponent died on 17.12.1942."

Undoubtedly the petitioner denied the signature on this document and it was essential that the document should be proved. In the circumstances of the case, the proof that was forthcoming of this document was the evidence of three witnesses, one was Kazi Vikhayatulla, who was the son of Kazi Inayathullah. He identified the signature of his father as well as the signature of Tajammul and stated that the body of the writing is in the handwriting of one Munshi Abdul Gani who died in 1937. Nothing was brought out in the cross-examination of Kazi Vikhayatulla which would affect either his credibility or shake his evidence in any other manner.

The second witness who was called was Mahomed Yusuf, was the nephew of Tajammul Hussain Iman and he identified the signature of Tajammul and stated that Tajammul had died in 1943. He further stated that he was present when the panchanama was made and saw him sign. He further stated that he actually saw the applicant sign and he was present when the Kazi signed. In the cross-examination of this witness again nothing was elicited which would go to his discredit nor was any fact elicited which would affect his evidence in chief."

"In addition to these two witnesses, one Sheik Dawood was called who is a maternal uncle of the opponent. He was living with the opponent's father and taking part in the business as a member of the family. He only deposed to the fact that the deceased father of the opponent, had shown him the document in 1937. Now, ignoring the evidence of Kazi Vikhayatulla and Mohamed Yusuf is by itself sufficient to establish that the document was executed by the petitioner, because there is no other conceivable way in which proof of the document could have been given as Kazi Inayathullah and Tajammul are both dead and the father of the opponent is also dead."

10. In yet another judgment of this Court in *Rajavenkataramayya v. Kamisetti Ghattayya, 53 M.L.J. 216: A.I.R. 1927 Mad. 662.* in which the writer of the document examined as a witness stated that the attesting witnesses did not sign in his presence but his evidence was found to be false and the handwriting of the attestors was proved, this Court held:

> "All the parties to the document are dead but one and it has been found that he gave false evidence. The handwriting of the attestors has been proved and this presumption, in the absence of rebutting evidence is that they actually witnessed the execution of the dead."

11. We have referred to the above citations only to assure ourselves that it cannot be contended by any stretch of imagination that in cases where attesting witnesses were dead, a will could not be proved otherwise. The method in such a situation will be one as envisaged under Sec.69 of the Evidence Act.

12. Reverting to the facts of this case and the evidence that has found favour with the learned trial judge, we notice that to prove the signatures of the deceased attestors, certain documents were produced by P.W.1 (Exs.P-2 to P-4, P-21 and P-22), the books and letters of his father in which his father had put his signatures and he himself deposed that the will contained the signature of his father as one of the attesting witnesses. The defendant/appellant did not dispute the evidence of this witness. Similarly, another witness, P.W.2, produced Exs.P-5 to P-8 in which his father had signed and identified his signature on the will. His evidence was also not disputed by the defendant/appellant. Learned trial judge upon this said,

> "P.W.1 has deposed that Ex.P-1 found in Ex.P-10 will is the signature in the handwriting of his father, G.V.Raghavan and P.W.2 has deposed that Ex.P-1 (Q) in Ex.P-10 will is the signature in the handwriting of his father, S.V.Ardhanari. In Exs.P-1 and P-1(a), the residential address of the two attestors are given as No.17-A and No.17, Motilal Street, T.Nagar, Madras-17 respectively, P.W.1 has deposed that his father was residing in No.17-A, Motilal Street in the house adjacent to the house of the testator, Venkatachari and that his father had purchased No.17-A, Motilal Street house property in 1962. P.W.2 has deposed that his

father was residing in the house of the testator, K.Venkatachari as a tenant on a monthly rent of Rs.150 roughly for about 17 years before the death of his father. The above evidence of P.Ws.1, 2 are not disputed by the defendant. Thus the two attestors are not strangers as one was a tenant and the other was a neighbour at the time and date of the alleged execution of the will, *viz.*, 9.3.1974. Therefore, Ex.P-10 will should have come into existence before the death of the two attestors.

One attestor died in January, 1978. Therefore, it should have come into existence not subsequent to January, 1978. To prove the signatures of the attestors, P.W.1 has produced Exs.P-2 to P-4, P-21 and P-22, the books and letters of his father in which his father had put his dated signatures on 1.5.1969, 1.5.1977, 10.12.1977, 6.7.1970 and 19.6.1960, respectively. The signatures found in Exs.P-2 to P-4, P-21 and P-22 are identical with Ex.P-1 signatures found in will, Ex.P-10. Similarly P.W.2 has produced Ex.P-5 to P-8 in which his father had signed on 26.3.1972, 31.1.1974, 26.3.1972 and 5.9.1970 respectively and they are completely identical with the signature in Ex.P-1(a) found in the attestation in Ex.P-10. The defendant has not disputed the evidence of P.Ws.1 and 2 on those points. Therefore, it can be safely concluded that Ex.P-10 has been attested by P.Ws.1's father G.V.Raghavan and P.W.2' father S.V.Ardhanari."

13. Learned counsel for the appellants has taken us through the evidence of all the witnesses including the documents. There is slight difference in the alignment in the signature of the testator when compared to those found in Exs. P-11 and P-10 (will). Learned trial judge has also noticed this difference in the alignment. But he has also taken notice of the fact that the testator had become very old in 1974. In one of the documents (Ex.P-12) a mortgage deed executed by him, he had affixed his left thumb impression on 6.12.1975. In that he had stated the reason "due to old age and shivering of my hands, I am not in a position to affix my signature, though I used to sign previously. I now affix my left thumb impression." There has been a gap of about two months between Exs.P-11 and P-10. Ex.P-10 had come into existence about two months after the execution of Ex.P-11. Learned trial judge has said upon that,

"Therefore, it is possible that on account of the tremority and old age, the testator's handwriting began to be shaky and hence his signature found in Ex.P-10 is somewhat shaky, though identical with his admitted signatures found in Ex.P-11 as well as in Exs.P-18 to P-20."

14. Apart from the above, and we say so with respect, the learned trial judge has also noticed correctly that the witnesses who were examined hand no reason to depose in favour of the execution of the will but for the reason of a dispute as to the attestation and affixation of signature by the testator. All relevant facts have been taken into consideration by the learned trial judge. Nothing has been shown to us to take a different view. No other argument except a casual reference to the suspicious circumstances has been advanced before us. So far as suspicious circumstances are concerned, learned trial judge has gone into each one of them and found that they do not have any effect upon the genuineness of the will. We do not find any merit in the appeal. The appeal is accordingly dismissed. No costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

A.No.966 of 1986 and C.M.P.No.15374 of 1991
22nd November, 1991.

Devaki ...*Appellant*
v.
Hindu Religious and Charitable Endowments Department, Madras and others ...*Respondents.*

Deed - Construction - Court cannot read what is not found in the document.

A settlement deed contained the words.

The learned counsel for the appellant wanted it to be read as

Held, the document does not contain those words and the court cannot read what is not found in the document. *[Para 9]*

Cases referred to:

Arulmigu Ranganathaswamy Devasthanam v. Srinivasachariar, (1989)2 M.L.J. 54; Babu Gurukkal v. Commissioner for Hindu Religious and Charitable Endowments Board, (1964)1 M.L.J. 384; Assistant Commissioner, Hindu Religious and Charitable Endowments Department v. D.Rajagopal, 84 L.W. 764: A.I.R. 1972 Mad. 105; Venkataraman v. L.A.Thangappa, (1972)1 M.L.J. 325: A.I.R. 1972 Mad. 119; Ranganatha Pillai v. Commissioner for H.R. & C.E., (1979)2 M.L.J. 23.

Appeal against the decree of the Court of the Subordinate Judge, Namakkal, dated 26.4.1985 in O.S.No.47 of 1984 etc.

T.L.Rammohan, for Appellant.

D.Krishnakumar, Government Advocate, for Additional Government Pleader, for Respondent No.1.

W.C.Thiruvengadam, for Respondent Nos.2 to 5.

The Court delivered the following

JUDGMENT:- This appeal has been taken up with the consent of parties. The suit out of which this appeal arises is one filed under Sec.70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as the 'Act'), for setting aside the order of the Commissioner of Endowments, dated 21.11.1983 in A.P.No.10 of 1983.

2. The case of the plaintiff who is the appellant is that Arulmigu Angalamman of S.Palayapalayam, is the family deity of the plaintiff and that the trusteeship of the temple has always been with the family of the plaintiff. According to the plaintiff, one Marutha Pillai also known as Muthu Pillai and his brother Kuppa Pillai were the trustees and after them, Veerabadra Pillai, son of Marutha Pillai and Kandasamy and Karuppa Pillai, son of Kuppa Pillai became trustees. A reference is made to a settlement deed dated 9.4.1981 under which Kandasamy and Karuppa Pillai gifted certain property to the temple for its daily pooja. But, in the plaint is stated that the property was put in the possession of the then trustee Veerabadra Pillai. According to the plaintiff, Veerabadra Pillai's son was Ramalingam and after him, his sons Manickam and Rathinam Pillai became the trustees. Rathinam Pillai died without any issue and Manickam Pillai's daughter is the plaintiff.

3. It is the case of the plaintiff that for over 100 years, the trusteeship had been with the plaintiff's family and in 1981 there was some interference by the Hindu Religious and Charitable Endowments Department which led to the filing by the plaintiff of an application under Sec.63(b) of the Act before the Deputy Commissioner of Endowments, Coimbatore, for a declaration that the plaintiff and her husband are the hereditary trustees of the temple. The Deputy Commissioner dismissed the application holding that the evidence was not sufficient to prove the claim of the plaintiff and her husband. The order of the Deputy Commissioner is dated 10.2.1982. On appeal, it was affirmed by the Commissioner by order dated 21.11.1983. The present suit was filed on 3.4.1984. The suit was dismissed by the trial court on 26.4.1985. The trial court held that there was no necessity for a notice under Sec.80 of the C.P.C. as contended by the defendant, but the plaintiff failed to establish that she was the hereditary trustee of the temple. Aggrieved thereby, the plaintiff has preferred this appeal.

4. When the appeal was taken up, learned counsel for the plaintiff referred to the judgment of a Division Bench of this Court in *Arulmigu Ranganathaswamy Devasthanam v. Srinivasachariar, (1989)2 M.L.J. 54,* holding that notice under Sec.80, C.P.C. is necessary even for statutory suits under Sec.70 of the Act. But the said judgment has been set aside by the Supreme Court in C.A.No.3670 of 1991 by the order dated 12.9.1991. Hence, the judgment of the Division Bench of this Court cannot be treated as a binding precedent though the Supreme Court has not laid down the law in general in that case but confined itself to the facts of that case and declared that no notice was necessary in that particular case.

5. I have heard the appeal on merits. As I find that there is no merit in the appeal, I think it unnecessary to decide whether a notice under Sec.80, C.P.C. is necessary in this case. The Court below has taken the view that it is not necessary and I express no opinion thereon.

6. The plaintiff has examined her husband as P.W.1 and a poojari of the temple as P.W.2. P.W.1 was aged only 42 years at the time of his giving evidence. He claims that his wife is the daughter of his aunt. In the chief-examination he states that before his wife, his father-in-law was the trustee and before him, his wife's grandfather Ramalingam Pillai was the trustee. He also states that before that, Veerabadra Pillai was the trustee. He has spoken to Ex.A-3, a settlement deed dated

9.4.1981, executed by Kandasamy Pillai and another in favour of the temple. He has deposed that the attestors to Ex.A-3 are not alive. He has deposed that the father of Veerabadra Pillai mentioned in Ex.A-3 is Muthu Pillai *alias* Marutha Pillai. He claims that receipts have been obtained from poojaries for having given padithanam. In the cross-examination, he admits that the temple is on a poramboke land. He claims that his ancestors had constructed the temple. He does not know the year in which the temple was constructed. He admits that for the first time he was stating that the name of the father of Veerabadra Pillai was Muthu Pillai *alias* Marutha Pillai. He admits that he did not say so before the Deputy Commissioner. He admits that the temple has got inam lands which are being enjoyed by the poojaries.

7. It is to be noted that the witness was examined before the Deputy Commissioner on behalf of the plaintiff who was the first petitioner before the Deputy Commissioner. The witness was the second petitioner in the said application. There is no explanation in the present proceedings as to how P.W.1, the husband of the plaintiff claimed to be a hereditary trustee along with the plaintiff before the Deputy Commissioner. When P.W.1 gave evidence before the Deputy Commissioner, he did not say that Veerabadra Pillai's father's name was Muthu Pillai *alias* Marutha Pillai. The specific case put forward before the Deputy Commissioner was that Veerabadra Pillai's father's name was Marutha Pillai. But Ex.A-3 belies the same. That document clearly described Veerabadra Pillai as the son of Muthu Pillai. It does not refer to any other name being *alias* of Muthu Pillai. That itself disproves the version of the plaintiff that Veerabadra Pillai was one of her ancestors. There is absolutely no evidence on record to prove the geneology set out by the plaintiff. P.W.1 cannot claim any personal knowledge of the names of the father of the plaintiff's father and his father in turn.

8. P.W.2 is one of the poojaries in the temple. He claims to be a hereditary poojari and states in the chief-examination that there is no salary for the poojaries but they are given padithanan, by P.W.1 for performing poojas. According to him, the lands of the temple are being enjoyed by ten poojaries. He asserts in the chief-examination that the members of the plaintiff's family have been hereditary trustees. In the cross-examination he claims that he has been performing pooja for about 50 years. His age is given as 60 years. Even on his version that he has been performing pooja for 50 years, it is surprising that he does not know as to who was giving padithanam before the plaintiff. The plaintiff was aged about 31 at the time of the suit and she could have been in management, if at all, only for about 15 years. Before that, her father should have been in management if her version is true. But, P.W.2, is not prepared to say so. Further, P.W.2 says in the cross-examination that the income from the temple lands is used for doing poojas. If that is so, there is no question of P.W.1 giving padithanam to the poojaries. Thus, the oral evidence adduced by the plaintiff is absolutely worthless to make out that the plaintiff is the hereditary trustee.

9. Turning to the documentary evidence, Exs.A-1 and A-2 are the orders passed by the Commissioner and the Deputy Commissioner respectively-Ex.A-3 is the only documents filed by the plaintiff which is worthy of consideration. It is a settlement deed executed by Kandasamy Pillai and Karuppa Pillai sons of Kuppa Pillai. A piece of land is given under that document as gift to the temple for the purpose of performing daily poojas. The value of the land is stated to be Rs.100. It is stated in that document that the deity is the family deity of the settlors. It refers to Veerabadra Pillai son of Muthu Pillai of Kattuputhur as the Dharmakartha of the temple. It does not say that the settlors are the cousins of the said Dharmakartha. There is no indication whatever in the document to show that the settlors were the sons of the brother of Veerabadra Pillai's father. Nor does it indicate that the settlors had half share in the land. It was the case before the Deputy Commissioner that the settlors had half share in the land and the other half share belonged to Veerabadra Pillai. Reliance is placed on the words

The learned counsel for the appellant wants me to read those words as

The document does not contain those words and the court cannot read what is not found in the document. There is absolutely nothing in the document to show that the settlors were entitled to one half share in the land and the other half share belonged to the trustee of the temple.

10. Thus, the totality of evidence, both documentary and oral evidence, does not make out that the plaintiff is a hereditary trustee and that the trusteeship had been with the family of the plaintiff for

several generations as claimed in the plaint.

11. The appellant has filed C.M.P.No.15374 of 1991 for filing a document as additional evidence. The document now produced is a Register under Sec.29 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959, relating to the temple maintained by the plaintiff. That register has been temporarily approved as correct by the Deputy Commissioner on 20.1.1989. Obviously, the register was sent to the Department only in 1988 and the temporary acceptance was given in January, 1989. The register is intended only to disclose the properties owned by the temple. The entries in that register cannot be used for any other purpose. As rightly pointed out by learned counsel for respondents 2 to 5, it is self-serving document to some extent though it can be used as an admission if it is against the person in management of the temple.

12. Learned counsel for the appellant places reliance on the entries in page 1 of the Register which set out the names of the past trustees. The names of Muthu Pillai, Veerabadra Pillai, Ramalingam Pillai, Manickam Pillai and the plaintiff are set out therein in that order. Significantly, Muthu Pillai is not shown to have had an *alias* name Marutha Pillai. Learned counsel also invites my attention to page 16 in which it is stated that the daily expenses are being met by the heirs of the hereditary trustees of the temple. The Village Administrative officer (in-charge) has certified at the bottom of the entry that the contents of the entry are true. Learned counsel for the appellant places strong reliance on this document and contends that it proves the case of the plaintiff beyond doubt. The document is not evidence at all in law. It is register maintained only for the purpose of showing the properties of the temple as admitted by the persons in management. Secondly, the appeal has been pending when the register was submitted by the plaintiff to the Department. The trial court had held against the plaintiff. After filing the appeal, the plaintiff had obtained an order of injunction restraining the first respondent herein from interfering with her management of the temple. It is only because of the order of injunction, the Deputy Commissioner had no option but to accept temporarily the register as correct. The register cannot take the plaintiff anywhere in so far as the appeal is concerned. It cannot be treated as evidence in law.

13. Learned counsel for the appellant argues that the approval of the register under Sec.29 of the Act is a statutory act and the Deputy Commissioner having performed the same, is bound thereby. There is no substance in this contention. It is only Sec.63 of the Act which provides for determination of the question as to, whether the office of trusteeship is hereditary. A decision has been rendered by the appropriate authorities, namely, the Deputy Commissioner and the Commissioner of the Department and it has been affirmed by the civil court in the suit. When the appeal is pending, the plaintiff cannot submit a register to the Department reiterating her case that she is a hereditary trustee and just because the register has been temporarily approved because of the injunction order issued by this Court it cannot be contended that the register would constitute evidence to prove her claim in the suit. Consequently, nor reliance can be placed on the said document. I reject the said document and dismiss the civil miscellaneous petition.

14. Learned counsel for the appellant relies on the judgment of Mohan, J., as he then was, in *Ranganatha Pillai v. Commissioner for H.R. & C.E., (1979) 2 M.L.J. 23.* On the facts of that case, the learned Judge found that there was overwhelming evidence to prove that the plaintiff and his family had been exercising the rights of trusteeship for over three generations and there was nothing on record to show that anybody else had functioned as a trustee. On that footing the learned Judge held that the claim of the plaintiffs therein should be upheld. The following passage in the judgment is referred to by learned counsel.

> "The various documents which have been filed on the side of the plaintiff are all *ante litem motem* and from that point of view they are all of high evidentiary value. The argument of the learned counsel for the respondent that there is no link between Ex.A-1 and Ex.A-14 and that it is for the plaintiffs to produce series of documents for every year to prove their case cannot be accepted. So long as these document evidence transactions long before the suit, there can be no legal or valid objection for placing reliance upon the same. The judgments cited on the side of the plaintiffs do support the contention that when a member of a particular family alone was exercising rights of trusteeship, it will fall under the category of

hereditary trustee. Vide, the unreported decision in O.S.A.No.79 of 1951 by a Division Bench of this Court, (1951) M.W.N. (S.N.) pages exp. P.IX) and in all the three decisions in *Babu Gurukkal v. Commissioner for Hindu Religious and Charitable Endowments Board, (1964)1 M.L.J. 384, Assistant Commissioner, Hindu Religious and Charitable Endowments Department v. D.Rajagopal, 84 L.W. 764: A.I.R. 1972 Mad. 105* and *Venkataraman v. L.A.Thangappa, (1972)1 M.L.J. 325: A.I.R. 1972 Mad. 119,* this Court has taken the view that when in respect of a temple for the past three generations the members of the family of a person had managed the affairs of the temple, it must be held that the trusteeship was hereditary in the family of that person. The above ratio clearly applies to this case."

15. Even a mere reading of the above passage shows that the ruling will not help the appellant in the present case as there is absolutely no evidence worthy of acceptance in this case. The only conclusion that will follow is the dismissal of the appeal. The judgment and decree of the Subordinate Judge, Namakkal, in O.S.No.47 of 1984 are confirmed and the appeal is dismissed with costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

Rev.W.M.P.Nos.1 and 2 of 1992 in W.P.Nos.14600 and 14601 of 1991 *13th March, 1992.*

Coimbatore Texcity Share Brokers Association represented by its President, H.Bhaskaran and another ...*Petitioners*

v.

Union of India, represented by Secretary to Government, Ministry of Finance, Government of India, New Delhi and others ...*Respondents.*

Securities Contracts (Regulation) Rules (1957), Rule 8(1)(f) - Some Members of Stock Exchange disqualified they being engaged in business other than securities and accredited industrialists - Recognition granted to the Stock Exchange if bad.

As per Rule 8(1)(f), even though a person is disqualified from being admitted as a member of stock exchange seeking recognition, if he is engaged in any business other than that of securities, the proviso therein says that the Central Government may, for reasons sufficient in the opinion of the said Government permit a recognised stock exchange to suspend the enforcement of this clause for a specified period on condition...." The use of the words 'recognised stock exchange in the abovesaid proviso shows that the abovesaid disqualification in Rule 8(1)(f) is not an absolute one for the granting of the abovesaid recognition itself. Otherwise permitting a 'recognised stock exchange' to suspend the enforcement of the said clause (f) will not arise at all. If the recognition itself is bad *ab initio* suspension of a disqualification rule in considering the recognition application will not arise at all. So, the argument of the learned counsel for the Coimbatore Stock Exchange Limited that the said disqualification is a curable one in view of what is contained in the Proviso to Rule 8(1)(f) has to be accepted. *[Para 7]*

Application under O.47, Rule 1 read with Sec.114 of the C.P.C. and Art.226 of the Constitution of India, for review of the Order of the High Court, dated 20.1.1992 and made in W.P.Nos.14600 and 14601 of 1991 respectively presented under Art.226 of the Constitution of India to issue writs of *certiorari,* calling for the records of the proceedings of the Notification in S.O.606(E) of the Government of India, Ministry of Finance, Department of Economic Affairs, dated 18.9.1991 quash the same.

G.Vasantha Pai, Senior Counsel, for *M/s R.Venkataraman, T.Muthuraman* and *A.K.Jayaraj,* for Petitioners.

Ilias Ali, Additional Central Government Standing Counsel, for Respondent Nos.1 to 4.

Habibullah Badsha, Senior Counsel, for *Shakir Ali,* for Respondent No.5.

The Judgment of the Court was delivered by

Abdul Hadi, J.:- These two review applications are for reviewing our common order dated 20.1.1992, dismissing two writ petitions, W.P.Nos.14600 and 14601 of 1991. They are filed by the respective writ petitioners therein.

2. Both the said writ petitions sought to quash the Notification of the Central Government dated 18.9.1991, granting recognition under Sec.4 of the Securities Contracts (Regulation) Act, 1956 (42

of 1956) hereinafter for convenience sake referred to as "Securities Act") to the Stock Exchange at Coimbatore started by the Coimbatore Stock Exchange Limited, the 5th respondent in Review Application No.1 of 1992 and 3rd respondent in R.A.No.2 of 1992. The said writ petitioners are the rival applicants; for recognition of their respective exchanges to Coimbatore.

3. The learned Senior Counsel Mr.Vasanthapai appearing for the applicants submits as follows: Our abovesaid order did not consider the argument that four of the seven signatories to the Memorandum of Association of the company, the Coimbatore Stock Exchange Limited, were disqualified to be members of any Stock Exchange under Rule 8(1)(f) of Securities Contracts (Regulation) Rules, 1957 (hereinafter, for convenience sake, referred to as "Securities Rules") framed under the abovesaid Act, they being engaged in business other than securities and accredited industrialists. His further contentions are that they are "deemed members" of the Coimbatore Stock Exchange Limited under Sec.41(1) of the Companies Act, 1956, but that because of their abovesaid disqualification, the abovesaid recognition granted under the Securities Act is bad and that even the registration of the said Company itself is bad under the said Companies Act. According to the learned counsel, the abovesaid defect goes to the root of the jurisdiction to grant the said recognition and the failure to consider the same is an error apparent on the face of the record. The learned counsel also cited decisions in support of his contention that the review applications are maintainable on the facts of the present case.

4. On the other hand, the learned counsel for the Coimbatore Stock Exchange Limited submits as follows:- The above argument that the registration of the Coimbatore Stock Exchange Limited under the Companies Act itself was bad, was not made at all while the writ petitions were argued, nor the said plea was raised in any of the supporting affidavits of the respective writ petitions. Hence, there is no error apparent, which could be corrected in these review petitions. No doubt, the subscribers to the abovesaid Memorandum of Association have become automatically members of the Coimbatore Stock Exchange Limited, which has since been recognised. But, their such automatic admission to the membership of the said recognised Stock Exchange does not make the said recognition bad, even assuming there was any disqualification as alleged by the applicants, since under the above Rule 8(1)(f), the disqualification contemplated therein is a curable one in view of the proviso to the said Rule 8(1)(f) which says that the Central Government may permit a recognised stock exchange to suspend the enforcement of the said clause (f) of Rule 8(1). The learned counsel also cited decisions to contend that the review applications are not maintainable on the facts of the present case.

5. The learned counsel appearing for the other respondents (Governmental Authorities) generally supports the arguments of the learned counsel for the Coimbatore Stock Exchange Limited. However, it may also be noted that in the counter affidavit filed by the said respondents in the writ petitions it is stated that the abovesaid stock exchange has not yet admitted the members and during the appropriate stages, the company would consider the issue regarding the qualification of the members of the stock exchange.

6. We have considered the abovesaid rival submissions. On the question whether the subscribers to the Memorandum of Association of the Coimbatore Stock Exchange Limited have become automatically members of the recognised stock exchange of the Coimbatore Stock Exchange Limited, the learned counsel for the Coimbatore Stock Exchange Limited also represents that they have so become automatically members of the abovesaid recognised stock exchange in view of the relevant clause in the Articles of Association of the Coimbatore Stock Exchange Limited. (He no doubt contends that the definition of a member under the Companies Act cannot be imported into the Securities Act.) In view of the abovesaid representation by the said counsel that the said subscribers are automatically members of the abovesaid stock exchange, we are not giving any considered opinion on this question and we proceed on the basis of the abovesaid concerning representation of the said counsel of Coimbatore Stock Exchange Limited, and the counsel of the petitioners.

7. Then, the further question is whether such automatic admission of the abovesaid seven subscribers to the members of the said recognised stock exchange makes the said recognition bad, on the footing that four of them were admittedly industrialists and consequently come under the abovesaid Rule 8(1)(f) as disqualified persons

thereof. Rule 8(1) runs as follows:

"8. *Qualifications for membership of a recognised stock exchange*: The rules relating to admission of members of a stock exchange seeking recognition shall *inter alia* provide that:

(1) No person shall be eligible to be elected as a member if (a) he is less than twenty-one years of age;

(b) he is not a citizen of India; provided that the governing body may in suitable cases relax this condition with the prior approval of the Central Government;

(c) he has been adjudged bankrupt or a receiving order in bankruptcy has been made against him or he has been proved to be insolvent even though he has obtained his final discharge;

(d) he has compounded with his creditors unless he has paid sixteen annas in the rupee;

(e) he has been convicted of an offence involving fraud or dishonesty;

(f) he is engaged as principal or employee in any business other than that of securities except as a broker or agent not involving any personal financial liability unless he undertakes on admission to sever his connection with such business;

Provided that the Central Government may, for reasons sufficient in the opinion of the said government, permit a recognised stock exchange to suspend the enforcement of this clause for specified period on condition that the applicant is not associated with or is a member of or subscriber to or shareholder or debenture-holder in or connected through a partner or employee with any other organisation, institution, association, company or corporation, in India where forward business of any kind whether in goods or commodities or otherwise is carried on or is not engaged as a principal or employee in any such business;

(g) (omitted)

(h) he has been at any time expelled or declared a defaulter by any other stock exchange;

(i) he has been previously refused admission to membership unless a period of one year has elapsed since the date of such rejection."

Thus, as per the abovesaid Rule 8(1)(f), even though a person is disqualified from being admitted as a member of stock exchange, seeking recognition, if he is engaged in any business other than that of securities, the proviso therein says that "the Central Government may, for reasons sufficient in the opinion of the said Government, permit a recognised stock exchange to suspend the enforcement of this clause for a specified period on condition...." The use of the words "recognised stock exchange" in the abovesaid proviso shows that the abovesaid disqualification in Rule 8(1)(f) is not an absolute bar for the granting of the abovesaid recognition itself. Otherwise, permitting a 'recognised stock exchange' to suspend the enforcement of the said clause (f) will not arise at all. If the recognition itself is bad *ab initio* suspension of a disqualification rule in considering the recognition application will not arise at all. So, we have to accept the argument of the learned counsel for the Coimbatore Stock Exchange Limited that the said disqualification is a curable one in view of what is contained in the Proviso to Rule 8(1)(f).

8. Nextly it must be stated that as contended by the learned counsel for the Coimbatore Stock Exchange Limited, there was no contentions raised, either in the affidavits of the writ petitioners or by way of argument by the counsel who appeared for the writ petitioners, stating that the registration of the Coimbatore Stock Exchange Limited under the Companies Act itself was bad in view of the abovesaid disqualification. So, on that footing, it cannot be held that there is any error apparent on the face of the record for us to review our earlier order. Further, there is neither prayer to quash the registration of the Coimbatore Stock Exchange Limited as a company, nor the Registrar of Companies who registered the company has been impleaded. That apart, in the view we have taken on the earlier question discussed by us, the Registrar of Companies cannot be said to have wrongly registered the said company under the Companies Act.

9. In the above view we have taken, there is no necessity to go into the question whether on the facts of the present case a review would lie at all and there is also no necessity to consider the different decisions cited by both the rival counsels on that question.

10. In the result, we find that there is no merit in these review applications and hence they are

dismissed. However, in the circumstances of the case, there will be no order as to costs.

B.S. ---- *Applications dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.Nos.9163, 12529 etc. of 1990 *29th April, 1992.*

M.Rajagopal and others ...*Petitioners*
v.
The Government of Tamil Nadu and another ...*Respondents.*

Land Acquisition Act (I of 1894), Sec.4(1) (as amended by Act LXVIII of 1984) - Notification under - Publication in newspapers prior to the issuance of the publication of the notification in Official Gazette - Acquisition proceedings, if vitiated.

The Supreme Court has held in *Collector v. Raja Ram Jaiswal, (1985)3 S.C.C. 1,* that unless the decision is notified in the Government Gazette by an appropriate notification, the proceedings for acquisition cannot be said to have been initiated and the decision would remain a paper decision. The position of law settled by the Supreme Court will hold good even after the amendment made by Act LXVIII of 1984. A reading of the judgment clearly shows that the publication under Sec.4(1) in the Gazette is a preliminary step. Though the modes of publication are prescribed in Sec.4(1), after the amending Act, 1984, the publication has to be made first only in the Gazette and then only the other publications are to follow. It is settled law that when a power is given to do a certain thing, that thing must be done in that way or not at all and the other order of performance are necessarily forbidden. These principles would apply when the question is considered with regard to notification in a newspaper earlier than the publication is made in the gazette. The power given under Sec.4(1) has to be followed strictly by the State and the publication has to be made only in the seriatim as given in the section itself. In this case, the paper notification has been made prior to the publication of the notification made in the official gazette. The notification has been published in the gazette on 2.11.1988 whereas in the newspapers it was on 27.10.1988. On this score alone without going into the other contentions, the acquisition proceedings have got to be set aside. *[Para 4, 7 and 8]*

Cases referred to:
Collector v. Raja Ram Jaiswal, (1985)3 S.C.C. 1; Manindra Lal Jain v. State of U.P., (1963) S.C.C. (Supp.) 912; Gompa Lali Naidu v. The Secretary, A.P., (1990) L.A.C.C. 589; Principal Secretary to Government, H.R.A., and U.D. Department v. C.Adhilakshmamma, A.I.R. 1989 A.P. 342; Balakrishna Pillai v. State of Kerala, A.I.R. 1992 Ker. 136; Deepak Pahwa v. Lt. Governor of Delhi, A.I.R. 1984 S.C. 1721: (1984)4 S.C.C. 308; Garg Farms, Delhi v. State, A.I.R. 1990 All. 1: (1990)1 L.A.C.C. 186.

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the respective affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari*, calling for the records of the first respondent in all the petitioners, relating to the G.O.Ms.No.1665, Agricultural Department, dated 14.10.1988 and G.O.Ms.No.856, Agricultural Department, dated 11.11.1989 in so far as it relates to the petitioner's lands.

K.Govindarajan, for Petitioners.
M.Meenakshi Sundareswaran, Government Advocate, for Respondents.

The Court made the following

ORDER:- In all these petitions, the petitioners challenge the acquisition proceedings initiated under the Land Acquisition Act for the construction of Additional buildings for Coimbatore Regulated Marketing Committee.

2. The Government passed G.O.Ms.No.1665, Agricultural Department, dated 14.10.1988 and issued the draft notification under Sec.4(1) of the Land Acquisition Act, hereinafter referred to as the Act and it was published in the Gazette on 2.11.1988. The paper publication is the local dailies was on 27.10.1988 which was prior to Gazette publication. As enquiry under Sec.5-A of the Act was held and the petitioners objected to the acquisition proceedings stating that they have purchased the lands for construction of houses and the Land Acquisition Officer sent a report to the Government recommending exclusion of the lands

belonging to the petitioners and certain others to an extent of 1.10 acres in Survey. Field No.55/3. However, the Government after calling for a report from the Special Commissioner overruled the objections and decided to proceed with the acquisition and issued a declaration under Sec.6 of the Act on 11.11.1989 and it was published in the gazette on the same date. Aggrieved by the same, the petitioners are before me.

3. Notice of motion has been ordered by S.Ramalingam, J., on 8.8.1990. Mr.Meenakshisundaram, learned Government Advocate appears for the State. Several contentions have been raised in the affidavit filed in support of the writ petitions. Mr.K.Govindarajan, learned counsel appearing for the petitioner mainly contends that the provisions of Sec.4(1) of the Act cannot be invoked in this case and as such, the acquisition is bad in law. Learned counsel for the petitioners referred to the decision of the Supreme Court reported in *Collector v. Raja Ram Jaiswal, (1985) 3 S.C.C. 1,* for the proposition that there cannot be a publication in the newspapers prior to the issuance of the publication of the notification in the official gazette. Learned counsel for the petitioners contends that on this ground alone, the acquisition proceedings are vitiated. *Per contra* learned counsel appearing for the State referred to Sec.4(1) of the Act which has been amended by Act 68 of 1984 and contends that sub-sec.(1) to Sec.4 of the Act stated that a notification to that effect shall be published in the official gazette and in two daily newspapers circulating in that locality apart from the public notice of the substance of such notification and nowhere it is stated in the section that the Gazette notification should precede paper publication. According to the learned counsel for the State, the petitioners have taken part in the enquiry under Sec.5-A of the Act and their objections have been duly considered and as such every opportunity had been given to the petitioners and therefore, the acquisition proceedings cannot be said to be vitiated.

4. I considered the arguments of the learned counsel for the petitioners and also the State. Sub-sec.(1) of Sec.4 of the Land Acquisition Act reads as follows:

> "(1) Whatever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company *a notification to that effect shall be published in the official gazette and in two daily newspapers* (*underlining mine*) circulating in that locality of which at least one shall be in the regional language and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification."

Prior to amendment Act 68 of 1984 the requirement of publication of the notification in two dailies was absent. The Supreme Court in the decision referred to above had an occasion to consider the question of public notice and the notification in the gazette and held that there cannot be a publication in the locality prior to publication of the notification in the Official Gazette. The Supreme Court held as follows:

> "Assuming that a notification in the Official Gazette is a formal expression of the decision of the Government, the decision of the Government is hardly relevant, unless it takes the concrete shape and form by publication in the official gazette. Where a decision of the Government to be effective and valid has to be notified in the Government Gazette, the decision itself does not become effective unless a notification in the official gazette follows. In *Manindra Lal Jain v. State of U.P., (1963) S.C.C. (Supp.) 912,* it was held that a notification under Sec.4-A of the Indian Forest Act, 1927 is required to be published in the Gazette and unless it is so published, it is of no effect. Logically, the same view must be adopted for a notification under Sec.4. Therefore assuming that a notification is a formal expression of a decision of the Government to acquire land, unless the decision is notified in the Government Gazette by an appropriate notification, the proceedings for acquisition cannot be said to have been initiated and the decision would remain a paper decision. Sec.4(1) further requires that 'the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality.' The expression 'such notification' in the latter part of Sec.4(1) and sequence of events therein enumerated would clearly spell out that first the Government should reach a decision to acquire land, then publish a

notification under Sec.4(1) and simultaneously or within a reasonable time from the date of the publication of the notification cause a notice to be published containing substance of such notification meaning thereby that notification which is published. Obviously, therefore, there cannot be a publication in the locality prior to the issuance of the notification. The submission of Mr.Kadher does not commend to us."

The Supreme Court has held that unless the decision is notified in the Government Gazette by an appropriate notification, the proceedings for acquisition cannot be said to have been initiated and the decision would remain a paper decision. I am of the view, that the position of law settled by the Supreme Court will hold good even after the amendment made by Act 68 of 1984.

5. Learned Government Advocate relies upon the decision in M/s. *Garg Farms, Delhi v. State of U.P., A.I.R. 1990 All. 1: (1990)1 L.A.C.C. 186,* wherein a Division Bench of the Allahabad High Court has held that after the amendment in 1984, it is not necessary that the notification under Sec.4(1) has to be published in the Gazette earlier than it is published in the newspapers. He relies on the following passage in the judgment:

"The upshot is that the impugned notifications are not invalidated merely because the Collector caused public notice of the substance of the notification under the latter part of Sec.4(1) to be made prior to the issue of the publication of the notification in the gazette and in the newspaper."

He then relies upon the decision of a Division Bench of the Andhra Pradesh High Court in *Gompa Lali Naidu v. The Secretary, A.P., (1990) L.A.C.C. 589,* where in the dictum laid down in *Garg Farms, Delhi v. State of U.P., A.I.R. 1990 All. 1: (1990)1 L.A.C.C. 186,* was referred to. A decision in *Principal Secretary to Government, H.R.A., and U.D. Department v. C.Adhilakshmamma, A.I.R. 1989 A.P. 342,* was also referred to in *Gompa Lali Naidu v. The Secretary, A.P., (1990) L.A.C.C. 589,* and it was held therein that there was no occasion for the Division Bench to decide that question. It is seen that the decision in *Principal Secretary to Government, H.R.A., and U.D. Department v. C.Adhilakshmamma, A.I.R. 1989 A.P. 342,* is not overruled in *Gompa Lali Naidu v. The Secretary, A.P., (1990) L.A.C.C. 589.* The learned Government Advocate further relies on the decision of a learned single Judge of the Kerala High Court in *Balakrishna Pillai v. State of Kerala, A.I.R. 1992 Ker. 136,* wherein the principles laid down by the Allahabad High Court in *Garg Farms, Delhi v. State of U.P., A.I.R. 1990 All. 1: (1990)1 L.A.C.C. 186,* have been followed.

6. Mr.Govindarajan, learned counsel for petitioners, on the other hand, points out that the Division Bench of the Allahabad High Court in *Principal Secretary to Government, H.R.A., and U.D. Department v. C.Adhilakshmamma, A.I.R. 1989 A.P. 342,* has arrived at the correct conclusion that the gazette notification should precede any other notification either in newspapers or by public notice and this conclusion has not been overruled by the decision in *Gompa Lali Naidu v. The Secretary, A.P., (1990) L.A.C.C. 589.* However, as I have already stated, the notification under Sec.4(1) in the gazette is a preliminary stage by which the Government declared that the land is needed for a public purpose.

7. Before the amendment came into force, the Supreme Court had an occasion to consider the gap of time between publication of notification and public notice of substance of the said notification, in *Deepak Pahwa v. Lt. Governor of Delhi, A.I.R. 1984 S.C. 1721: (1984)4 S.C.C. 308.* In that case, the Supreme Court had made observations to the effect that, if there is publication in the gazette and if there is public notice in the locality, the requirements of Sec.4(1) must be held to be satisfied, unless the two are unlinked from each other by a gap of time so large as may lead one to the *prima facie* conclusion of lack of *bona fides* in the proceedings for acquisition. A reading of the judgment of the Supreme Court clearly shows that the publication under Sec.4(1) in the Gazette is a preliminary step. I do not think that the conclusion arrived at by the Allahabad High Court that only modes of publication are given in Sec.4(1) and there is no necessity to follow the modes given in the seriatim as given in the section, could be said to be correct. Though the modes are prescribed in Sec.4(1), after the amending Act, 1984, in my view, the publication has to be made first only in the Gazette and then only the other publications are to follow. It is settled law that where a power is given to do a certain thing, that thing must be done in that way or not at all and the other modes of performance are necessarily forbidden. In my view,

these principles would apply when the question is considered with regard to notification in a newspaper earlier than the publication is made in the gazette. As such, I am not able to accept the decision of the Allahabad High Court or the Andhra Pradesh High Court and I am of the view that the power given under Sec.4(1) has to be followed strictly by the State and the publication has to be made only in the seriatim as given in the section itself.

8. Considering the facts and circumstances of the case and the section, as extracted above, I am of the view that the notification in the gazette should be published first and then only paper publication should be made. The section itself has given the modes of publication in seriatim, first, in the official gazette, second, in two daily newspapers and third, by way of public notice of the substance of the said notification at convenient places. In this case, the paper notification has been made prior to the publication of the notification made in the official gazette. The notification has been published in the gazette on 2.11.1988. whereas in the newspapers it was on 27.10.1988. I am of the view that, on this score alone without going into the other contentions, the acquisition proceedings have got to be set aside and the writ petitions are allowed. No costs.

B.S. ---- *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

O.S.A.No.15 of 1992 *6th.March, 1992.*

J.Bakthavatchalam and another ...*Appellants*
v.
P.Krishnamoorthy ...*Respondent.*

Succession Act (XXXIX of 1925), Secs.222, 276 and 295 - Will sought to be probated - Husband of testatrix filing caveat and accepted as caveator - Dying when proceedings were pending - His heirs and legal representatives, if can be added on caveators.

One Padmini Chandrasekhar who had executed a will on 20.9.1975 died on 7.6.1980. The will was sought to be probated and probate was issued to the plaintiff respondent. But it was revoked on a petition filed by Padmini's husband Chandrasekharan. The matter was taken to the Supreme Court. By consent of parties, the Supreme Court passed an order that on a caveat filed by Chandrasekharan, the matter would be treated as a testamentary suit in the Original Side of the High Court. After that order and during the proceedings in the testamentary suit, Chandrasekharan died on 31.5.1991. The appellants herein claiming to be heirs and legal representatives of Chandrasekharan applied for being added as defendant/caveators in place of Chandrasekharan. A learned single Judge of the court ordered that the appellants could not come on record as legal representatives of Chandrasekharan on account of the absence of any caveatable interest for them in the estate of the deceased Padmini Chandrasekharan. In appeal,

Held:- The rationale in the judgment in *Piroishabikheli v. Pestonji Morwanji, I.L.R. 34 Bom. 459, Dular Kuer v. Kesar Kuer, A.I.R. 1964 Pat. 518* and *Sadananda Pyne v. Herinan Sha, A.I.R. 1950 Cal. 179,* when applied to consider the *locus standi* of Padmini's husband to object to the grant of probate to the plaintiff/respondent must be found to have been in his favour. Otherwise, the Supreme Court would not have admitted him as a caveator or recognised a right in him to object to the grant of probate of the will. This cannot be disputed that any interest of a Hindu dying intestate shall vest in his heirs and his legal representatives in the order of succession and if a testament is created, a testamentary succession will follow. Chandrasekharan's interest which gave him a right to object to the grant of probate of the will to the plaintiff/respondent, thus on his demise must be deemed to have devolved upon his heirs and legal representatives. The interest that Chandrasekharan had thus to object to the grant of probate to the plaintiff must accordingly be deemed to have devolved upon his heirs and legal representatives whether intestate or claiming under a testament. There is no gainsaying that rules in the Code of Civil Procedure are not strictly applied to a probate proceedings under the Succession Act, for it is well-known that Sec.295 of the Indian Succession Act lays down that when the proceedings

become contentious, it shall take as nearly as may be the form of a regular suit according to the provisions of the Code of Civil Procedure. In a proceeding as nearly as a suit to be decided in accordance with the provisions in the Code of Civil Procedure, it will be unjust to say that those who stand in the place of the deceased caveator shall have no interest to object to the plaintiff's claim for grant of probate. The view expressed by a single judge in *Baggiammal v. Balagopala, A.I.R. 1948 Mad. 33,* clearly shows that there should be interest in the estate of the testator to justify a caveat and such a right Chandrasekharan had, a fact which cannot be disputed. The appellants herein are claiming the very same right which Chandrasekharan claimed. Thus they fully justify their appearance as caveators in the place of Chandrasekharan. *[Paras 3, 4 and 5]*

Cases referred to:

Piroishabikhali v. Pestonji Marwanji, I.L.R. 34 Bom. 459, Dular Kuer v. Kesar Kuer, A.I.R. 1964 Pat. 518; Sadananda Pyne v. Herinan Sha, A.I.R. 1950 Cal. 179; Baggiammal v. Balagopala, A.I.R. 1948 Mad. 33.

Appeal under Clause 15 of the Letters Patent against the Order of Thangamani, J., dated 20.12.1991 and made in the exercise of the original testamentary and jurisdiction of the High Court passed on the memo. dated 17.7.1991 in T.O.S.No.28 of 1982, etc.

R.Subramanian, for Appellant.

N.S. Varadachari, for Respondent.

The Judgment of the Court was delivered by

Mishra, J.:- This appeal has been posted after notice of motion and since we have heard learned counsel for parties at length, we find it possible to dispose of the appeal itself at this stage.

2. One Padmini Chandrasekharan who died on 7.6.1980 at Madras had executed a will on 20.9.1975. That will was sought to be probated in O.P.No.117 of 1981 on the file of this court under Secs.222 and 276 of the Indian Succession Act. It appears that on 28.4.1981 probate was issued to the plaintiff/ respondent. But on a petition by Padmini's husband in Application No.1998 of 1982 it was revoked. In terms of an order finally passed by the Supreme Court by consent of the parties, the judgment of the Court in O.P.No.117 of 1981, dated 16.9.1982 and O.S.Appeal No.96 of 1983, dated 12.3.1984 were set aside and it was ordered that on the caveat filed by him, the matter would be treated as a regular testamentary suit in the Original Side of the High Court. This order was passed by the Supreme Court on 11.9.1985 in Civil Appeal No.4462 of 1984. After the order and during the proceedings in the testamentary suit as ordered by the Supreme Court, Padmini's husband Chandrasekharan died on 31.5.1991. The appellants herein claiming to be heirs and legal representatives of Chandrasekharan applied for being added as defendant/caveators in place of Chandrasekharan. By the impugned order, a learned single Judge of this Court has said that the proposed parties cannot come on record as legal representatives of the deceased defendant in this action on account of the absence of any caveatable interest for them in the estate of the deceased. Padmini Chandrasekharan.

3. It is indeed a case, in our opinion, in which there is a glaring error or law apparent on the face of the record. The learned trial judge has taken notice of the interest of a person who should be cited or if an file caveat in these words.

> "In *Piroishabikheli v. Pestonji Morwanji, I.L.R. 34 Bom. 459,* it is held that the interest which entitled a person to put in a caveat must be an interest in the estate of the deceased person, that is, there can be no dispute whatever as to the title of the deceased to the estate, but that the person who wishes to come in as the caveator may show some interest in the estate derived from the deceased by inheritance or otherwise. In *Dular Kuer v. Kesar Kuer, A.I.R. 1964 Pat. 518,* it is laid down that an interest or even an interest dependent upon remote contingencies was sufficient to entitle a person to oppose a will and to entitle him to citation. But the possibility of an interest should rest on existing facts and not mere conjectures. When at the time of the testator's death he had no possible chances of succeeding to the testator's estate, he has no *locus standi* to oppose the grant of probate. The decision in *Sadananda Pyne v. Herinan Sha, A.I.R. 1950 Cal. 179,* states that in order to have the *locus standi* to apply for revocation of probate a person must have an interest in the estate of the deceased, supposing he had died intestate. A person who has merely the possession of a trespasser has no interest in the estate of the deceased. He has therefore no *locus standi* to file such an application."

The rationale in those Judgments when applied to consider the *locus standi* of Padmini's husband to object to the grant of probate to the plaintiff/respondent must be found to have been in his favour. Otherwise, the Supreme Court would not have admitted him as a caveator or recognised a right in him to object to the grant of probate of the will. This cannot be disputed that any interest of a Hindu dying intestate shall vest in his heirs and his legal representatives in the order of succession and if a testament is created, a testamentary succession will follow. Chandrasekharan's interest which gave him a right to object to the grant of probate of the will to the plaintiff/respondent, thus on his demise must be deemed to have devolved upon his heirs and legal representatives. The interest that Chandrasekharan had thus to object to the grant of probate to the plaintiff must accordingly be deemed to have devolved upon his heirs and legal representatives, whether intestate or claiming under a testament.

4. There is no gainsaying that rules in the Code of Civil Procedure are not strictly applied to a probate proceedings under the Succession Act, for it is well-known and the learned single Judge has also noticed accordingly that Sec.295 of the Indian Succession Act lays down that when the proceedings become contentious, it shall take as nearly as may be the form of a regular suit according to the provisions of the Code of Civil Procedure. In a proceeding as nearly as a suit to be decided in accordance with the provisions in the Code of Civil Procedure, it will be unjust to say that those who stand in the place of the deceased caveator shall have no interest to object to the plaintiff's claim for grant of probate.

5. Besides the cases that were cited before the learned single Judge, we must fairly accept a stand at the instance of the learned counsel for the plaintiff/respondent based upon a judgment of a learned single Judge of this Court in the case of *Baggiammal v. Balagopala, A.I.R. 1948 Mad. 83.* The view expressed in this judgment is as follows:

> "Now it is conceded by counsel on behalf of the respondent that the denial by him of the interest of the testator in the properties cannot entitle him to file a caveat. It is of course a denial of the title of the testator and no persons denying the testator's title can on that account alone be entitled to lodge a caveat. But in my view this does not dispose of the matter for if it is held contrary to the respondent's main contention, that there was a valid partition in status, the respondent would be entitled as a reversioner in the event of its being held that the will now sought to be proved was invalid. Thus in that event the respondent clearly has an interest in the estate of the deceased. Counsel for the petitioner has urged that to take this view of the matter involves allowing the respondent to raise two entirely inconsistent places. I cannot accept that contention. There would, in my view, be no impropriety in the respondent pleading that he was entitled to the whole estate as survivor of the joint undivided Hindu family, and in the alternative that if a partition was held to have taken place he was entitled as a reversioner. If it is held in the suit now pending that there was a valid partition the respondent will necessarily become a reversioner and could only be displaced in that right by the acceptance as valid of the will now put forward."

This clearly shows that there should be interest in the estate of the testator to justify a caveat and such right Chandrasekharan had, a fact which cannot be disputed. The appellants herein are claiming the very same right which Chandrasekharan claimed. Thus they fully justify their appearance as caveators in the place of Chandrasekharan.

6. For the reasons afore-mentioned, we are inclined to interfere with the impugned judgment. The same is accordingly set aside. The appellants herein have shown sufficient interest (the same as Chandrasekharan had) to be present in the proceedings as caveators and object to the grant of probate. They shall accordingly be entitled to be cited as defendants in the testamentary suit. No costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Somasundaram, J.*

C.R.P.Nos.2751 and 2752 of 1985

21st February, 1992.

M/s.Wren Bennett & Co. India Ltd. ...*Petitioner*
v.
Dr.C.P.Gupta and others ...*Respondents.*

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.4 - Partnership Act (IX of 1932), Sec.69(2) - Fixation of fair rent under Sec.4 - Petition for - Filed by unregistered partnership - Objection not taken at the earliest stage - Cannot be allowed to be taken in appeal or in revision.

The maintainability of the petition for fixation of rent is a plea that will have to be taken by the respondent at the earliest stage to the R.C.O.P. itself and when such a plea has not been taken in the counter filed in the R.C.O.P. itself, it will not be open to the respondent to raise the plea either in the appeal filed before the appellate authority or in revision before the High Court. *[Para 4]*

(B) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Secs.2 (6) and 4 - Petition for fixation of fair rent under Sec.4 - If can be filed by partners of a firm.

The definition of 'landlord' given under Sec.2(6) of the Act is an inclusive definition. The inclusive definition in Sec.2(6) of the Act adds to the normal concept of landlord, certain other categories of persons such as the person who is receiving or entitled to receive the rent of a building whether on his own account or on behalf of another or on behalf of himself and others as an agent etc. A person who is actually receiving or who is entitled to receive the rent of a building will be a landlord within the meaning of Sec.2(6) of the Act and such a person can maintain a petition for fixation of fair rent against the tenant. In the present case, the petition for fixation of fair rent is not filed in the firm name but in the name of individual partners. The firm is merely a compendious name for partners who constituted it and when the firm purchased the petition-mentioned property, the purchase is really by the partners and after the purchase of the petition-mentioned property, the partners become the landlords within the meaning of Sec.2(6) of the Act as they are entitled to receive the rent for the petition-mentioned property as an agent of the firm from the tenant. It is needless to point out that every partner of a firm is an agent of the firm and as an agent of the firm the partners are entitled to receive the rent for the petition-mentioned property from the tenant. In these circumstances, in view of the inclusive definition of landlord contained in Sec.2(6) of the Act and inasmuch as the petitioner as partners of the unregistered firm are entitled to receive the rent due for the petition-mentioned property and actually received the same, there is no difficulty in holding that the petitioners are landlords within the meaning of Sec.2(6) and the petition for fixation of fair rent filed by them is maintainable. *[Para 4]*

(C) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.4 - Fixation of fair rent under - Premises consisting of freehold land and leasehold land - Fixation, if can be asked for entire premises.

A careful reading of Sec.4 of the Act shows that the fair rent is fixed for the building and it is payable by the tenant for the building occupied by him. In other words, what is fixed under Sec.4 of the Act is the fair rent for the building let out by a landlord to a tenant. It is not the case of the respondent that it is not liable to pay rent for the petition-mentioned buildings. Admittedly, the respondent is a tenant in respect of the petition-mentioned buildings and it is liable to pay rent for the petition-mentioned building. When it is admitted that the respondent is liable to pay rent to the petitioners for the petition-mentioned buildings and when the respondent is actually paying the monthly rent to the petitioners, the respondent is equally liable to pay the fair rent in respect of the petition-mentioned building to the petitioners. Further in any by the sale deed Ex.P-8, the petitioners have purchase the right, title and interest of their vendors namely Dinrose Estate in the petition-mentioned premises. In these circumstances, there is no merit in the contention of the respondent that the petitioners cannot ask for fixation of fair rent for the entire petition mentioned premises including the leasehold land. *[Para 6]*

Cases referred to:

Balasore Textile Distributors Association v. Indian Union, A.I.R. 1960 Orissa 119; Ram Adhar v. Rama

Kirat Tiwari, A.I.R. 1981 All. 405; Wardman Finance Corporation v. Ghulam Ahmad Lone, A.I.R. 1982 (NOC.) 142; Jalal Mohammed Ibrahim (died) v. Kokka Mohammed Ghouse, 84 L.W. 654; N.A.Munavar Hussain Sahip v. E.R.Narayanan, A.I.R. 1984 Mad 47; M/s. T.N.K.Govindarajulu Chetty by T.N.V.Nanjappa Chetty v. P.Urajlal Dulabidass & Co., (1967)2 M.L.J. 465; Rovel & Co. v. Ramachandran, (1977)1 S.C.C. 424; Suryaprakasam alias Chidambaranathan v. R.Vijayarangam, (1970)1 M.L.J. 243.

S.Rangarajan, Senior Counsel, for *S.Soundrarajan* for Petitioners.

R.Krishnamoorthy Senior Counsel, for *M.Venkatachalapathy* for Respondents.

The Court made the following

ORDER: The respondent in R.C.O.P.No.1245 of 1982 on the file of the Rent Controller (XI Judge, Court of Small Causes), Madras, is the petitioner in these C.R.Ps. The first petitioner and the legal representative of the second petitioner in the said R.C.O.P. are the respondents in these C.R.Ps. For the sake of convenience, the parties are referred to in this order as per their nomenclature in R.C.O.P.No.1245 of 1982.

2. The petitioners filed R.C.O.P.No.1245 of 1982 against the respondents under Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by (Act 23 of 1973), (hereinafter called the Act) for fixation of fair rent for the petition mentioned building. The case of the petitioners is that they are the owners of the premises bearing D.No.2, General Patters Road, Madras 2 and the respondent is the tenant on a monthly rent of Rs.631. Their further case is that taking into consideration the cost of construction of the petition mentioned building, the age of the building, the amenities provided for and the land value in the locality etc. the fair rent for the petition mentioned building has to be fixed at Rs.19,585 per month. The respondent filed a counter admitting that the respondent is a tenant of the petition mentioned building and is carrying on business there. However, the respondent contended that the building is 50 years old, that the roofing is only Mangalore tiled roofing, that teak-wood is not used and that the wood used in the building in joists, rafters, doors and windows are only country wood. The respondent further contended that the present monthly rent of Rs.631 is the fair rent and reasonable rent for the petition mentioned building.

3. Before the Rent Controller, P.W.1 was examined on behalf of the petitioners, R.W.1 was examined on behalf of the respondent and the commissioner appointed by the Court was examined as C.W.1. The Rent Controller, on a consideration of the entire evidence on record both oral and documentary fixed the fair rent for the petition mentioned building at Rs.12,128 per month and ordered that the petitioners are entitled to fair rent fixed at Rs.12,128 per month from the date of petition. Aggrieved by the order of the Rent Controller fixing the fair rent at Rs.12,128, the respondent filed an appeal R.C.A.No.1617 of 1983 and the petitioners filed R.C.A.No.252 of 1984 before the Appellate Authority (4th Judge, Court of Small Causes, Madras). The Appellate Authority by a common Judgment confirmed the order of the Rent Controller and dismissed both the appeals. As against the common judgment of the Appellate Authority in R.C.A.No.1617 of 1983 and R.C.A.No.252 of 1984, the respondent has filed the present C.R.Ps.

4. Mr.Rangarajan, the learned Senior Counsel appearing for the respondent, in the first place contended that the petition for fixation of fair rent was filed by the petitioner which is an unregistered partnership firm M/s.Gupta & Co., and such a petition for fixation of fair rent filed by the unregistered partnership firm is not maintainable in view of Sec.69(2) of the Partnership Act. The learned counsel further contended that whether the petition for fixation of fair rent is filed by all partners collectively or it is filed in the name of the firm by one or more partners, the following two conditions prescribed by Sec.69(2) of the Partnership Act must be fulfilled;

(1) the firm must be registered and

(2) That the persons suing must have been shown in the register of Firm as partners of the firm;

the above conditions prescribed under Sec.69(2) of the Partnership Act are not satisfied in the present case, and therefore, the petition for fixation of fair rent filed under Sec.4 of the Act by the partners of an unregistered firm is not maintainable. In support of his contention, the learned counsel relied on the decision reported in *Suryaprakasam alias Chidambaranathan v. R.Vijayarangam, (1970)1 M.L.J. 243, Balasore Textile Distributors Association v. Indian Union, A.I.R. 1960*

Orissa 119, Ram Adhar v. Rama Kirat Tiwari, A.I.R. 1981 All. 405 and *Wardman Finance Corporation v. Ghulam Ahmad Lone, A.I.R. 1982 (NOC.) 142 (J.& K.).* I am unable to accept the above contention of the learned counsel for the respondent for the following two reasons: (a) This plea that the fixation of rent petition filed by the partners of the unregistered firm is not maintainable in view of Sec.69(2) of the Partnership Act was not raised in the counter filed by the respondent in R.C.O.P.No.1245 of 1982. Admittedly, such a contention was raised for the first time only before the appellate authority. The maintainability of the petition for fixation of rent is a plea that will have to be taken by the respondent at the earliest stage in the R.C.O.P. itself and when such a plea has not been taken in the counter filed in the R.C.O.P. itself, it will not be open to the respondent to raise the plea either in the appeal filed before the appellate authority or in the revision before this Court. In *Jalal Mohammed Ibrahim (died) v. Kokka Mohammed Ghouse, 84 L.W. 654,* a Division Bench of this Court has held as follows:

> "These authorities clearly establish that the evidence of non-registration of the firm is a plea that will have to be raised in the suit itself, and if it had not been raised, it could not be permitted to be raised for the first time in the second appeal. Such a plea could not be permitted to be raised in a separate suit is, in our opinion, a *fortiorari* case. In this connection we may also refer to the decision of this Court in *Govardandas v. Abdul Rahiman,* wherein it was held: "There is distinct provision in the Limitation Act that a court is bound to dismiss a suit on the ground of limitation, if it finds the suit to to be barred, whether a plea of this kind had been raised on behalf of the defendants or not. No such provision however exists, in the Partnership Act and therefore the court is not bound to dismiss the suit on the ground of non-registration of the firm *suo motu*, if no plea had been raised by any of the defendants to the suit."

Learned counsel for the appellant drew our attention to O.7, Rule 11(d), C.P.C., which states that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law and contended that Sec.69 of the Partnership Act being a provision barring a suit by an unregistered firm, the court could dismiss a suit *suo motu* and that therefore the decision in *Govardandas v. Abdul Rahiman,* requires reconsideration. But, we consider that it is not necessary to go into the aspect, because we are of the view that the maintainability of a suit is a plea that will have to be taken by a defendant in the suit, and, if such a plea had not been taken, it will not be open to him to raise the plea on any ground in a separate suit." In *N.A.Munavar Hussain Sahip and another v. E.R.Narayanan and others, A.I.R. 1984 Mad. 47,* another division Bench of this Court following the principles laid down in *Jalal Mohammed Ibrahim (died) v. Kokka Mohammed Ghouse Sahib, 84 L.W. 654,* held that the plea based on Sec.69(2) of the Partnership Act not raised in the written statement, cannot be allowed to be raised at a later stage. Therefore, as rightly pointed out by the appellate authority without pleadings as to the maintainability of the petition for fixation of fair rent in view of Sec.69(2) of the Partnership Act, the contention of the respondent as to the maintainability of the petition for fixation of fair rent at a later stage before the appellate authority and before this Court in revision is not sustainable.

(b) The facts of the present case go to show that the petition for fixation of fair rent is not filed in the firm name, but it is filed by the individual partners Dr.Gupta and Mrs.Kasthuri Gupta describing themselves as partners of M/s.Gupta & Co. It is admitted before me that the said firm is not a registered firm. A firm is merely a compendious name for the partners who constituted it. As pointed out by this Court in *M/s.T.N.K.Govinda Raju Chetty by T.N.V.Nanjappa Chetty v. P.Urajlal Dulabdass & Co. and another, (1967)2 M.L.J. 465,* the firm not being a legal entity, in substance, the partners of the firm will be the landlords. This Court further observed in the above decision that when a firm purchases property, the purchase is really by its partners and it follows therefore, that when a firm lets out a residential building belonging to it, in effect, its partners become the landlords. Again, the Act is a self-contained Code in its field. Sec.4 of the Act deals with the fixation of fair rent and Sec.4 says that any application for fixation of fair rent can be filed before the Rent Controller either by the landlord or by the tenant. The landlord is defined under Sec.2(6) of the Act as follows:

> "Landlord" includes the person who is receiving or is entitled to receive the rent of a

building, whether on his own account or on behalf of another or on behalf of himself and others or as an agent, trustee, executor, administrator, agent, trustee, executor, administrator, receiver or guardian or who would so receive the rent or be entitled to receive the rent, if the building were let to a tenant."

Thus, it will be seen that the definition of landlord given under Sec.2(6) of the Act is inclusive definition. The inclusive definition in Sec.2(6) of the Act adds to the normal concept of landlord, certain other categories of persons such as the person who is receiving or is entitled to receive the rent of a building whether on his own account or on behalf of another or on behalf of himself and others as an agent etc. A person who is actually receiving or who is entitled to receive the rent of a building will be a landlord within the meaning of Sec.2(6) of the Act and such a person can maintain a petition for fixation of fair rent against the tenant. In the present case, the petition for fixation of fair rent is not filed in the firm name but in the name of individual partners. As already pointed out, the firm is merely a compendious name for partners who constituted it and when the firm purchased the petition-mentioned property, the purchase is really by the partners and after the purchase of the petition-mentioned property, the partners become the landlords within the meaning of Sec.2(6) of the Act as they are entitled to receive the rent for the petition-mentioned property as an agent of the firm from the tenant. It is needless to point out that every partner of a firm is an agent of the firm and as an agent of the firm, the partners are entitled to receive the rent for the petition-mentioned property from the tenant. In these circumstances, in view of the inclusive definition of landlord contained in Sec.2(6) of the Act and inasmuch as the petitioners as partners of the unregistered firm are entitled to receive the rent due for the petition-mentioned property and actually received the same, there is no difficulty in holding that the petitioners are landlords within the meaning of Sec.2(6) and the petition for fixation of fair rent filed by them is maintainable. There is no merit in the contention of the learned counsel for the respondent that the petition for fixation of fair rent filed by the partners of the unregistered firm is not maintainable in view of Sec.69(2) of the Partnership Act. The principles laid down in the decisions relied on by the learned counsel for the respondent have no application to the facts of the present case.

5. The second contention of the learned counsel for the respondent is that the petition mentioned premises consist of both free hold land measuring 5,627 sq.ft. and lease hold lands measuring 5,141 sq.ft.; the petitioners cannot claim the benefits of Tamil Nadu City Tenants Protection Act in respect of the lease hold land and therefore, the petitioners cannot ask for anything to be taken into account in respect of the lease hold land, for purpose of fixation of fair rent for the petition mentioned property. The above contention of the learned counsel for the respondent cannot be countenanced for the following reasons:

1. The above contention was not raised by the respondent either before the Rent Controller or before the Appellate Authority or even in the grounds of C.R.P., and it is raised for the first time only during the arguments before me the respondent cannot be permitted to raise such a plea for the first time before this Court in the C.R.P.

(B) The respondent in para 3 of the counter affidavit filed in R.C.O.P.No.1245 of 1982 admitted that it is a tenant of the petition mentioned building and the monthly rent payable is Rs.631.

As already pointed out, the inclusive definition of landlord contained in Sec.2(6) of the Act includes a person who is actually receiving rent or who is entitled to receive rent in respect of the building. In view of the above definition of landlord, contained in Sec.2(6) of the Act and inasmuch as the petitioners are entitled to receive the rent and are actually receiving the rent due for the petition mentioned building from the respondent, it cannot be contended that the petitioners are not the landlords.

6. A careful reading of Sec.4 of the Act shows that the fair rent is fixed for the building and it is payable by the tenant for the building occupied by him. In other words, what is fixed under Sec.4 of the Act is the fair rent for the building let out by a landlord to a tenant. *Vide: Rovel & Co. v. Ramachandran, (1977)1 S.C.C. 424.* It is not the case of the respondent that it is not liable to pay rent for the petition-mentioned buildings. Admittedly, the respondent is a tenant in respect of the petition-mentioned buildings and it is liable to pay rent for the petition-mentioned building. When it is

admitted that the respondent is liable to pay rent to the petitioners for the petition-mentioned buildings and when the respondent is actually paying the monthly rent to the petitioners, the respondent is equally liable to pay the fair rent in respect of the petition-mentioned building to the petitioners. Further in any by the sale deed Ex.P-8, the petitioners have purchased the right, title and interest of their vendors namely Dinrose Estate in the petition-mentioned premises. In these circumstances, there is no merit in the contention of the learned counsel for the respondent that the petitioners cannot ask for fixation of fair rent for the entire petition mentioned premises including the leasehold land.

7. The next question we have to examine is whether the fair rent fixed by the Rent Controller and the Appellate Authority for the petition mentioned buildings at Rs.12,128 per month is correct.

8. Admittedly, the tenancy is for non-residential purpose and according to Sec.4(3) of the Act, the fair rent for non-residential buildings shall be 12% of the gross return p.a. on the total cost of such building. Sec.4(4) says that the total cost referred in Sec.4(3) of the Act shall consist of the market value of the site in which the building is constructed, the cost of construction of the building and the cost of provision of any one or more of the amenities specified in Schedule-1 of the Act. Therefore, in the first instance, we have to determine the cost of construction of the building. To find out the cost of construction of the building in question, we have to find out the class and type of the building, the age of the building, plinth area, market value of the site on which the building is constructed, the amenities etc. P.W.1 in his evidence speaks about the nature of the petition mentioned building. The evidence of P.W.1 and his report Exs.P-6 would go to show that part of the building is constructed with brick and lime mortar and the remaining portion with brick and cement mortar. P.W.1 has further stated in his evidence that the petition mentioned building comes under the category of type-I Class A construction, except for the country tiled roofing portion which comes under the category of type-II. C.W.1 in his evidence has stated that the building is built with brick work partly in lime and partly in mud and it is plastered with lime mortar. C.W.1 has further stated in his evidence that the petition mentioned building comes under the category of Type-1 B building. The sale deed in favour of the petitioners is marked as Ex.P-8 in this case, and it is seen from annexure I A attached to Ex.P-8 that the petition mentioned building is a building with brick masonry walls and that country wood has been used. Inasmuch as the sale deed in favour of the petitioners Ex.P-8 is dated 22.1.1979, the particular furnished in Annexure I A to Ex.P-8 have to be taken as correct. On the basis of the particulars given in Annexure I A to Ex.P-8, it has to be held that the building has been built with brick and lime mortar and that country wood had been used. In these circumstances, the Rent Controller and the Appellate Authority rightly held that the petition mentioned building has to be classified as class-A-I according to P.W.D. specification. With regard to the age of the building, P.W.1 has deposed that the country tiled portion of the petition mentioned building is 60 years old and the remaining portion of the building is 40 years old. On the other hand, C.W.1 in his evidence has stated that the entire building is 80 years old. In the annexure I-A attached to Ex.P-8, the age of the building is given as over 60 years. Placing reliance on Ex.P-8, the Rent Controller and the appellate Authority have rightly fixed the age of the building as 60 years. Coming to the plinth area of the building P.W.1 in his evidence has stated that the total plinth area of the building would be 8,026 sq.ft. On the other hand, C.W.1 in his evidence has stated that the total plinth area is 7,366 sq.ft. In annexure I-A of Ex.P-8, the total plinth area is given as 7,355 sq.ft. On the basis of the evidence of C.W.1 and the recitals in Ex.P-8 the Rent Controller and the Appellate Authority rightly fixed the plinth area of the petition mentioned building as 7,366 sq.ft. Then we have to find out the market value of the site on which the petition mentioned building is constructed. The evidence on record discloses that the lease hold land measuring 4,874 sq.ft. is in the front portion and the free hold land measuring 4,199 sq.ft. is in the rear portion of the petition mentioned premises. P.W.1 on the basis of Ex.P-2 and P-4 has fixed the market value of the land for the lease hold land at Rs.2 lakhs per ground and the market value of the free hold land at Rs.1,50,000 per ground. C.W.1 in his report has fixed the land value of the lease hold land at Rs.1,50,000 per ground and the market value of free hold land at Rs.2,25,000 per ground. The evidence in this case discloses that the petition

mentioned building is situated next to the Wellington theatre in General Patters Road very near to the Mount Road, in an important place and it has all the locational amenities. Taking into consideration the evidence on record, the Rent Controller and the Appellate Authority correctly fixed the market value of the hold lease land at Rs.2 lakhs per ground and for the free hold land at Rs.3,50,000 per ground.

9. Coming to the amenities, P.W.1 in his evidence has stated that the petition mentioned building has all the basic amenities, Whereas R.W.1 in his evidence has stated that the petition mentioned building has only the basic amenity of electricity. Admittedly, the petition mentioned building has the amenity of excess open land after deducting the 50% of the open land after deducting the 50% of the open land appurtenant to the petition mentioned building, and such excess open land has to be treated as amenity by virtue of proviso to Sec.4(4) of the Act. Taking note of the above amenities the Rent Controller and the Appellate Authority have correctly allowed the 10% of the cost of construction towards the basic amenities and 5% of the cost of building towards Schedule-I amenities. On the basis of the above findings with regard to the cost of construction of the building, the value of the site and the amenities the Rent Controller in para 11 of the order has given the following calculations for fixing the fair rent for the petition mentioned building at Rs.12,128 per month."

Costs of construction of plinth Mangalore tiled roof at Rs.29 per sq.ft. for 3751 sq.ft.	Rs. 1,08,779-00
Costs of Construction for Mangalore tiled over flat tiles at Rs.21 per sq.ft. for 721 sq.ft.	Rs. 26,677-00
Cost of construction for AC sheet roof at Rs.34 per sq.ft. for 134 sq.ft.	Rs. 4,556-00
Total cost of construction of the building	Rs. 1,40,012-00
Costs of construction for free hold land at Rs.37 per sq.ft. for 853 sq.ft.	Rs. 31,561-00
at Rs.29 per sq.ft. for 1907 sq.ft.	Rs. 55,303-00
Total costs of construction of the Building	Rs. 2,26,876-00
Add 10% towards basic amenities	Rs. 22,688-00
	Rs. 2,49,564-00
Costs of depreciation (P.45284)	Rs. 1,13,013-00
Depreciated costs	Rs. 1,36,551-00
Costs of land for lease-hold land at Rs.2,00,000 per ground for 4,874 sq.ft.	Rs. 4,06,167-00
Costs of land for free hold land at Rs.3,50,000 per ground for 4,199 sq.ft.	Rs. 6,12,354-00
Costs of the building	Rs. 11,55,672-00
Add 5% towards Schedule I amenities	Rs. 55,754-00
GROSS RETURN	Rs. 12,12,826-00
12% on the gross return per month	$\frac{12,12,826 \times 12}{100 \times 12}$

Rs. 12,128-26
or
Rs. 12,128.

The fair rent is Rs.12,128 per month." The above calculation on the basis of the findings of the Rent Controller and the Appellant Authority with regard to the cost of construction of the building, value of the site and the provisions amenities as correct, the calculations given by the Rent Controller in para 11 of his order and confirmed by the Appellate Authority for arriving at the fair rent at Rs.12,128 per month are also correct and they do not call for any interference in these C.R.Ps. The fair rent is fixed by the Rent Controller and the Appellate Authority for the petition mentioned building Rs.12,128 per month on the basis of evidence on record and there is no infirmity in the order of the Rent Controller and the judgment of the Appellate Authority. There is no merit in these C.R.Ps. and they are liable to be dismissed. Accordingly the C.R.Ps. are dismissed. No costs.

B.S. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

A.No.671 of 1981 *20th January, 1992.*

A.Shanmugha Mudaliar and others ...*Appellants*
v.
P.V.Rajagopal (died) and others ...*Respondents.*

(A) Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.64(5)(b) - Deputy Commissioner modifying scheme - Person wanting to set aside modified scheme - It should plead that ingredients of section have not been satisfied.

The suit is to set aside the order of the Deputy Commissioner and the appellate order therein. In such a suit, the main grounds that can be taken are only with reference to the above referred to two points. So, unless the plaintiff in such a suit pleads and proves before the Deputy Commissioner that the abovesaid ingredients of Sec.64(5)(b) were not satisfied, he cannot succeed in such a suit. *[Para 6]*

(B) Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.64(5)(a) and (b) - Are mutually exclusive - Proviso to section applies only to sub-section (a) - Deputy Commissioner has unrestricted and unconditional power to modify scheme under Sec.64(5)(b) - He can modify scheme framed by court also.

The proviso relates only to Sec.64(5)(a) and not to Sec.64(5)(b). Only underneath Sec.64(5)(a), the proviso is found in the enactment and thereafter only comes Sec.64(5)(b). No doubt, both Secs.64(5)(a) and 64(5)(b) deal with modification of any pre-existing scheme by the Deputy Commissioner. But Sec.64(5)(b) deals with modification by the Deputy Commissioner where he is satisfied that there is the abovesaid inconsistency. On the other hand, Sec.64(5)(a) deals with modification of any scheme. There may be even any other factual necessities for modification of a scheme and such modifications would come under Sec.64(5)(a). But though Sec.64(5)(a) is worded generally, in view of Sec.64(5)(b) providing for a particular situation as stated above, Sec.64(5)(a) should be held to be providing for a modification other than the modification contemplated under Sec.64(5)(b). So, in that sense, Sec.64(5)(a) and Sec.64(5)(b) are mutually exclusive. Only in the case of Sec.64(5)(a), the proviso therein will apply, that is, in certain cases of court Schemes modification could be done by the Deputy Commissioner subject to such conditions and restrictions as may be prescribed. But that qualification to the power given to the Deputy Commissioner is not there in the case of his power to modify under Sec.64(5)(b). If really he is satisfied that there is the abovesaid inconsistency, he is free to modify the original scheme and the Legislature has not thought it fit to fetter the said power with any restrictions or conditions as contemplated in the case of modification under Sec.64(5)(a) of the Act. *[Para 7]*

Cases referred to:

Radhakrishnan v. Manickam, (1974)2 M.L.J. 179; Sri Kailasanathaswami Devasthanam v. Chockalingam Chettiar, (1981)1 M.L.J. 159.

M.Venkatachalapathy for Appellants.

P.M.Bhaskaran, T.L.Ram Mohan, for Respondent Nos.2, 3, 4 and 5.

The Court delivered the following

JUDGMENT:- Defendants 3 to 5 are the appellants in this appeal against the judgment and decree dated 24.4.1981 in O.S.No.122 of 1977 on the file of Sub Court, Kancheepuram, decreeing the suit as prayed for by the plaintiff-1st respondent herein and thereby setting aside Ex.A-2 appellate order dated 24.3.1977 of the 1st defendant-2nd respondent herein (The Commissioner, H.R. & C.E.) in A.P.No.29 of 1976 on his file and also the original order in O.A.No.37 of 1974, dated 18.5.1974 passed by the 2nd defendant 3rd respondent herein (The Deputy Commissioner, H.R. & C.E.). The said suit was filed under Sec.70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as 'the Act').

2. Originally the abovesaid Deputy Commissioner initiated *suo motu* action to modify the scheme relating to the suit temple, of which the plaintiff claimed to be the hereditary trustee. The Deputy Commissioner sought to so modify under Sec.64(5)(b) of the said Act. The original scheme relating to the suit temple was framed according to the plaintiff, by Ex.A-3 judgment dated 24.1.1924 passed by the court of the District Munsif of Kancheepuram in O.S.No.384 of 1920. That was a suit for a declaration that the plaintiffs therein were hereditary Dharmakarthas of the suit temple along with the defendants therein. There, no doubt it was held that there was no evidence as to when the suit temple was built and who built it. However, the said court found that the plaintiffs 1 to 3, 6, 8, 12, 15 and 16 therein were hereditary Dharmakarthas of the suit temple along with the defendants therein. According to the present plaintiff, the abovesaid plaintiffs in O.S.No.384 of 1920, in whose favour, the abovesaid decree has been given, were his forefathers. The further plea of the plaintiff is that pursuant to Ex.A-3, the then existing Hindu Religious and Charitable Endowment Board, in O.A.No.221 of 1927 framed a scheme for the suit temple by order dated 11.1.1928 taking into consideration the abovesaid decision in O.S.No.324 of 1920. Further, according to the plaintiff, under clause (5) of the said scheme, the actual management of the suit temple has to be carried on by three executive trustees, one of whom shall be a member of the family of Venkatachala Mudaliar (16th plaintiff therein, who is said to be the ancestor of the present plaintiff) and that all the three trustees shall be elected by the community in the manner provided in the scheme. The further plea of the plaintiff is that the said scheme was sought to be cancelled in O.S.No.11 of 1928 on the file of District Court, Chingleput. But the said suit was dismissed and the scheme was approved and as such according to the plaintiff the scheme must be deemed to be one framed by the civil court and the abovesaid Deputy Commissioner under the Act has no jurisdiction to modify the said scheme already framed by the court under Sec.64(5)(a) and (b) of the Act. His further plea is that under the abovesaid original scheme, the administration of the suit temple has to be carried on by the Board of Trustees, representing 12 families referred to therein, with a special provision for the plaintiff's family, who shall always be one of the Executive Trustees to be elected by the community. This particular provision giving special right to the plaintiff's family had been deleted in the modified scheme of the Deputy Commissioner and, therefore, the present suit has been filed after the plaintiff has failed before the commissioner also.

3. In the suit, *inter alia,* the court below has found that the Deputy Commissioner has no power to modify the scheme under Sec.64(5)(b) of the Act; the said Sec.64(5)(b) runs as follows:

> "If the Deputy Commissioner is satisfied that any such scheme referred to in clause (a) is inconsistent with this Act and the rules made thereunder, he may, at any time, after consulting the trustee and the persons having interest, modify it in such manner as may be necessary to bring it into conformity with the provisions of this Act and the rules made thereunder."

The court below has held, *inter alia,* that there is no evidence in this case that the Deputy Commissioner was satisfied that the scheme already framed was inconsistent with the provisions of the abovesaid act or that at any time he consulted the trustees and the persons having interest in the affairs of the temple before modifying the scheme. Factually also, the court below found that there were no inconsistencies as stated above. No doubt, the court below also held that there was no need to amend the original scheme because there was no complaint by the villagers that the temple was mismanaged and the scheme was not working well. The court below also held that the original

scheme was that of the court and that it was conceded that when a scheme was settled by a court, the authorities under the Act had no jurisdiction to interfere.

4. No doubt, against the said judgment of the court below, there is no appeal by defendants 1 and 2. Defendants 3 to 5 alone have preferred this appeal. The learned counsel for the appellants points out that since the power exercised by the Deputy Commissioner in modifying the scheme was exercised under Sec.64(5)(b) (which according to the decision in *Radhakrishnan v. Manickam, (1974)2 M.L.J. 179,* is only a *suo motu* power exercisable by the Deputy Commissioner where the ingredients of the said clause are satisfied. The plaintiff, if he wants to set aside such a scheme; ought to have alleged either in his objection before the Deputy Commissioner or in his appeal before the Appellate Authority or in his plaint in this suit that the ingredients of Sec.64(5)(b) of the Act have not been satisfied. In other words, according to him, while the plaintiff has not pleaded anywhere that the Trustees of the suit temple or the persons interested in the suit temple were not consulted by the Deputy Commissioner before he made the modification, or, that there was no inconsistency between the original scheme and the abovesaid Act or the Rules made thereunder, the court below has erred in going into the said question and holding that such ingredients of Sec.64(5)(b) have not been complied with and that modification by the Deputy Commissioner was wrong or without jurisdiction.

5. The learned counsel for defendants 1 and 2 who are respondents 2 and 3 supports the abovesaid argument of the learned counsel for the appellants. On the other hand, the learned counsel for the respondents 4 and 5 contends that since the said question relates to the jurisdiction of the Deputy Commissioner under Sec.64(5)(b) of the Act, there was no necessity to plead the non-consultation of the trustees or the abovesaid persons interested, or, the non-existence of the abovesaid inconsistency. He also argues that the original scheme was a court scheme and that the Deputy Commissioner cannot modify the scheme in the year 1971 since at that time there were no Rules stipulating the conditions and restrictions subject to which such modification could be made pursuant to proviso to Sec.64(5). In this connection he also relied on the decision in *Sri Kailasanathaswami Devasthanam v. Chockalingam Chettiar, (1981)1 M.L.J. 159.*

6. I do not agree with the argument of the learned counsel for the respondents 4 and 5. But, I am inclined to accept the argument of the learned counsel for the appellants. It is because, the suit is to set aside the order of the Deputy Commissioner and the appellate order therein. In such a suit, the main grounds that can be taken are only with reference to the above referred to two points. So, unless the plaintiff in such a suit pleads before the Deputy Commissioner and proves that the abovesaid ingredients of Sec.64(5)(b) were not satisfied, he cannot succeed in such a suit. On the other hand, the only plea in the plaint is that since the original scheme was court scheme, the Deputy Commissioner had no power to modify it.

7. But the law is not that the scheme framed by the court cannot be modified at all by the Deputy Commissioner. No doubt in the above referred to *Sri Kailasanathaswami Devasthanam v. Chockalingam Chettiar, (1981)1 M.L.J. 159,* it was held by this Court that pursuant to the proviso to Sec.64(5)(a) in respect of certain court Schemes mentioned therein, the Deputy Commissioner could modify the scheme "only subject to such conditions and restrictions as may be prescribed" and in that case it was found on facts that at the relevant point of time, the said Rules prescribing the abovesaid conditions and restrictions were not framed and that is why it was held in that decision that since the said Rules had not been prescribed, the Deputy Commissioner had no power to modify those kinds of court scheme. The learned counsel for respondents 4 and 5 contends that the said proviso would apply even to the present case though coming under Sec.64(5)(b) of the Act and that since in the present case also, in 1971, there were no such Rules, it should be held that the Deputy Commissioner had no power to modify the original scheme, which according to the said counsel, was a court scheme as contemplated in the said proviso. I am unable to agree with this submission. The proviso relates only to Sec.64(5)(a) and not to Sec.64(5)(b). Only underneath Sec.64(5)(a), the proviso is found in the enactment and thereafter only comes Sec.64(5)(b). No doubt, both Secs.64(5)(a) and 64(5)(b) deal with modification of any pre-existing scheme by the Deputy Commissioner. But Sec.64(5)(b) deals with modification by the Deputy Commissioner where

he is satisfied that there is the abovesaid inconsistency. On the other hand, Sec.64(5)(a) deals with modification of any scheme. There may be even any other factual necessities for modification of a scheme and such modifications would come under Sec.64(5)(a). But though Sec.64(5)(a) is worded generally, in view of Sec.64(5)(b) providing for a particular situation as stated above, I think Sec.64(5)(a) should be held to be providing for a modification other than the modification contemplated under Sec.64(5)(b). So, in that sense, Sec.64(5)(a) and Sec.64(5)(b) are mutually exclusive. Only in the case of Sec.64(5)(a), the proviso therein will apply, that is in certain cases of court Schemes modification could be done by the Deputy Commissioner, subject to such conditions and restrictions as may be prescribed. But that qualification to the power given to the Deputy Commissioner is not there in the case of his power to modify under Sec.64(5)(b). If really he is satisfied that there is the abovesaid inconsistency, he is free to modify the original scheme and the Legislature has not thought it fit to fetter the said power with any restrictions or conditions as contemplated in the case of modification under Sec.64(5)(a) of the Act.

8. The net result is that the observation of the court below that in view of the non-consultation as contemplated under Sec.64(5)(b) of the Act and the non-existence of the abovesaid inconsistency, the Deputy Commissioner in the present case, did not have the power to modify the original scheme, is special pleading by the court below, unless, the plaintiff, who wants to set aside the abovesaid order of the Deputy Commissioner or the Commissioner, pleads that the abovesaid requirements of Sec.64(5)(b) were not fulfilled, the court cannot go into that question. The court can very well presume in such a situation that those requirements were fulfilled.

9. In the result, the judgment and decree of the trial court are set aside and the abovesaid orders of defendants 1 and 2 respectively are upheld and the suit is dismissed. Accordingly the appeal is allowed. However, in the circumstances of the case, there will be no order as to costs throughout.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Bellie, J.*

S.A.No.1296 of 1983 *23rd August, 1991.*

Yakub Rowther ...*Appellant*

v.

Poongavanammal and others ...*Respondents.*

Civil Procedure Code (V of 1908), O.21, Rule 63 - Claim suit - Decision - When operates as res judicata in a subsequent suit.

A decision rendered in a claim suit filed under O.21, Rule 63 where the claimant is plaintiff and the judgment-debtor is defendant or one of the defendants that decision will operate as *res judicata* if the requisite conditions laid down in Sec.11, C.P.C., *viz.*, the subject-matter of the suits and the issue involved for decision being the same are present. *[Para 7]*

Cases referred to:

Kandadai Narasimhachariar v. Raghava Padayachi, (1945)2 M.L.J. 89; Mangru Marto v. Yamakandan Lal, A.I.R. 1967 S.C. 1390; Bandipada Ramireddy v. Tagaran Bichalu, (1952)1 M.L.J. 475; Mangru v. Tarakeshwar Nath, (1931)61 M.L.J. 196; Yakub Rowther v. Poongavanammal, (1990)1 L.W. 444.

R.Alagar, Senior Counsel, for Appellants.

S.Gopalarathnam, Senior Counsel, for Respondents.

The Court made the following

JUDGMENT:- The plaintiff is the appellant. He filed a suit for declaration and injunction against the seven defendants on the basis of the sale deed Ex.A-1 executed by second defendant on 24.4.1967. The same property was sold by the second defendant along with defendants 3, 4 and 5 under Ex.B-10 sale deed dated 2.3.1978 in favour of first defendant. According to the plaintiff on the basis of Ex.B-10 the defendants 1, 6 and 7 interfered with the possession and enjoyment of the plaintiff. Therefore the suit.

2. Defendants 1, 6 and 7 are contesting the suit while other defendants remained *ex parte*.

3. It is contended that one Sadayan Asari filed O.S.No.290 of 1967 against the second defendant for recovery of amount due under a pronote dated 9.10.1964. In that suit Sadayan Asari got the suit property attached before judgment on 27.6.1967.

The present plaintiff who had purchased the property earlier on 24.4.1967 filed a claim petition I.A.No.1972 of 1968 for raising attachment by an order dated 8.8.1970 that application was dismissed on the ground that another suit O.S.No.577 of 1967 filed by the present plaintiff against two persons in respect of the same properties for declaration and injunction was dismissed. The present plaintiff filed O.S.No.656 of 1971 against Sadayan Asari and Pachaiyammal-second defendant in the District Munsif Court, Kallakurichi under O.21, Rule 63, C.P.C. for setting aside the summary order in the claim petition. This suit was decreed on 30.4.1973 on the ground that the judgment and decree in O.S.No.577 of 1967 were reversed in A.S.No.181 of 1969 on 28.8.1970 on the file of Sub Court, Cuddalore, Sadayan Asari filed A.S.No.447 of 1973 in the Sub Court, Cuddalore against the judgment and decree in O.S.No.656 of 1971 against the present plaintiff and also Pachaiyammal-the second defendant. The appeal was allowed on 4.11.1974 and the suit was dismissed on the ground, that, (i) the sale in favour of the present plaintiff by Pachaiyammal was intended to defeat and delay the creditors and hence it was hit by Sec.53 of the Transfer of Property Act; and (ii) Pachaiyammal was a minor on the date of sale and therefore the sale was invalid. As against this judgment no second appeal was preferred.

While so the fourth defendant in the present suit filed O.S.No.113 of 1975 against the present plaintiff, his vendor-second defendant Pachaiyammal and also her sisters-defendants 3 and 5, for partition of her 1/4th share in the very same property on the ground that the property belonged to her father Doraisamy Asari who died leaving behind three daughters and a son. The suit was contested on the ground that the fourth defendant was not the daughter of Doraisamy Asari and in any case he died before 1956 and therefore she could not claim any share. The plaintiff as first defendant in that suit also contended that he was the absolute owner of the property and Pachaiyammal had no right. The trial court held that the plaintiff therein *i.e.*, Vengachi *alias* Veerammal was not the daughter of Doraisamy Asari and also she did not prove that Doraisamy Asari died after 1956. The court gave further finding that the second defendant herein-Pachaiyammal alone was the owner of the property in view of the judgment in appeal A.S.No.447 of 1973. The fourth defendant filed an appeal A.S.No.46 of 1978 before the Sub Court. Cuddalore. In that appeal the present plaintiff *i.e.*, the first defendant in that case also filed a cross objection against the finding that Pachaiyammal was entitled to the property. The appellate court concurred with the finding of the trial court and dismissed the appeal and also dismissed the cross objection on the ground that A.S.No.447 of 1973 operates as *res judicata*. No further appeal was filed. On these grounds the defendants prayed for dismissal of the suit.

4. The trial court held that the judgment in A.S.No.447 of 1973 and the judgment A.S.No.46 of 1978 do not operate as *res judicata* as contended by the defendants. If further held that the second defendant Pachaiyammal was a major on the date of the sale deed in favour of the plaintiff and the plaintiff was also in possession of the property on the date of the suit. Therefore the suit was decreed as prayed for. The contesting defendants 1, 6 and 7 filed A.S.No.120 of 1982 in the Sub Court, Cuddalore and the Court gave a finding to the effect that the said two judgments in the earlier proceedings operate as *res judicata* and therefore it allowed the appeal and dismissed the suit. As against this the present second appeal is preferred.

5. The second appeal earlier came up before Mohan, J. (as he then was). The main point that arose for consideration of the learned Judge was whether the present suit is barred by the principle of *res judicata* in view of the decisions in A.S.No.447 of 1973 and A.S.No.46 of 1978. In support of the contention of the appellant-plaintiff that the suit is not barred by *res judicata* a Full Bench decision of this Court in *Kandadai Narasimhachariar v. Raghava Padayachi, (1945) 2 M.L.J. 89*, and a judgment of the Supreme Court in *Mangru Marto v. Yamakandan Lal, A.I.R. 1967 S.C. 1390*, were cited, while on the side of the respondents-defendants a Division Bench ruling of this Court in *Bandipada Ramireddy v. Tagaran Bichalu, (1952) 1 M.L.J. 475*, was relied on.

6. While it was argued by the appellant-plaintiff that the decision in A.S.No.447 of 1973 which was rendered in a claim suit under O.21, Rule 63, C.P.C. will not operate as *res judicata*, the opposite side contended that it will operate as *res judicata*. In the Division Bench decision in *Bandipada Ramireddy v. Tagaran Bichalu, (1952) 1 M.L.J.*

475, it has been clearly held that a decision regarding the title to the property in dispute in a claim suit filed under O.21, Rule 63, C.P.C. where the claimant and judgment-debtor were parties as co-defendants would operate as *res judicata* in a subsequent suit between the claimant and the representatives in interest of the judgment-debtor where the title of the same property is in dispute if the three requisite conditions laid down by the Privy Council in *Mangru v. Tarakeshwar Nath, (1931)61 M.L.J. 196*, for applicability of the rule of *res judicata* as between co-defendants are satisfied. The requisite conditions are, (i) there must be a conflict of interests between the defendants concerned, (ii) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (iii) the question between the defendants must have been finally decided.

7. From this principle laid down it goes without saying that a decision rendered in a claim suit filed under O.21, Rule 63, where the claimant is plaintiff and the judgment-debtor is defendant or one of the defendants that decision will operate as *res judicata* if the requisite conditions laid down in Sec.11, C.P.C., *viz.*, the subject-matter of the suits and the issue involved for decision being the same are present. In this Division Bench decision an observation of the Full Bench in *Kandadai Narasimhachariar v. Raghava Padayachi, (1945)2 M.L.J. 89*, has been referred to and held that the said observation will not land itself to the interpretation that in no case will the decision be given in a suit under O.21, Rule 63 with reference to title to the property would operate as *res judicata* in a subsequent suit. In other words according to the Division Bench the Full Bench decision is not to the effect that the decision rendered in a suit filed under O.21, Rule 63 will not operate as *res judicata* even if the parties, the subject-matter and issues involved for decision in the two suits are same.

8. In the decision of the Supreme Court in *Mangru Marto v. Yamakandan Lal, A.I.R. 1967 S.C. 1390*, the point under consideration was whether an order passed on petition filed under O.21, Rule 58 would operate as *res judicata* in a subsequent suit. While deciding this point the Supreme Court referred to with approval the decision in the Full Bench in *Kandadai Narasimhachariar v. Raghava Padayachi, (1945)2 M.L.J. 89*, Mohan, J. Expressing the view that the said observation in the Division Bench decision in *Bandipada Ramireddy v. Tagaran Bichalu, (1952)1 M.L.J. 475*, does not seem to be in accordance with the ruling of the Full Bench in the light of the confirmation of it by the Supreme Court and this is an important question to be decided, wanted the matter to be referred to a Full Bench.

9. The Full Bench to which the matter was referred to in the decision reported in *Yakub Rowther v. Poongavanammal, (1990)1 L.W. 444*, held, as seen from paragraph 7 of the Judgment, that the Supreme Court decision in *Mangru Marto v. Yamakandan Lal, A.I.R. 1967 S.C. 1390*, was rendered with regard to the implications of an unsuccessful claimant (who filed a petition under O.21, Rule 58, C.P.C. and not filed a suit under O.21, Rule 63 and the approval of the Supreme Court of the decision of the Full Bench in *Kandadai Narasimhachariar v. Raghava Padayachi, (1945)2 M.L.J. 89*, would only be understood as confining to the said aspect alone *i.e.*, the appication of an order passed on a petition filed under O.21, Rule 58 without taking the matter further by way of suit. The Full Bench further held that the decision of the Division Bench in *Bandipada Ramireddy v. Tagaran Bichalu, (1952)1 M.L.J. 475*, was rendered in a different context, by meaning that in the case in the Division Bench decision a claim suit under O.21, Rule 63 has been filed. So holding the Full Bench said that whether to a particular case a decision rendered under O.21, Rule 63 will operate as *res judicata* will depend upon the scope of the controversy in that case *i.e.*, as to whether the subject matter of the suit in both the suits is the same and the parties are the same and issue involved is the same. So holding the Full Bench referred the matter back to the single judge to dispose of the appeal. This is how the matter is now before me.

10. From the above findings of the Full Bench in *Yakub Rowther v. Poongavanammal and others, (1990)1 L.W. 444*, it is clear that a decision rendered in a claim suit filed under O.21, Rule 63 will operate as *res judicata* as held by the Division Bench in *Bandipada Ramireddy v. Tagaran Bichalu, (1952)1 M.L.J. 475*, if the subject matter of the suits is the same and the parties are the same and issues involved for decision are the same. So what we have to decide is, for the decision in A.S.No.447 of 1981 to operate as *res judicata* in the present suit whether the parties in both the suits

are the same and the issues involved are the same as laid down under Sec.11, C.P.C. It is not in dispute that the parties in both the suits are same and the subject-matter is the same and the issues involved is also the same. This being the case it is obvious that the decision in A.S.No.447 of 1981 will operate as *res judicata* in the present suit. The decision in the cross objections filed by the plaintiff herein in A.S.No.46 of 1978 which was based on the decision in A.S.No.447 of 1973 that decision *i.e.*, the decision in the cross-objections in A.S.No.46 of 1978 also would operate as *res judicata*. Therefore the judgment of the first appellate Court has to be upheld as correct.

11. The result is, the appeal is dismissed, but considering the circumstances of the case there will be no order as to costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.3291 of 1990 *17th December, 1990.*

M.Nemichand Jain ...*Petitioners*

v.

P.Ethirajan ...*Respondent.*

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(a)(iii) - Petition under - No averment that landlord is not in occupation of any non-residential building for the purpose of carrying on his son's business - Landlord seeking eviction on that footing only - Absence of averment whether vitiates proceedings.

Though there is no specific averment, it is clear from the petition that the respondent is seeking eviction of the petitioner herein on the footing that he requires the premises for the purpose of his son's business which is being carried on in a rented premises. Taking into consideration all the averments made in the petition, it is clear that the respondent prayed for an order of eviction only on the basis of *bona fide* requirement. The courts have to consider only the evidence on record and decide whether the *bona fide* requirement has been made out. The absence of an express sentence in the pleading does not vitiate the proceedings. *[Para 1]*

(B) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Secs.2(2) and 10(3)(a)(iii) - 'Building' - Building let out for rent two shops in the front portion - Rear portion always in occupation of landlord for purpose of his residence - Landlord vacating that portion but not letting it out and keeping it vacant - Such residential portion, if that of the building let out to tenants - Landlord, if can be said to be occupying a non-residential building of his own for the purpose of his son's business.

Sec.2(2) of the Act defines a 'building' as any building let or to be let separately for residential or non-residential purposes and includes the garden, grounds etc., In this case, the building that was let out was only the shop which was occupied by the petitioner herein and another teashop in the front, portion of No.62, Kandappa Chetty Street. The rear portion was always in the occupation of the landlord for the purpose of his residence. Hence there is a severance and carving out of the portion let out from the entire building. The portion let out has been used for non-residential purposes and the portion which was retained by the landlord was only used for his residential purpose. Even after he vacated it, it was not let out and it was kept vacant and therefore, it continued to be a residential building. Hence, it cannot be treated as part of the building let out to the tenant within the meaning of Sec.10(3)(c) of the Act. Under Sec.10(3)(a)(iii) of the Act, a landlord may, subject to the provisions of clause (d) apply to the controller for an order directing the tenant to put him in possession of the building in case it is a non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying, a non-residential building in the city, town or village concerned which is his own. The language is quite clear and it cannot be said that the landlord is occupying a non-residential building of his own for the purpose of his son's business. *[Para 2]*

(C) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), Sec.10(3)(a)(ii) - Bona fides - Question of - How to be considered.

The question of *bona fide* has to be considered only on the basis of all the circumstances available

in the case. It is not possible to contend that the court should advert to one of such circumstances only and decide the question of *bona fide*. *[Para 8]*

Cases referred to:

M/s.Shelat Brothers v. Lord Narendradas, A.I.R. 1985 Mad. 95; C.S.Pillai v. Captain M.A.Murugaraj, (1983)2 M.L.J. 310; Nandan Brothers v. Kamaladevi Chandak and others, (1989)2 L.W. 25.

T.L.Ram Mohan, for Petitioner.

R.Srinivasan, for Respondent.

The Court made the following

ORDER:- The civil revision petition is directed against the concurrent orders of the Rent Controller and Appellate Authority granting the prayer of the respondent herein for eviction of the petitioner, under Sec.10(3)(a)(iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The petitioner contends that the findings of the courts below are wholly unsustainable for several reasons. The first submission made by learned counsel for the petitioner is that there is no specific averment in the petition filed by the respondent that the respondent is not in occupation of any non-residential building for the purpose of carrying on his son's business. In the absence of such an averment in the pleading, it is contended by learned counsel that the *bona fide* requirement of the respondent ought not to have been accepted. I do not agree. Though there is no specific averment, it is clear from the petition that the respondent is seeking eviction of the petitioner herein on the footing that he requires the premises for the purpose of his son's business, which is being carried on in a rented premises at No.224, Thambu Chetty Street, Madras-1. Taking into consideration all the averments made in the petition, it is clear that the respondent prayed for an order of eviction only on the basis of *bona fide* requirement. The courts have to consider only the evidence on record and decide whether the *bona fide* requirement has been made out. The absence of an express sentence in the pleading does not vitiate the proceedings before the courts below.

2. The second contention put forward by learned counsel is that the petition under Sec.10(3)(a)(iii) of the Act is not maintainable inasmuch as the respondent was having in his possession a portion in the very same building at No.62, Kandappa Chetty Street, in the rear, vacant. It is brought out in the evidence that the respondent was living in the said rear portion and he had shifted his residence to Mylapore two years prior to the deposition. According to learned counsel, when a portion of the building is vacant and is in the control of the respondent, that would bring the matter under Sec.10(3)(e) of the Act and it is not open to the respondent to seek eviction under Sec.10(3)(a)(iii) of the Act. I am unable to agree with this contention. The portion occupied by the respondent was always used for residential purposes. After his vacating the same and shifting his residence to other place, he had not let out the same to any other person. That portion cannot be treated as a non-residential building. Sec.2(2) of the Act defines a 'building' as any building let or to be let separately for residential or non-residential purposes and includes the garden, grounds etc. In this case, the building that was let out was only the shop which was occupied by the petitioner herein and another teashop in the front portion of No.62, Kandappa Chetty Street. The rear portion was always in the occupation of the landlord for the purpose of his residence. Hence, there is a severance and carving out of the portion let out from the entire building. The portion let out has been used for non-residential purposes and the portion which was retained by the landlord was only used for his residential purpose. Even after he vacated it, it was not let out and it was kept vacant and therefore, it continued to be a residential building. Hence, it cannot be treated as a part of the building let out to the tenants within the meaning of Sec.10(3)(c) of the Act. Under Sec.10(3)(a)(iii) of the Act, a landlord may, subject to the provisions of clause (d) apply to the controller for an order directing the tenant to put him in possession of the building in case it is a non-residential building, if the landlord or any member of his family is not occupying for purposes of a business which he or any member of his family is carrying on, a non-residential building in the city, town or village concerned, which is his own. The language is quite clear and it cannot be said that the landlord is occupying a non-residential building of his own for the purpose of his son's business.

3. It is a fact that the landlord was only residing in the portion as admitted by the petitioner herein as R.W.1. In his deposition he has stated that the respondent has changed his residence from No.62, Kandappa Chetty Street to Adyar.

4. It is next contended that the respondent's son is carrying on business only in the suit premises in

another portion and it is false to contend that he is doing business in No.224, Thambu Chetty Street. This contention is negatived by the admission made by the petitioner himself as R.W.1. In this deposition he stated that he did not know whether the respondent's son was doing business in No.62, Kandappa Chetty Street. He also stated positively that the respondent's son was doing business in No.224 Thambu Chetty Street. Excepting to state that there was a board showing the name of the business of the respondent's son in the suit premises, the petitioner had not stated anything to substantiate his version that the respondent's son was doing business in the suit premises itself.

5. Reliance is placed by learned counsel on the admission of P.W.2, the son of the respondent that the sales tax registration for his business is with reference to the suit premises. In the course of evidence, the respondent's son stated that he had registered his business under the provisions of the Tamil Nadu General Sales Tax Act and it has not so far been cancelled. It is also stated by him that the registration relates to the premises in No.62, Kandappa Chetty Street. It is contended by learned counsel that under Sec.21 of the Tamil Nadu General Sales Tax Act, an application for registration shall be made to the prescribed authority and shall be accompanied by a fee of Rs.100 for the principal place of business and an additional fee of rupees twenty-five in respect of each of his places of business other than the principal place of business. Learned counsel also referred to Rule 24, Sub-rule (1) of the Rules framed under the Act which enjoins the dealer to submit to the registering authority of the area in which his principal place of business is situate an application for registration within 30 days of his total turnover reaching Rs.75,000. Under Sub-rule (12) of Rule 24 of the Rules, when a registered dealer changes any place of his business, he shall intimate the fact to the registering authority, within thirty days of such change and get his certificate of registration amended accordingly. Under Sub-rule (14) of Rule 24 of the Rules, no registered dealer shall keep his goods in any place or godown not mentioned in the registration certificate.

6. If the respondent's son had contravened the provisions of the Tamil Nadu General Sales Tax Act or the Rules framed thereunder, it is for the authorities under the Act to take appropriate proceedings against the respondent's son. The fact that the respondent's son is doing business in one place after obtaining the certificate of registration under the Tamil Nadu General Sales Tax Act for running the business in another place, would not mean that the requirement of the respondent of the building is not *bona fide*. Hence, reliance placed on the certificate of registration issued under the Tamil Nadu General Sales Tax Act to the respondent's son would not take us far.

7. In view of the fact that the findings of the courts below are based on the admissions made by the petitioner himself that he did not know whether business was carried on in No.62, Kandappa Chetty Street and that the respondent was carrying on business in No.224, Thambu Chetty Street, the findings are not liable to be interfered with. I do not find any justification whatever to interfere with the concurrent findings of fact.

8. The question of *bona fide* has to be considered only on the basis of all the circumstances available in the case. It is not possible to contend that the court should advert to one of such circumstances only and decide the question of *bona fide*. Here, the courts below had given regard to all the evidence on record and considered the contentions put forward by the petitioner herein fully and then only come to the conclusion that the requirement of the respondent is *bona fide*. There is no error in the appreciation or discussion of the evidence on record.

9. Learned counsel for the petitioner invites my attention to the judgment of Ratnam, J., in *M/s.Shelat Brothers v. Lord Narendradas, A.I.R. 1985 Mad. 95*. In that case, one of the contentions put forward by the revision petitioner was that the Appellate Authority had not considered the case of the tenant that certain portions in its occupation has been surrendered earlier and a finding on the evidence in relation to such a plea would have a possible bearing upon the *bona fide* of the requirement. The learned Judge found as a fact that such a surrender as pleaded by the petitioner before him had not been established and, therefore, there was no lack of *bona fides* on the part of the landlords in filing the application for an order of eviction under the provisions of the Act. The judgment does not help the petitioner. On the other hand, it is possible to contend that it goes against the contentions put forward by the petitioner.

10. Learned counsel relies on the judgment in

C.S.Pillai v. Captain M.A.Murugaraj, (1983)2 M.L.J. 310. The learned Judge held that if a landlord is in judicial possession of the ground floor that would be enough to non-suit him concerning eviction under Sec.10(3)(a)(i) of the Act and that if he wanted the entire premises for his own occupation, the remedy of the petitioner would be only to file an application under Sec.10(3)(c) of the Act and not under Sec.10(3)(a)(i) of the Act. That is a case in which the tenants were using the portions let out for their residential purposes. The landlord was using the remaining portion for his own residence. Thus, the entire building was used only for residential purposes and it was quite possible in that case to take the view that a part of the building was in the occupation of the landlord when he applied for eviction. Rightly if I may so, the learned Judge held that Sec.10(3)(c) of the Act would apply and not Sec.10(3)(a)(i) of the Act. That judgment has no bearing on the present case.

11. My attention is drawn to a judgment of mine in *Nandan Brothers v. Kamaladevi Chandak and others, (1989)2 L.W. 25.* That was a case in which a portion of the non-residential building was obtained by the landlord after filing the eviction petition. The building was being occupied by several tenants in several portions. When the petitions for eviction were filed, some of the tenants had vacated their portions and delivered possession to the landlord. The question was whether the *bona fide* requirement of the landlord ceased because of his occupying the portions vacated by the tenants. I found on the facts that the portions surrendered to him were not sufficient for the purpose of his business and the *bona fide* requirement was not in any way affected, thereby. That judgment has no relevance to the facts of the present case.

12. In the circumstances, I do not find any warrant to interfere with the concurrent conclusion of the courts below.

13. The civil revision petition fails and it is dismissed. There will be no order as to costs.

14. Learned counsel for the petitioner prays for time to vacate the premises. The respondent's counsel has no objection for grant of two months time provided an affidavit of undertaking is filed by the petitioner. Hence, the petitioner is granted time till 28.2.1991 for vacating the premises on condition that he files an affidavit in this court on or before 2.1.1981 undertaking to vacate the premises by 28.2.1981 without driving the respondent to execution proceedings. If the affidavit of undertaking is not filed, the petitioner will not be entitled to the benefit of time granted.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

L.P.A.No.102 of 1988 *20th December, 1991.*

Muniammal and others ...*Appellants*

v.

Venkitammal and others ...*Respondents.*

(A) Practice and procedure - Burden of proof - Significance of, is lost only in cases in which specifically certain facts are not required to be proved by a particular party but found proved on evidence as record.

(B) Deed - Construction - Person holding property absolutely - Can encumber property either absolutely or for life or postpone encumbrance to operate on a future date - Deed in which right is recognised and postponed for a future date to accrue but conveyance completed by way of settlement or a family arrangement - Is a settlement and not a will - Right created under such deed cannot be affected or withdrawn by a deed of cancellation.

(C) Limitation Act (XXXVI of 1963), Sch.I, Arts.58 and 65 - Suit for possession based on title in immovable property - Art.65 applies and not Art.58.

The first defendant in trial court 'V' acquired the site or the land in dispute under two documents Exs.B-1 and B-2 out of her funds and the buildings thereon were also put up by her. On 30.11.1970 as per Ex.A-1, V executed a settlement in favour of the plaintiffs 'M', 'Ru' and 'S' and the defendants 3 to 5, Ra, Kr and Ka, in respect of the suit property. On 17.3.1971, V executed a deed Ex.A-2 cancelling Ex.A-1. On 7.4.1971, V executed a fresh settlement deed in favour of the second defendant 'N' her husband. The plaintiffs filed a suit for a declaration that the alleged cancellation of Ex.A-1 by Ex.A-2 was null and void. At the stage of appeal, they filed a petition to amend the prayer seeking for a declaration that they were

entitled to the vested remainder in the plaint schedule property along with defendants 3 to 5. The trial court held that Ex.A-1 was in the nature of a Will, that its cancellation by Ex.A-2 was valid and that the suit was barred by limitation as per Art.58 of the Limitation Act. In appeal,

Held:- Cases in which the burden of proof loses significance are those in which specifically certain facts are not required to be proved by a particular party but found proved on the evidence on record whether adduced by the party upon which the burden lies or the party opposing. *[Para 6]*

Coming to Ex.A-1, it is not unknown that any absolute owner of a property decides either to leave a testament and convey in future his or her right either for consideration or subject to the laws that govern such transactions. In the case of a testament or a will, the conveyance is postponed until the death of the testator and devolves only when a probate is granted or letters of administration. In the latter case, however, it is more in the nature of recognition of a right and the right postponed for a future date to accrue but conveyance completed by way of a settlement or a family arrangement. The Court below has treated the recital in Ex.A-1 as if the first defendant recognised who were the beneficiaries of her estate. There can be no dispute that her exercise of disposition was not confined to her life alone. She held the property absolutely and so she could encumber the property either absolutely or for life or postpone the encumbrance to operate on a future date. That is why the court holds that Ex.A-1 has been misconstrued as a Will. It is a deed conveying such interests which the first defendant possessed in the property to the plaintiffs and some of the defendants. Once it is found that Ex.A-1 is a valid document of transfer of interest by way of settlement in favour of the plaintiffs and some of the defendants, unless it is found that the first defendant has still got a right to cancel the transfer deed, it is obvious that Ex.A-2 cannot be found to be a valid document. A right already created under a deed of transfer cannot be taken away by a deed of cancellation. A disposition once effected cannot be withdrawn. Ex.A-2 for that reason alone must be found to be invalid. The invalidity of Ex.A-2 shall automatically invalidate the deed of settlement dated 7.4.1971 in favour of the second defendant. *[Paras 7 and 8]*

Art.58 falls in Part III of the Schedule to the Limitation Act. This part deals with suits relating to declaration. Part V deals with suits relating to immovable property. Art.65 thereof reads that for possession of immovable property or any interest therein based on title, the period of limitation is twelve years. The instant suit based upon Ex.A-1 is undoubtedly a suit for interest based on title in immovable property. The period of limitation in such a situation will be 12 years and not three years. *[Para 9]*

Cases referred to:

Venkatachalam Chetty v. Govindasamy Naicker, 46 M.L.J. 288.

Appeal under Clause 15 of the Letters Patent against the order of Nainar Sundaram, J., dated 6.1.1988 and made in the exercise of the Appellate Jurisdiction of the High Court in Appeal No.637 of 1980 (O.S.No.156 of 1978, Subordinate Judge, Coimbatore).

The judgment of the Court was delivered by

Mishra, J.:- Three questions, (1) Whether Ex.A-1 had the character of a testament alone or is a deed of settlement of rights and interests in the property of the executrix for life and on her death upon the plaintiffs and the defendants 3 to 5 and the heirs and legal representative of the deceased daughter of the executrix (defendants 6 to 9) in O.S.No.156 of 1978 of the court of Subordinate Judge, Coimbatore, (2) whether the deed of cancellation (Ex.A-2) is valid and legal in the sense that it cancelled the rights and interests of the plaintiffs and the defendants 3 to 9 in the suit and (3) whether the suit filed beyond the period of three years for a declaration that Ex.A-2 is *null and void* is maintainable, arise for our consideration in this Letters Patent Appeal.

2. Before we enter into the examination on the above questions, we may state briefly the facts.

It is the admitted case of the parties that the site or the land in dispute was in the name of the first defendant acquired under two documents, one dated 19.8.1931 (Ex.B-1) and the other dated 3.6.1932 (Ex.B-2). According to the plaintiffs, the land was acquired by the first defendant out of her own funds and the buildings thereon were also put up by her. On 30.11.1970 as per Ex.A-1, a document purported to be a settlement deed was executed by her in favour of the plaintiffs and the defendants 3 to 5 in respect of the suit property. On 17.3.1971, she (first defendant) executed a deed as per Ex.A-2 cancelling Ex.A-1. On 7.4.1971,

the first defendant executed a fresh settlement deed in favour of the second defendant (her husband) in respect of the plaintiffs and thus they filed the instant suit for a declaration that the alleged cancellation deed dated 17.3.1971 is null and void. Although the suit as originally framed sought declaration only, the plaintiffs preferred an amendment to the plaint at the stage of the appeal in the court below seeking for the declaration as above that they are entitled to vested remainder in the plaint schedule property along with the defendants 3 to 5. as per the settlement deed (Ex.A-1).

3. A common plea has been raised on behalf of the defendants, which has been summarized in the impugned judgment as follows:

> "The suit site was purchased by the second defendant with his funds benami in the name of the 1st defendant; the construction over the suit site were put up by the second defendant; the first defendant had no right, title and interest to execute the Settlement Deed Ex.A-1; Ex.A-1 was vitiated by fraud and undue influence and is liable to be set aside; Ex.A-1 even if true was in the nature of a will and hence it stood revoked by the subsequent document; the suit is barred by limitation, and in any event the second defendant has perfected title to the suit property by adverse possession."

4. The trial court answered the main disputes between the parties as follows:

> "The suit site was purchased by the second defendant with his funds benami in the name of the first defendant. The construction in the suit site were put up by the second defendant. The first defendant had no title to convey or right to execute the settlement deed dated 30.11.1970. The settlement deed dated 30.11.1970 was vitiated by fraud and undue influence and is liable to be set aside."

On the question that Ex.A-2 was brought about by threats and fraud and undue influence and hence null and void and Ex.A-1 was in the nature of a will and hence the subsequent document executed by the first defendant cannot be questioned by the plaintiffs, the trial Court held that the plaintiffs failed to establish that Ex.A-2 was brought about by threats and force, fraud and undue influence and that Ex.A-1 was in the nature of a will and hence the subsequent document executed by the first defendant cannot be questioned by the plaintiffs. The trial court also held that the second defendant had perfected title to the suit property by adverse possession long prior to the year 1970. It also said that the suit filed on behalf of the plaintiffs was barred by limitation.

5. The court below formulated the following four questions and answered them as follows:

> "1. Whether the suit site was acquired by the second defendant benami in the name of the first defendant?
>
> 2. Whether the constructions over the suit site were put up by the second defendant?
>
> 3. Whether Ex.A-1 had the character of a testament alone, and hence it has got to be ignored by virtue of the subsequent document executed by the first defendant?
>
> 4. Whether the suit as laid by the plaintiffs is barred by limitation?"

While considering the first two questions, the learned Judge has said,

> "It is true that the burden of proving that a particular transaction is benami is on the person, who sets forth that plea. But where the controversy has been put-in issue and the parties have placed their evidence in substantiation of their respective cases, then it will be the duty of the court to deal with the question on the basis of reasonable probabilities and legal and factual inferences to be drawn from the materials exposed. The initial burden is certainly on the party, who sets forth the plea of benami. The significance of the burden of proof need not be carried too far after the parties have placed their evidence on the issue. It is only in that context it has to be stated that the burden of proof is not a static and a rigid proposition. The entire evidence has got to be scanned on the question in issue and to import consideration of will be certainly out of place and the duty of the court is to weigh the evidence and to decide the issue on a careful assessment of the totality of the evidence on the basis of reasonable probabilities."

On the third question above, the learned Judge has said,

> "...the express dispositive words used in Ex.A-1 are clinching and they do indicate that the vesting should take place only after the life time of the first defendant. In my view, this can be taken to be a clear indication that the document could have only the character of a will. If this is so, the subsequent documents executed

by the first defendant, namely the original of Ex.A-2, the deed of cancellation and the settlement deed, dated 7.4.1971 executed by the first defendant in favour of the second defendant could certainly survive and Ex.A-1 has got to be ignored."...

On the fourth question, the learned Judge has said,

"...As per Art.58, the plaintiffs with one prayer which they projected in their plaint ought to have laid the suit within three years from that date. But that was not done. Hence, I have to hold the suit as laid is barred by limitation."

Disposing of the C.M.P. for amendment of the plaint, the learned Judge has said,

"Obviously, the present move is to get over the hurdle of limitation by changing the prayer. As already held the plaintiffs prayer for declaration as they projected in their plaint could not be granted on account of the bar of limitation. I do not think at this stage it will be just, fair and appropriate to allow the amendment."

Regarding another petition to receive two documents as additional evidence, namely, (1) the settlement deed dated 7.4.1971 executed by the first defendant in favour of the second defendant, and (2) a communication from the Coimbatore Co-operative Milk Supply Society to the first plaintiff dated 5.11.1980, the learned Judge has said,

"The averments made in the affidavit filed in support of this petition do not bring the case within the ambit of O.41, Rule 27 of the Code of Civil Procedure. I do not find any warrant to admit and receive additional evidence at this stage."

6. Before we take up the questions posted before us, we may here state that the approach of the court below as to the title, whether vested in the first defendant or in the second defendant, has substantially affected the consideration of the main question as to the determination of the character of Ex.A-1. We are compelled to state that the cases in which the burden of proof loses significance are those in which specifically certain facts are not required to be proved by a particular party but found proved on the evidence on record, whether adduced by the party upon which the burden lies or the party opposing. The significant omission in this case of the presumption of title in favour of the first defendant in the suit though admittedly the two documents Exs.B-1 and B-2, dated 19.8.1931 and 13.6. 1932 stand in the name of the first defendant, and acceptance straightaway of a case of benami, ignoring altogether the proof of ingredients thereof, has almost determined all the questions against the plaintiffs. The presumption that certain properties belong to the co-parcenary or to a joint family arises when the properties stand in the name of a male member of the family. This presumption is not available when the property is in the name of a female member of the family. A male or female member of the family can claim right or interest in such property only by establishing that the ostensible purchaser shown in the transfer document was a benamidar and or represented the interests of the real owner, whether a husband, a brother, a friend or any other close associate. There has been absolutely no attempt by either of the courts below to go into this aspect of the case and ignore any claim of the second defendant until the second defendant established by cogent evidence that the first defendant stood as a benamidar for him in the sale transactions in August, 1931 or in June, 1932 (Exs.B-1 and B-2). We may here assumes in favour of the defendants that the first defendant was a benamidar for the second defendant. She was not the ostensible owner and she firstly executed Ex.A-1 so much so that she executed a further document to cancel Ex.A-1 and, it is said, she executed a deed of settlement in favour of the second defendant on 7.4.1971. These facts are not disputed. The second defendant thus sought to obtain title in the property by a document of transfer by the first defendant. Unless she was the owner, why the second defendant wanted such a document? If the second defendant was the real owner, no such document was required at all. The documents (Exs.B-1 and B-2) are admittedly in favour of the first defendant. Sec.91 of the Evidence Act states,

"When the terms of a contract, or of a grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The defendants produced Exs.B-1 and B-2. They thus establish that the title in respect of the suit site in dispute vested in the first defendant. It is well-settled that a document of sale proves title of the vendee in the property. Plaintiffs thus proved the title of the first defendant. They also corroborated Exs.B-1 and B-2 by Exs.A-1 and A-2 and the admitted transaction dated 7.4.1971 of transfer of interest in the property by the first defendant to the second defendant, her husband wherein she claimed that she possessed title and that she had the power of disposition. The question thus was of great significance how the second defendant proved that the first defendant was a benamidar and that he is the real owner of the property and not his wife the first defendant.

7. Coming to Ex.A-1, one has to see what this document does? It is not unknown that any absolute owner of a property decides either to leave a testament and convey in future his or her right either for consideration or subject to the laws that govern such transactions. In the case of a testament or a will, the conveyance is postponed until the death of the testator and devolves only when a probate is granted or letters of administration. In the latter case, however, it is more in the nature of recognition of a right and the right postponed for a future date to accrue, but conveyance completed by way of a settlement or a family arrangement. There is hardly any difference in the relief of declaration originally asked for in the suit and the relief asked for in the amendment petition in the sense that in case the validity of Ex.A-1 is upheld it will give nothing to the plaintiffs and other beneficiaries, (the defendants in the suit) except the vested remainder, the right which they shall get only after the life time of the first defendant. The court below has treated the recitals in Ex.A-1 as if the first defendant recognised who were the beneficiaries of her estate. There can be no dispute that her exercise of disposition was not confined to her life alone. She held the property absolutely and so she could encumber the property either absolutely or for life or postpone the encumbrance to operate on a future date. That has always been the thrust and we say so with respect that this view is not inconsistent with the view expressed by a Bench of this Court *Venkatachalam Chetty v. Govindasamy Naicker, (1924)46 M.L.J. 288.* That is why we hold that Ex.A-1 has been misconstrued as a will. It is a deed conveying such interests which the first defendant possessed in the property to the plaintiffs and some of the defendants. The approach taken by the court below thus that Ex.A-1 has got to be ignored and Ex.A-1 and the settlement deed dated 7.4.1971 executed by the first defendant in favour of the second defendant would survive is thus vitiated to the extent that Ex.A-2 can survive only if the first defendant still possessed such interests in the property that she could cancel the transfer in favour of the plaintiffs and some of the defendants under Ex.A-1 and the settlement deed dated 7.4.1971 would survive only when Ex.A-2 is held to be valid.

8. Once we have found that Ex.A-1 is a valid document of transfer of interest by way of settlement in favour of the plaintiffs and some of the defendants, unless we find that the first defendant has still got a right to cancel the transfer deed, it is obvious that Ex.A-2 cannot be found to be a valid document. A right already created under a deed of transfer cannot be taken away by a deed of cancellation. A disposition once effected cannot be withdrawn. Ex.A-2 for that reason alone must be found to be invalid. The invalidity of Ex.A-2 shall automatically invalidate the deed of settlement dated 7.4.1971 in favour of the second defendant.

9. We must give credit to the learned counsel for the respondents that he realised in the course of the arguments that Art.58 of the Limitation Act shall have no application on the facts of this case. The error which the trial court committed in applying Art.59 of the Limitation Act, which is applied to suits relating to decrees and instruments was no doubt rectified by the court below, but the error committed in applying Art.58 is obvious. Art.58 falls in Part III of the Schedule to the Limitation Act. This part deals with suits relating to declaration. Part V deals with suits relating to immovable property. Art.65 thereof reads that for possession of immovable property or any interest therein based on title, the period of limitation is twelve years. The instant suit based upon Ex.A-1 is undoubtedly a suit for interest based on title in immovable property. The period of limitation in such a situation will be 12 years and not three years.

10. The view that we have taken thus leads to the irresistible conclusion that the courts below erred in holding that the first defendant was a benamidar and the title in reality vested in the second defendant and not in the first defendant and so

Ex.A-1 executed by the first defendant conveyed no property to the plaintiffs. Since the suit concerned immovable property and interest therein, the limitation period for the suit was 12 years and not 3 years as held by the courts below.

11. Since we have concluded that the first defendant conveyed her title to her heirs under Ex.A-1 and thus ceased to have any interest therein and she could not cancel Ex.A-1 by Ex.A-2. The plaintiffs, in our opinion, have proved their case of title and accordingly became entitled to a decree.

12. For the reasons aforesaid, the appeal has to be allowed. The judgment and decree of the courts below are accordingly set aside. The suit is decreed as prayed for. On the facts and in the circumstances of the case, parties shall bear their own costs. The appellants shall pay the court-fee throughout.

B.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

W.A.No.262 of 1992 *16th March, 1992.*

K.Muthuswamy *...Appellant*

v.

The Chairman, Neyveli Lignite Corporation Ltd., Neyveli and another *...Respondents.*

(A) Constitution of India (1950), Art.226 - Writ of mandamus - *If can be issued to compel carrying out terms of contract.*

The relationship between the petitioner and the Corporation is admittedly one based on contract and no writ of *mandamus* could be issued to compel the Corporation to carry out the terms of the contract. *[Para 6]*

(B) Constitution of India (1950), Art.226 - Writ of mandamus - *If can be issued without a legal right.*

It is settled law that no one can ask for *mandamus* without a clear legal right. But in the present case all that the appellant has been pleading again and again is for further extension of time for furnishing bank guarantee stipulated under the contract. This is only seeking indulgence from the Corporation. In such circumstances, there is absolutely no scope for grant of any writ of *mandamus. [Para 8]*

Cases referred to:

Divisional Forest Officer v. Bihswanath Tea Company Ltd., A.I.R. 1981 S.C. 1368; B.K.Sinha v. State, A.I.R. 1974 Pat 230; Radhakrishna Agarwal v. State of Bihar, A.I.R. 1977 S.C. 1496; Har Shanker v. Dy. Excise and Taxation Commissioner, A.I.R. 1975 S.C. 1121.

Appeal under Clause 15 of the Letters Patent against the Order of Bakthavatsalam, J., dated 26.2.1992 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.2605 of 1992 presented under Art.226 of the Constitution of India to issue a writ of *mandamus* directing the respondents from taking any action in the matter of the right of retrieval carbonaceous material flowing out from B & C Drain belonging to them in pursuance of the letter dated 11.2.1992 in Lr.Mktg. S III-3/5087/1991 issued by the second respondent.

S.K.Sundaram, for Appellant.

R.Krishnaswamy, for Respondents.

The Judgment of the Court was delivered by

Abdul Hadi, J.:- This writ appeal is against the order dated 26.2.1992 of Bakthavatsalam, J. in W.P.No.2605 of 1992, filed by the appellant against the Authorities of Neyveli Lignite Corporation. The writ petition is for the issue of writ of *mandamus* forbearing the said Corporation from taking any action in the matter of the right of retrieval of carbonaceous material flowing out from B and C drain belonging to them in pursuance of the letter dated 11.2.1992 issued by the Corporation.

2. The petitioner-appellant has been conferred with a right of retrieval of the abovesaid material for a period of one year pursuant to his tender. Consequently, the petitioner has paid a sum of Rs.30,000 as earnest money deposit. No doubt, the petitioner-appellant is the highest bidder, his bid being for Rs.41 lakhs plus taxes. The Corporation accepted the said bid and called upon him by letter dated 12.12.1991 to remit either the full sum or if he desires to pay in monthly instalments, to remit the first monthly instalment and to furnish bank guarantee for the balance. The appellant having opted to pay in instalments, was given the format of the bank guarantee to be furnished as per the tender notice, on 18.12.1991. The appellant was given 15 days' time to furnish bank

guarantee. He wanted an extension of time by 30 days by his letter dated 30.12.1991. The Corporation gave another 15 days' time. But, the appellant sought further time of 60 days. The Corporation, finally by its letter dated 11.2.1992, gave only another extension upto 15.2.1992. In that letter, it is specifically stated that if the appellant fails to do so, the contract would automatically lapse on 15.2.1992 and the abovesaid deposit of Rs.30,000 would also be forfeited. Aggrieved by the said letter, the appellant filed the abovesaid writ petition.

3. The learned Judge disposed of the writ petition at the admission stage as follows:

> "Taking into account the facts and circumstances of this case and in particular the interest of revenue of the confuction (S.C. Corporation) and the petitioner being the highest bidder, I am of the view, as a last chance, the petitioner may be given time till 7.3.1992 to furnish bank guarantee for a sum of Rs.Fortyone lakhs along with other requisite charges. Accordingly, the respondent is directed to grant time till 7.3.1992 to furnish bank guarantee for the amount specified in the tender conditions along with the requisite other charges. If the petitioner furnishes bank guarantee for the requisite amount on or before 7.3.1992, the same shall be accepted by the respondents. The writ petition is disposed of accordingly."

Aggrieved by the said order, the petitioner has preferred this appeal.

4. Since the next higher bid was very much below the bid of the appellant, we were initially inclined to order notice of motion to the Corporation and the Corporation has entered appearance. The Corporation has also filed its counter in the injunction petition from which alone some of the facts narrated above have been extracted.

5. The learned counsel for the appellant submits as follows: The appellant was the highest bidder and the next highest bid was only for Rs.27,50,200 plus taxes. Further, as per clause 14 of the tender, furnishing of bank guarantee would come in only after the first monthly instalment is paid. The appellant is ready to pay the first monthly instalment and requests that this Court should direct the Corporation to give further time of four weeks for furnishing bank guarantee in view of the huge amount involved. Further, the Corporation would only benefit very much if the appellant is allowed to have this remedy since his bid is very much higher than the next higher bid.

6. But, we do not see any merit in the argument of the learned Counsel for the appellant. First of all, we think that the writ petition itself is not maintainable. The relationship between the petitioner and the Corporation is admittedly one based on contract and no writ of *mandamus* could be issued to compel the Corporation to carry out the terms of the contract. In *B.K.Sinha v. State, A.I.R. 1974 Pat 230,* Untwalia, J. has observed as follows:

> "A writ of *mandamus* cannot issue to compel the authorities to remedy a breach of contract *pure and simple.*" (*emphasis supplied*)

Further, in *Radhakrishna Agarwal v. State of Bihar, A.I.R. 1977 S.C. 1496,* the Supreme Court divided the cases involving breaches of alleged obligation by the State arising out of contract or promise by the State, into three categories and held that in one of them a writ would not lie. That category is where the contract entered between the State and the person aggrieved *is not statutory and purely contractual* and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State. In *Har Shanker v. Dy. Excise and Taxation Commissioner, A.I.R. 1975 S.C. 1121 & 1126,* also the Supreme Court observed thus:

> "The writ jurisdiction of High Courts under Art.226 of the Constitution is not intended to facilitate avoidance of *obligations voluntarily incurred.*" (*emphasis supplied*)

Again in *Divisional Forest Officer v. Bishwanath Tea Company Ltd., A.I.R. 1981 S.C. 1368,* the petitioner tried to enforce through writ petition the right to remove timber under the contract. Dismissing the action, the Supreme Court observed thus:

> "A right to relief flowing from a contract has to be claimed in a civil court, where a suit for specific performance of contract or for damages could be filed."

These rulings squarely apply to the present case.

7. That apart, the interpretation which the learned counsel for the appellant wants to put on clause 14 of the contract cannot be accepted. Clause 14 runs as follows:

> "The bid amount along with sales tax should be paid in one lump sum by D.D. payable at Neyveli in favour of Neyveli Lignite Corporation Limited or by instalments at the

discretion of the Management. In the case of payment by instalments the bidder should produce Bank Guarantee to cover *the balance amount of bid value after remitting the first instalment* after N.L.C. exercise their discretion and agree for payment in instalments." (*emphasis supplied*)

No doubt, the Corporation has in its discretion permitted the petitioner to pay in instalments. But, in such a case, the highest bidder should necessarily produce the bank guarantee for 11/12th of the bid amount on paying the first monthly instalment, that is 1/12th of the total bid amount. The term "the balance amount of bid value after remitting the first instalment" would only mean the above said 11/12th of the bid amount and not that the first instalment must be paid initially and thereafter bank guarantee should be given.

8. It is also settled law that no one can ask for *mandamus* without a clear legal right. But, in the present case, all that the appellant has pleading again and again is for further extension of time for furnishing bank guarantee stipulated under the contract. This is only seeking indulgence from the Corporation. In such circumstances, there is absolutely no scope for grant of any writ of *mandamus.*

9. Further, from the counter affidavit of the Corporation in the aforesaid injunction petition (C.M.P.No.3055 of 1992) we find the following averments:

"The gap between the offer made by the appellant and the second bidder is rather big, yet the Corporation was driven to the next bid, in view of the default committed by the Appellant. The second offer was confirmed on 21.2.1992, granting them 15 days time to furnish the bank guarantee. The said party has sent its monthly instalments amount by Demand Draft and these amounts are lying with the Corporation. Before processing this bid, the Respondent Corporation received a communication by an order from the High Court, Madras, dated 26.2.1992, stating that the Appellant has been given time till 7.3.1992 for giving bank guarantee."

Further, it is also averred in the said counter affidavit as follows:

"Further, the earlier contract ended on 5.12.1991 and the materials were accumulating and could not be disposed effectively. Further, it is being removed on an *ad hoc* basis, causing grave loss to the respondent Corporation. By reason of this delay, the Corporation is losing more than Rs.2,00,000 a month. In view of this revenue loss, any further extension would affect the respondent Corporation very gravely and, therefore, the appellant's request for extension of time could not be acceded to."

10. For all these reasons, the writ appeal is dismissed with costs. Counsel fee Rs.1,000.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *K.S.Bakthavatsalam, J.*

W.P.No.10546 of 1990 *21st February, 1992.*

The Management of T.V.S., Suzuki Limited, Harita Hosur represented by its President ...*Petitioner*

v.

State of Tamil Nadu represented by the Secretary, Department of Labour and Employment, and others ...*Respondents.*

Industrial Disputes Act (XIV of 1947), Sec.10 - Reference under - Duty of Government - Settlement under Act if can bind union not a party to it.

The third respondent T.V.S.Suzuki Thozhilalar Munnetra Sangam raised demands on two items *i.e.*, supply of two uniforms and payment of washing allowance. The Government referred the demands and also the question of bonus for 1987-88 under Sec.10 of the Industrial Disputes Act. The petitioner management filed a writ petition contending that the Government had no jurisdiction to refer the question of bonus as the 3rd respondent did not raise the question of bonus in their charter of demands and that with regard to the other two items, they were covered by a valid settlement entered into between the Management and the minority union.

Held:- It is well-settled that when an industrial dispute is raised what is the power of the Government under Sec.10(1) of the Act has been

succinctly put in *Shaw Wallace Company v. State of Tamil Nadu represented by Commissioner and Secretary, Labour Department and others, (1987)1 L.L.J. 177.* If the principles laid down by the Division Bench of this Court are applied to the facts of this case, the Government cannot deny reference of the matter for adjudication under Sec.10(1) of the Act. The Division Bench has held that the Government would normally refer the dispute for adjudication and can refuse reference only on certain grounds. Though the ground stated by the Division Bench cannot be said to be exhaustive, on the facts of this case, the Government cannot refuse to refer the dispute. There is no subsisting settlement between the 3rd respondent-union and the petitioner. It is true that there is settlement with another union. But that will not bind the 3rd respondent-union on the facts and circumstances of this case. *[Para 6]*

Cases referred to:

Shaw Wallace Company v. State of Tamil Nadu represented by Commissioner and Secretary, Labour Department and others, (1987)1 L.L.J. 177; Management of Binny Ltd. (B. and C. Mills) v. The Government of Tamil Nadu, (1989)1 L.L.J. 180.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the 1st respondent relating to G.O.Ms.No.2158, dated 14.12.1980 and quash the same.

A.R.Ramanathan, for Petitioner.

P.Gunaraj, Additional Government Pleader, for Respondent No.1.

A.S.Shanmughasundaram, for Respondent No.3.

The Court made the following

ORDER:- The short question that has to be considered in this case is whether a reference under Sec.10 of the Industrial Disputes Act by the Government is valid, when the charter of demand is raised by a minority Union, according to the petitioner-management.

2. Mr.A.R.Ramanathan, learned counsel for the petitioner-Management took me to the various settlements entered into between the recognised Union INTUC. on 12.2.1988 and 12.5.1989 with regard to certain items on which demands were raised by the 3rd respondent-Union. The dispute in this case is with regard to the bonus for 1987-1988, supply of two uniforms and payment of washing allowance. According to the learned counsel Mr.A.R.Ramanathan, the 3rd respondent Union did not raise the question of bonus in that charter of demand and as such the Government has no jurisdiction to refer the dispute under Sec.10 of the Act. With regard to the other two items, the learned counsel contends that they are covered by valid settlement made under Sec.18(1) of the Act entered into between the Union INTUC., which according to him is the majority Union in the petitioner-management. Learned counsel states that the Government has not applied its mind and there is no interim dispute existing and the Government has no jurisdiction to refer the dispute at all under Sec.10 of the Act.

3. Learned counsel for the 3rd respondent Union states that these are matters to be decided by the industrial tribunal and when once reference is made under Sec.10, the petitioner can very well agitate all these points before the tribunal and this Court under Art.226 of the Constitution of India need not enter into the merits of the case, especially when it is necessary to examine the factual position. According to the learned counsel for the 3rd respondent what all accepted was only *ex gratia* payment and not bonus and as such, it cannot be said that bonus was not raised as one of the demands. With regard to other items which have been referred, the learned counsel for the 3rd respondent states that the 3rd respondent-union was not a party to it and so, it is not binding on them.

4. Though no counter affidavit is filed, learned Additional Government Pleader, on instructions, states that the settlement effected between the petitioner and the T.V.S.Suzuki Employees Union was under Sec.18(1) of the Act and the same will be binding on the 3rd respondent. It is stated by the learned Additional Government Pleader that the 3rd respondent raised Industrial Dispute containing various demands, as contemplated under Sec.2(k) of the Industrial Disputes Act. Though various demands are raised, the Government thought fit to refer only three issues only *viz.,* payment of bonus for the year 1987-88 supply of two uniforms and payment of washing allowance. According to the Additional Government Pleader, the terms of settlement under Sec.18(1) of the Industrial Disputes Act will bind the parties who are signatories and will not bind those who have not signed the settlement.

5. With regard to the contention raised by Mr.A.R.Ramanathan, learned counsel for the petitioner that there was no demand for bonus, the learned Additional Government Pleader stated that the Union demanded 30% bonus and the management's reply was that they could not pay any bonus due to loss sustained. It is stated by the Additional Government Pleader that the issue raised is different from the one covered by the settlement and there is every justification in referring the dispute to arbitration under Sec.10 of the Act. It is also stated by the learned Additional Government Pleader that though there may be a settlement on the issue relating to *ex gratia* payment it cannot be termed as bonus, as bonus is entirely a different one from *ex gratia* payment. It is also stated by the Additional Government Pleader that there is no bar or ban on a Union, which is not a party to a settlement for raising a dispute on the issues covered by a settlement.

6. Considering the contentions raised by the learned counsel for the petitioner the 3rd respondent and the learned Additional Government Advocate, I am of the view that there are no merits in this writ petition. It is well settled that when an Industrial Dispute is raised what is the power of the Government under Sec.10(1) of the Act has been succinctly put in *Shaw Wallace Company v. State of Tamil Nadu represented by Commissioner and Secretary, Labour Department and others, (1987)1 L.L.J. 177.* If the principles laid down by the Division Bench of this Court are applied to the facts of this case, I do not think, the Government can deny reference of the matter for adjudication under Sec.10(1) of the Act. The Division Bench has held that the Government would normally refer the dispute for adjudication and can refuse reference only on certain grounds. Though the grounds stated by the Division Bench cannot be said to be exhaustive, I am of the view that on the facts of this case, the Government cannot refuse to refer the dispute. Mr.A.R.Ramanathan, learned counsel referred me to a judgment of the Division Bench of this court reported in *Management of Binny Ltd. (B. and C. Mills) v. The Government of Tamil Nadu and others, (1989)1 L.L.J. 180,* for the proposition that a settlement under the Act will bind the parties and no reference can be made under Sec.10 of the Act. I do not think that the Division Bench has decided the proposition as to what will be the provision when another union marks a demand when the settlement was entered into with a particular Union. What was decided by the Division Bench is if there is subsisting settlement under Secs.18 and 19 on the date of reference, the appropriate Government has no competence to make a reference. I do not think that this is the case here. There is no subsisting settlement between the 3rd respondent-union and the petitioner. It is true that there is settlement with another union. But in my view that will not bind the 3rd respondent-union on the facts and circumstances of this case.

7. The other contention of Mr.A.R.Ramanathan is that some of the members of the 3rd respondent Union have accepted the benefit under the settlement by turning round has raised an Industrial Disputes now. In other words, learned counsel contends that some of the members of the 3rd respondent are estopped from doing so and the Government could have taken note of that and decided that there is no dispute at all to be referred. I do not agree. This is a matter of evidence, before the tribunal which has to see whether the members of the Union accepted the benefit or how many members accepted the benefit and was there any dispute at all after evidence is adduced before it.

8. Though Mr.A.R.Ramanathan tries to produce before me a xerox copy of the accounts to show that some of the members of the 3rd respondent had the benefit, I do not think that this court sitting under Art.226 of the Constitution of India can scrutinise it, as an appellate forum. It is well settled that the order of the Government is and under Sec.10(1) of the Act administrative order and on the facts of this case, I do not think that the order can be assailed on any ground. It is open to the petitioner to raise all the contentions before the tribunal with regard to the validity of the reference also on the ground that no industrial dispute exists. With this observation, this writ petition shall stand dismissed. No costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.Nos.1531 and 2269 of 1991

10th March, 1992.

The Management of Tamil Nadu Mercantile Bank Ltd. represented by its Chairman, Tuticorin and another ...*Petitioners*

v.

T.Venkatesan ...*Respondent.*

(A) Industrial Disputes Act (XIV of 1947), Schedule V, Item 7 - Employee transferred - Transfer alleged by employee to be mala fide *act of victimisation and punishment - Industrial dispute raised - Employee if can maintain a suit in the civil court for declaration that transfer was* mala fide, *illegal and unjust and for consequential injunction.*

Held:- A perusal of the plaint shows that the only ground on which the order of transfer is challenged is that it is a *mala fide* act of victimisation and punishment. It is not the case of the plaintiff that there is any violation of the terms of the contract of service. It is not in dispute that the order of appointment under which the respondent entered in service with the petitioners contained a specific clause providing that the respondent was liable to be transferred to any section/ department/branch of the establishment. It is not the case of the respondent that the said clause is in violation of any provision in the Contract Act or any other statute. This is not a case in which the respondent is seeking to enforce the contract between him and the petitioners; nor is it a case based on breach of contract. No doubt, there is a passing reference in paragraph 12 of the plaint that the order of transfer is also contrary to the transfer policy *i.e.*, a staff will not be transferred from one place to another before completion of three years. There is no averment in the plaint that the so-called transfer policy forms part of contract between the plaintiff and the defendants. No such contention has been urged before the court. On the other hand, the circular dated 4.7.1988 issued by the first defendant and produced as document No.1 along with the plaint from which the so-called transfer policy is sought to be inferred is only to the effect that only those members who have completed total service of three years and above in the same branch are eligible to apply for transfer. The circular has nothing to do with a transfer by the management of its own on administrative grounds or for other reasons. It is, thus, evident that the plaint is only on the footing that the order of transfer is a *mala fide* act of victimisation and, therefore, not sustainable. The law that prevailed before the advent of the Industrial Disputes Act did not recognise any right in an employee to question an order of the employer falling strictly within the terms of the contract on the ground that it was a *mala fide* act of victimisation. It is only under the provisions of the Act such right is created by the legislature enabling the workers to challenge orders of transfer made by the management. Before the Industrial Disputes Act, was passed, there was no fetter on the powers of the employer to transfer an employee when the terms of contract of employment expressly provided therefor. In fact, contracts of service were governed by the provisions of the Contract Act and the Specific Relief Act. It is too well-settled that a contract of personal service cannot ordinarily be specifically enforced and there were only three well-recognized exceptions to the rule; *viz.*, (i) where a public servant is sought to be removed from service in contravention of the provisions of Art.311 of the Constitution of India, (ii) where a worker is sought to be reinstated on being dismissed under the industrial law, and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute. The respondent having initiated proceedings under the Act, is not entitled to maintain the suit in the civil court even if his case is governed by principle No.2 formulated by the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadake, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427.*

r[Paras 11, 12, 13 and 21]

(B) Civil Procedure Code (V of 1908), Secs.151 and 115 - Order under Secs.151 and 115 - Not appealable - Revision lies.

There is no doubt whatever that the trial court has no jurisdiction to entertain the suit. Nor is there any doubt that C.R.P.No.1531 of 1991 as against the order in I.A.No.22349 of 1990 is maintainable in this Court as the order in the said I.A. is not an appealable one. It is not an order under O.39, Code of Civil Procedure, but one under Sec.151 of the Code of Civil Procedure. *[Para 28]*

Cases referred to:
T.Rajaiah v. Southern Roadways Ltd., (1991)1 L.L.N. 453; Kerala Rubber and Reclaims, Ltd. v. P.A.Sunny, (1989)1 L.L.N. 676; Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadake, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427; Dhulabhai v. State of Madhya Pradesh, A.I.R. 1969 S.C. 78; B.V.Rao v. Chittivalasa Jute Mills, (1990)1 L.L.J. 513; Vaish Degree College v. Lakshmi Narain, A.I.R. 1976 S.C. 888; Grindlays Bank Employees' Union v. J.Kannan, (1978)1 L.L.J. 453; Sitaram Kashiram Konda v. Pigment Cakes and Chemicals Manufacturing Company, (1979)2 L.L.J. 444; Bharat Singh v. Management of New Delhi Tuberculosis Centre, A.I.R. 1986 S.C. 842; Central Cooperative Bank Ltd. v. M.Parthasarathi, (1988)2 L.L.N. 107; Dr.S.B.Dutt v. University of Delhi, A.I.R. 1958 S.C. 1950: 1959 S.C.R. 1246; S.R.Tiwari v. District Board, Agra, (1964)1 L.L.J. 1: A.I.R. 1964 S.C. 1680: 3 S.C.R. 55; Indian Airlines Corporation v. Sukhdeo Raj, (1971)1 L.L.J. 496: (1971)41 F.J.R. 261; (1971) S.C.R. (Supp.) 510; Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1975)2 L.L.J. 445: (1975)48 F.J.R. 252: (1976)1 S.C.R. 427; Kerala Rubber and Reclaims, Ltd. v. P.A.Sunny, (1988)73 F.J.R. 507; Y.Mookan, Major v. Branch Manager, Southern Roadways Ltd., (1991)1 L.L.J. 533; Jitendra Nath Biswas v. M/s.Empire of India and Ceylon Tea Company, (1983)3 S.C.C. 582; Kumari Estate Workers' Union v. Modaile Easwari Estate, Ponmanai, (1971)2 L.L.J. 500; S.Sundaram Pillai v. P.Govindasami, A.I.R. 1985 Mad. 199; Indian Oxygen Ltd. v. Ganga Prasad, (1990)1 L.L.N. 115; Southern Roadways Ltd. v. G.Palanikumar, (1990)1 L.L.N. 119.

Sanjay Mohan for *M/s.Ramasubramaniam & Associates* for Petitioners.

N.G.R.Prasad for *Mr.S.Ayyathurai,* for Respondent.

The Court made the following

ORDER:- The question to be considered in these revision petitions is whether the City Civil Court, Madras, has got jurisdiction to entertain the suit filed by the respondent herein. The relevant facts are as follows:

The respondent joined the service of first petitioner bank as a clerical apprentice in August, 1984 and he was appointed as a clerk in 1985 with effect from 22.1.1985. He was confirmed in service in February, 1986. He was working in Calcutta and transferred to Madras in July, 1989. By order dated 12.11.1990 he was transferred to Pannaipuram branch of the first petitioner. The Tamil Nadu Mercantile Bank Employees' Union raised an industrial dispute questioning the validity of the transfer. While the matter was pending before the Conciliation Authority, the respondent filed the suit O.S.No.9867 of 1990 on 29.11.1990 in the City Civil Court, Madras for a declaration that the order of transfer dated 12.11.1990 is *male fide*, illegal and unjust and for consequential permanent injunction restraining the petitioners from transferring him from Madras to Pannaipuram. He also prayed for a permanent injunction directing the petitioners to allow him to continue at Madras. In the plaint, he alleged that he was the Vice-President of the Tamil Nadu Mercantile Bank Employees' Union and the Management was infuriated by the protest demonstrations organised by the Union. He referred to the show cause notice issued to him on 25.10.1990 for having organised protest demonstrations and his reply dated 3.11.1990. He stated in paragraph 8 of the plaint as follows:

> "...In the second week of November, 1990 the plaintiff came to know that he was going to be transferred. Since the plaintiff had some organisational work in the Union regarding the grievances of members and had to discuss with the leaders of his affiliating Union, *i.e.*, B.D.F.I., he went on leave. On the advice of affiliating Union Leaders, his union raised a dispute before the Regional Labour Commissioner (Central), Madras, on the harassment and victimisation of the employees of his union by the management on 20.11.1990."

He proceeded to state that after the expiry of the leave, when he reported for work, the impugned order of transfer was served on him. He stated, "the plaintiff submits that the order of transfer of the plaintiff by the defendant bank is nothing but a clear act of victimisation and punishment for being active in the Union. The plaintiff submits that he has been victimised by the management by way of transfer for being an office-bearer of the union and taking active part in his union activities." He alleged that the action of the petitioners is *mala fide* and contrary to the transfer policy that a staff will not be transferred from one place to another before completion of three years. According to him, the transfer is a punishment transfer. On those averments, he prayed for the

reliefs set out already. Along with the plaint, he filed eight documents. Document No.5 is a copy of the letter from his Union to the Regional Labour Commissioner dated 20.11.1990 and document No.8 is a letter from his Union to the second defendant dated 27.11.1990.

2. He filed I.A.No.22348 of 1990 for an interim injunction restraining the defendants from implementing the order of transfer dated 12.11.1990 and I.A.No.22349 of 1990 for an interim direction directing the second defendant to permit the respondent to work in his office pending disposal of the suit.

3. After service of summons and notice, the petitioners filed written statement in the suit and counter affidavit in the applications. They contested the maintainability of the suit in the civil court and contended that in view of the provisions of the Industrial Disputes Act, the civil court had no jurisdiction to entertain the suit. In paragraph 5 of the written statement, the following plea is raised:

> "5. This defendant submits that in fact the Tamil Nadu Mercantile Bank Employees' Union of which the plaintiff is Vice-President has already raised an industrial dispute challenging his transfer before the Regional Commissioner of Labour (Central), Madras and the said industrial dispute is still pending before the said Conciliation Authority for consideration. The plaintiff having taken his grievance before the appropriate forum has been estopped from approaching this Hon'ble Court by way of a civil suit. Regarding para 8 of the plaint and document No.5 to 8 filed along with, it would clearly establish that the plaintiff's union has taken up the dispute before the Regional Commissioner of Labour (Central) at Madras.".

The petitioners also denied the allegations of *mala fide*.

4. The 17th Assistant Judge, City Civil Court, Madras, who heard the applications, held that the civil court had jurisdiction to decide the dispute in the suit as it would not be governed by Sec.25-T and item 7 of Schedule V of the Industrial Disputes Act. He also held that the order of transfer was vitiated by *mala fides*. On those findings he granted the prayers in both the petitions. Against the order in I.A.No.22348 of 1990, C.R.P.No.2269 of 1991 has been filed. Against the order in I.A.No.22349 of 1990, C.R.P.No.1531 of 1991 is filed.

5. Arguments were advanced in common to both the revisions, as the question involved in them is the same. According to learned counsel for the petitioners, the dispute raised in the suit in one falling squarely within the provisions of the Industrial Disputes Act. It is submitted that though the plaintiff has not chosen to refer specifically to the relevant provisions of the Act, a perusal of the plaint disclosed that the complaint of the plaintiff is that the order of transfer tantamounts to unfair labour practice as defined by Sec.2(ra) read with item 7 of the Fifth Schedule to the Act and prohibited by Sec.25-T of the Act. Learned counsel submits that the jurisdiction of the civil court is taken away by the provisions of the said Act and the said position has been recognised in the judgments of the Supreme Court and the High Courts including this Court. *Per contra*, learned counsel for the respondent submits that the right agitated by the plaintiff in the suit is a common law right which was in existence even prior to the passing of the said Act and a suit to enforce the same is maintainable in a civil court as laid down by the Supreme Court. According to him, there is no error in the view taken by the Court below, either in law or on facts, and the revision petitions deserve a dismissal.

6. The question that arises for consideration is not *res integra*. Recently it had been considered in detail by S.T.Ramalingam, J. in *T.Rajaiah v. Southern Roadways Ltd., (1991)1 L.L.N. 453*. The facts are almost similar and there also suits were instituted by workers challenging the orders of transfer. The learned Judge has held that civil court has no jurisdiction to entertain such suits. He agreed with the view taken by Malimath, C.J. in *Kerala Rubber and Reclaims, Ltd. v. P.A.Sunny, (1989)1 L.L.N. 676*, and held that the question of transfer would fall directly under item 7 of Fifth Schedule to the Industrial Disputes Act and the remedy of the aggrieved worker is only to approach the forum created under the Act. In that case also, there was initiation of proceedings under the Act for reference of the dispute to the Tribunal. The learned Judge held that the plaintiffs in that case having elected to initiate a proceeding under the Act, were not entitled to invoke the jurisdiction of the civil court.

7. Arguments have been advanced at length by

learned counsel for the plaintiff that the view taken by S.T.Ramalingam, J. is erroneous and the right of a worker to question an order of transfer is a common law right and not one created by the Industrial Disputes Act. According to learned counsel, the judgment of the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427,* has not been properly understood.

8. The question of exclusion of jurisdiction of civil courts by special enactments has been the subject of discussion in innumerable cases. In view of the importance of the question and the frequent recurrence of the same, the Apex Court discussed the matter in detail in *Dhulabhai v. State of Madhya Pradesh, A.I.R. 1969 S.C. 78,* by a Bench of five Judges. The result was summarised and reduced to seven principles. It is not necessary for this case to repeat them here. Suffice it to refer to principles 1, 2 and 7, which read thus:

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."
>
> (2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether the remedies normally associated with actions in civil courts are prescribed by the said statute or not."
>
> "(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

9. The question arose with particular reference to the Industrial Disputes Act in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427.* A Bench of three Judges summed up the principles as follows:

> "(1) If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act the remedy lies only in the civil court.
>
> (2) If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in particular remedy.
>
> (3) If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.
>
> (4) If the right which is sought to be enforced is a right created under the Act such as Chapter V-A then the remedy for its enforcement is either Sec.33-C or the raising of an industrial dispute, as the case may be."

10. It is the contention of the petitioners that the present case will fall under principles (3) and (4). The respondent urges that this case is governed by the second principle. An argument is advanced by learned counsel for the petitioners that the second principle should be understood in the light of what is stated in the next paragraph in the same judgment and even if the present case is governed thereby, the suit is not maintainable in the civil court. It is also added that in any event, the respondent having elected to pursue the remedy under the Act is not entitled to approach the civil court for the reliefs of declaration and injunction. Learned counsel for the respondent submits that the contention of the petitioners' counsel is based on a wrong understanding of the said judgment and the correct interpretation is found in the judgment of the Andhra Pradesh High Court in *B.V.Rao v. Chittivalasa Jute Mills, (1990)1 L.L.J. 513.* I do not think it necessary for the purpose of this case to decide that controversy in the view I propose to take in this matter.

11. I am of the view that the present case does not

fall under the second principle enunciated by the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427.* This is clearly one governed by principles (3) and (4). I do not agree with learned counsel for the respondent that the right sought to be enforced in the suit is a common law right which existed even prior to the passing of the Industrial Disputes Act. A perusal of the plaint shows that the only ground on which the order of transfer is challenged is that it is a *mala fide* act of victimisation and punishment. It is not the case of the plaintiff that there is any violation of the terms of the contract of service. It is not in dispute that the order of appointment under which the respondent entered in service with the petitioners contained a specific clause reading thus:

"You may be transferred to any section/ department/branch of our establishment."

It is not the case of the respondent that the said clause is in violation of any provision in the Contract Act or any other statute. This is not a case in which the respondent is seeking to enforce the contract between him and the petitioners; nor is it a case based on a breach of contract. No doubt, there is a passing reference in paragraph 12 of the plaint that the order of transfer is also contrary to the transfer policy *i.e.*, a staff will not be transferred from one place to another before completion of three years. There is no averment in the plaint that the so-called transfer policy forms part of the contract between the plaintiff and the defendants. No such contention has been urged before me. On the other hand, the circular dated 4.7.1988 issued by the first defendant and produced as document No.1 along with the plaint from which the so-called transfer policy is sought to be inferred is only to the effect that only those staff members who have completed total service of three years and above in the same branch are eligible to apply for transfer. The circular has nothing to do with a transfer by the management of its own on administrative grounds or for other reasons. The court below has also observed that the said circular cannot be treated as a term of the contract of service; but strangely proceeded to hold that because it is not a term of the contract, the order of transfer will not fall under Sec.25-T or item (7) of the Fifth Schedule of the Industrial Disputes Act. The reasoning of the court below on that aspect of the matter is wholly unsustainable.

12. It is, thus, evident that the plaint is only on the footing that the order of transfer is a *mala fide* act of victimisation and, therefore, not sustainable. The law that prevailed before the advent of the Industrial Disputes Act which is described as the common law by learned counsel for the respondent did not recognise any right in an employee to question an order of the employer falling strictly within the terms of the contract on the ground that it was a *mala fide* act of victimisation. It is only under the provisions of the Act such a right is created, if I may say so, by the Legislature enabling the workers to challenge orders of transfer made by the management.

13. Before the Industrial Disputes Act, was passed, there was no fetter on the power of the employer to transfer an employee when the terms of contract of employment expressly provided therefor. In fact, contracts of service were governed by the provisions of the Contract Act and the Specific Relief Act. It is too well-settled that a contract of personal service cannot ordinarily be specifically enforced and there are only three well-recognized exceptions to the rule; *viz.*, (i) where a public servant is sought to be removed from service in contravention of the provisions of Art.311 of the Constitution of India, (ii) where a worker is sought to be reinstated on being dismissed, under the industrial law, and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute. (See *Vaish Degree College v. Lakshmi Narain, A.I.R. 1976 S.C. 888.* Learned counsel for the respondent had submitted that the scope of the exceptions to the rule has been widened and the act of the employer can be questioned on the ground of *mala fides* by the employee under the general law too, without any reference to the Industrial law. In support of the said contention, he has placed reliance on the following rulings:

(1) *Grindlays Bank Employees' Union v. J.Kannan, (1978)1 L.L.J. 453;* (2) *Sitaram Kashiram Konda v. Pigment Cakes and Chemicals Manufacturing Company, (1979)2 L.L.J. 444;* (3) *Bharat Singh v. Management of New Delhi Tuberculosis Centre, A.I.R. 1986 S.C. 842;* (4) *Central Cooperative Bank Ltd. v. M.Parthasarathi, (1988)2 L.L.N. 107;* (5) *B.V.Rao v. Chittavalasa Jute Mills and another, (1990)1 L.L.J. 513.*

14. The first of the above cases related to the

seniority of the employees. The suit was based on an agreement between the National and Grindlays Bank Limitd and National and Grindlays Bank Employees Union at the time of merger of the Lloyds Bank with the National and Grindlays Bank. The suit was for enforcement of the terms of the agreement relating to the seniority of the employees. N.S.Ramaswamy, J. rejected the contention that the jurisdiction of the civil court was ousted by the Industrial Disputes Act on the ground that the right sought to be enforced in the suit was not one created under the Act and it was one arising under the general law or common law. That ruling will have no bearing on the present case.

15. In the second case referred to above, the plaintiff claimed a declaration that removal from service was illegal and prayed for reinstatement or in the alternative for compensation. The Supreme Court held that though the suit was not maintainable with reference to the main reliefs prayed for by the plaintiff, it was sustainable in so far as it related to payment of compensation. It is worthwhile extracting the following passage from the judgment:

> "The correct position of law is that the main reliefs asked for by him which when granted will amount to specific performance of the contract of service and, therefore, they cannot be granted. There are a number of decisions of this Court to that effect; to wit (1) *Dr.S.B.Dutt v. University of Delhi, A.I.R. 1958 S.C. 1950: 1959 S.C.R. 1236*, (2) *S.R.Tiwari v. District Board, Agra, (1964)1 L.L.J. 1: A.I.R. 1964 S.C. 1680: (1964)3 S.C.R. 55* and (3) *Indian Airlines Corporation v. Sukhdeo Raj, (1971)1 L.L.J. 496: (1971)41 F.J.R. 261; (1971) S.C.R. (Supp.) 510.* Reference may also be made in this connection to the decision of this Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1975)2 L.L.J. 445: (1975)48 F.J.R. 252: (1976)1 S.C.R. 427.*
>
> 4. But then in the alternative, the appellant had also prayed for awarding compensation to him. And reading the plaint as a whole, it can legitimately be culled out that he had made out a case, whether it was right on fact or not, that is a different question, that he was wrongfully dismissed from service. This relief could be granted by the civil court if it found that the plaintiff's case was true. The High Court, in our opinion, is not right in saying that no such case had at all been made out in the plaint. In our opinion, as we have earlier said, reading the plaint at a whole, such case can be spelt out. That being so, to this limited extent, the matter could be examined by the civil court."

That judgment does not help the respondent in the present case.

16. The third case cited is also a ruling of the Apex Court, but it is one relating to the interpretation of Sec.17-B of the Industrial Disputes Act. The view taken by the High Court that the section would apply only to cases where the awards were passed after the commencement of the said section, was reversed and it was held that the section was only a recognition of a pre-existing right. Reliance is placed on the following passage in the judgment by learned counsel for the respondent:

> "That is not the case with Sec.17-B. Here it is not the conferment of a new jurisdiction but the codification in statutory form of a right available to the workmen to get back wages when certain given conditions are satisfied. There are no words in the section to compel the court to hold that it cannot operate retrospectively. Before Sec.17-B was introduced there was no bar for courts for awarding wages. Of course the workmen had no right to claim it. This section recognises such a right. To construe it in a manner detrimental to workmen would be to defeat its object."

Learned counsel wants to draw an analogy and submits that the provisions of Sec.25-T and item (7) of Fifth Schedule of the Industrial Disputes Act are only in recognition of right which was already inherent in the worker. I do not agree. A right to challenge an order of transfer on the ground of *mala fides* or victimisation cannot be equated with the right to get wages during the pendency of a proceeding in a High Court or the Supreme Court by an employer against the award passed by a Labour Court, Tribunal or National Tribunal directing reinstatement of workman. The effect of Sec.17-B of the Industrial Disputes Act is that though the reinstatement may be stayed by the higher court, the worker shall not be deprived of his wages, as it would cause undue hardship to him. There can be no comparison between the provisions of Sec.17-B and Sec.25-T of the Act. That ruling does not have any relevance in the present case.

17. The next case cited was decided by me. The question was whether the suit challenging an order of suspension passed by the Special Officer of the Central Co-operative Bank was not maintainable. The contention was that it was a suit to enforce specific performance of a contract of service and that the order of suspension was made pursuant on the direction of the Registrar of Co-operative Societies and the suit was barred by the provisions of the Co-operative Societies Act. I held that the facts of the case provided special circumstances which enabled the court to grant the specific relief prayed for by the plaintiff in enforcement of the contract of service. That judgment has no application to the facts of the present case, as I have already pointed out that the respondent is not seeking to enforce any term of the contract in the present suit.

18. The last of the cases referred to by learned counsel is the judgment of a Division Bench of the Andhra Pradesh High Court referred to earlier by me in this judgment. The Bench had to dispose of two writ appeals and one Letters Patent Appeal arising out of the same dispute. The Letters Patent Appeal was from a suit for reinstatement in service with antecedent benefits or, in the alternative, for damages/compensation for wrongful termination. The trial court granted a decree only for damages, negativing the other prayers. Thereafter, the employee raised an industrial dispute, which was the subject matter of reference before the Labour Court. The Labour Court passed an award declaring that the dismissal of the employee was wrongful and he was entitled to reinstatement in service; but in view of the decree passed by the civil court, he was not entitled to backwages or other monetary benefits from the date of termination till the date of reinstatement. The award was challenged by both parties in the writ petitions. There was also an appeal by the employer against the decree for damages in the suit. The writ petitions and the appeal were disposed of together by a single Judge, who held that the employee having elected to approach the civil court, was estopped from invoking the remedies under the Act. The writ petition filed by the employee was dismissed and the other writ petition was allowed. The decree passed in the civil suit was also modified with regard to the quantum of damages. It was that decision which was challenged before the Division Bench. The Bench upheld the finding that the dismissal of the workman was wrongful and held that the employee having elected to institute a suit in a civil court and obtained a decree for the alternative relief claimed by him, was precluded from pursuing his remedies under the Act; but rejected the contention that inasmuch as the civil court had no power to grant reinstatement, the remedy under the Act was open in so far as the relief of reinstatement was concerned. However, the employee filed an affidavit seeking permission to withdraw the suit and that permission was granted by the Bench. Yet, when the writ appeals were disposed of, the employer prayed for awarding only compensation to the employee instead of directing reinstatement and the Bench accepted the suggestion. Ultimately, the court passed an order granting only compensation to the employee in lieu of reinstatement.

19. Though the judgment of the Bench is relied on by the learned counsel for the respondent for the purpose of supporting his contention that the judgment of the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427*, should be understood in a particular manner, in so far as principle No.2 is concerned, as stated by me earlier I do not propose to decide that controversy, as it is not necessary for the purpose of this case. However, the judgment of the Bench is against the respondent inasmuch as it holds that an employee, who has elected his remedy by approaching one forum, is estopped from approaching the other forum in cases which are governed by the second principle enunciated by the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N: 1: (1976)1 S.C.R. 427.*

20. In this case it is not in dispute that the Employees' Union of which the plaintiff is the Vice-President, has already initiated proceedings under the Industrial Disputes Act. The copy of the letter written by the Union to the second defendant on 27.11.1990 has been placed before me. The relevant portion of the letter reads thus:

> "With reference to the above, at the outset, we strongly protest the action of the management in venturing to transfer our Vice-President, Shri T.Venkatesan to our Pannaipuram branch, which act of the management is purely an act of victimising the above employee for his legitimate, lawful trade union activities.

We hasten to bring to your attention that an Industrial Dispute, under the provisions of the Industrial Disputes Act, 1947 has been raised by our organisation with the Regional Labour Commissioner (Central) with regard to the above transfer.

The Regional Labour Commissioner (Central) has fixed the meeting for conciliation and the same has been posted on 11.12.1990 at Madras.

As the matter is seized under conciliation and as the conciliation process has been set in motion, in accordance with the provisions of the I.D. Act 1947, both the parties to the conciliation have to maintain *'status quo'* without altering the positions prevailed prior to the conciliation process initiated. Hence we hope that the management would not venture to precipitate the matter till the conciliation proceedings are over and request you to maintain *'status quo'*."

21. The respondent having initiated proceedings under the Act, is not entitled to maintain the suit in the civil court even if his case is governed by principle No.2 formulated by the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427.* Unfortunately, the court below has stated that the defendants had in the written statement admitted that the proceedings under the Act had come to an end and they were not pending. I am unable to find any such admission in the written statement. On the other hand, the relevant averments are made in paragraph 5 of the written statement, already extracted in this judgment. In any event, I am not resting my conclusion in this case on that aspect of the matter. I am of the view that the case falls under principles (3) and (4) formulated by the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427.*

22. In *Kerala Rubber and Reclaims, Ltd. v. P.A.Sunny, (1988)73 F.J.R. 507,* Malimath, C.J. has discussed the question in detail. In the case before him, the workman challenged an order of transfer on the ground that it was *mala fide* and the result of victimisation and unfair labour practice. After setting out the principles enunciated in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427,* the learned Judge observed:

"So far as the frame of the suit is concerned, the order of transfer is challenged on the ground that the transfer of the respondent by the petitioners is *mala fide* and the result of victimisation and unfair labour practice and is, therefore, illegal and unjust. It is not pleaded that the respondent is claiming any right recognised by the common law as such. Learned counsel for the respondent was also not in a position to point out if the right claimed is recognised as a common law right. Common law does not recognise any limitation on the power of the master to transfer his employees on grounds of *mala fides,* victimisation or unfair labour practice....But, after the Industrial Disputes Act was enacted, new rights and liabilities have been created restricting the unfettered common law rights of the master in dealing with the workmen in this behalf."

The learned Judge proceeded to consider whether the Act created a right to challenge an order of transfer and whether machinery is provided for enforcing the said right under the Act. The questions were answered in the affirmative by the learned Judge and ultimately he held that the civil court had no jurisdiction to entertain the suit. I agree with the reasoning of the learned Judge.

23. In *Y.Mookan, Major v. Branch Manager, Southern Roadways Ltd., (1991)1 L.L.J. 533,* Hiremath, J. of the Karnataka High Court accepted and applied the ruling of the Kerala High Court in *Kerala Rubber and Reclaims, Ltd. v. P.A.Sunny, (1988)73 F.J.R. 507,* and held that the suit filed by the appellant before him questioning an order of transfer made by the employers was not maintainable in the civil court, as the court had no jurisdiction to deal with the same.

24. In *Jitendra Nath Biswas v. M/s.Empire of India and Ceylon Tea Company, (1983)3 S.C.C. 582,* the question was whether a suit filed by a dismissed employee challenging the validity of the order of dismissal was maintainable in view of the provisions of Sec.14(1)(b) of the Special Relief Act. The Court held that the suit was not maintainable as there was no dispute that the Industrial Disputes Act was applicable to the case and the Industrial Employment (Standing Orders) Act was also applicable. It was jointed out that the main plea raised by the plaintiff was that the enquiry for misconduct held by the Management was not strictly in accordance with the Standing Orders. It was

argued before the court that unless there was a reference by the Government of the Industrial Dispute to the Labour Court under the provisions of the Act, the jurisdiction of the civil court was not barred. That argument was negatived and it was observed that the Act not only conferred the right on a worker for reinstatement and back-wages if the order of termination or dismissal was not in accordance with the Standing Orders, but also provided a detailed procedure and machinery for getting the said relief. It was held that there was an apparent implied exclusion of the jurisdiction of the civil court. It was said, "it is, therefore, clear that the scheme of the Industrial Disputes Act clearly excludes the jurisdiction of the civil court by implication in respect of remedies which are available under this Act and for which a complete procedure and machinery has been provided in this Act."

25. There can be no doubt whatever that the judgment of S.T.Ramalingam, in *T.Rajaiah v. Southern Roadways Ltd., (1991)1 L.L.N. 453,* is in accord with the well settled principles of law and I have no reason to differ therefrom. I express my full concurrence with the same.

26. A similar ruling was given by S.Ramalingam, J. in *Kumari Estate Workers' Union v. Modaile Easwari Estate, Ponmanai, (1991)2 L.L.J. 500.* In that case, the workers, whose services were terminated, filed a suit seeking injunction restraining the management from interfering with their right of doing work. The suit was dismissed for default. An industrial dispute raised by the workmen regarding their non-employment was referred in the meanwhile for adjudication. Before the Labour Court, the management raised a preliminary objection that the reference was not maintainable as the workers had taken the matter to the civil court in the suit. That objection was upheld by the Labour Court and the workers filed a writ petition. Allowing the writ petition, the learned Judge held that the civil court had no jurisdiction whatever to entertain the dispute and the dismissal of the suit for default would have no effect on the reference validly made. The learned Judge has referred to the judgments of the Supreme Court in *Premier Automobiles, Ltd. v. Kamalakar Shantaram Wadke, (1976)1 L.L.N. 1: (1976)1 S.C.R. 427* and *Jitendra Nath Biswas v. M/s.Empire of India and Ceylon Tea Company, (1989)2 L.L.J. 572.* The ratio will apply to the present case also as a right created by the Act is sought to be enforced here too.

27. I have no hesitation to hold that the suit filed by the respondent in the City Civil Court, Madras, is not maintainable inasmuch as the court has no jurisdiction to entertain the same.

28. Though at the time of the arguments learned counsel for the respondent did not raise any objection to the maintainability of the revision petitions, I put a question to learned counsel for the petitioners as to how he filed these revisions in this Court, when the Code of Civil Procedure has provided an appeal against the order of the court below under O.43, Rule 1(r) thereof. Learned counsel for the petitioners has submitted that the order in I.A.No.22349 of 1990 is one under Sec.151 of the Code of Civil Procedure and not appealable. As regards the other revision petition, it is his contention that when the trial court has no jurisdiction whatever to entertain the suit, it is open to this Court to interfere under Sec.115 of the Code of Civil Procedure with the interlocutory orders passed by the trial court, even if they are appealable. He places reliance on the judgment of this Court in *S.Sundaram Pillai v. P.Govindasami, A.I.R. 1985 Mad. 199, Indian Oxygen Ltd. v. Ganga Prasad, (1990)1 L.L.N. 115* and *Southern Roadways Ltd. v. G.Palanikumar, (1990)1 L.L.N. 119.* There is no doubt whatever that the trial Court has no jurisdiction to entertain the suit. Nor is there any doubt that C.R.P.No.1531 of 1991 as against the order in I.A.No.22349 of 1990 is maintainable in this Court as the order in the said I.A. is not an appealable one. It is not an order under O.39, Code of Civil Procedure, but one under Sec.151 of the Code of Civil Procedure. The question involved in both the revisions being the same, and the judgment of the court below in the two applications being the same, even if an appeal had been preferred by the defendants against the order in I.A.No.22348 of 1990 in the court of the Principle Judge, City Civil Court, Madras, I would have had it transferred to this Court *suo motu* to be heard along with C.R.P.No.1531 of 1991. It is also open to me to exercise my power under Art.227 of the Constitution of India *suo motu* and call for the records in I.A.No.22348 of 1990 and set aside the order made therein when it is found by me that the trial court has no jurisdiction to entertain the suit itself. Having come to the conclusion that the suit is unsustainable for want of jurisdiction in the

court in C.R.P.No.1531 of 1991, which is undisputedly maintainable in this Court, I do not think it necessary to decide whether the other revision petition *viz.*, C.R.P.No.2269 of 1991 is maintainable or not. While taking note of the three rulings referred to above to the effect that this Court can exercise its power under Sec.115 of the Code of Civil Procedure when the trial court suffers from total lack of jurisdiction, I refrain from entering into any discussion and expressing my conclusive opinion on that question, as it is unnecessary in this case. For the purpose of this case, I prefer to accept the three rulings referred to above and hold that C.R.P.No.2269 of 1991 is also maintainable in this Court.

29. In the result, the civil revision petitions are allowed. The orders of the 17th Assistant Judge, City Civil Court, Madras, in I.A.Nos.22348 and 22349 of 1990 are set aside. Both the applications are dismissed. The trial court is directed to dispose of the suit in the light of my finding that the civil court has no jurisdiction to entertain the suit. The respondent is not precluded from availing the remedies under the Industrial Disputes Act, if so advised. The parties are directed to bear their respective costs.

B.S. ------ *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Lakshmanan, J.*

O.P.No.31 of 1992 *24th March, 1992.*

H.M.Mahesh *...Petitioner.*

Civil Procedure Code (V of 1908), Sec.15 - Letters Patent (Madras), Clause 12 - Scope and object of Sec.15 - If section governs High Court exercising Ordinary Original jurisdiction.

Sec.15, C.P.C. lays down that a suit shall be filed in the court of the lowest grade competent to try the same. But this section enacts a rule of procedure and it does not affect the jurisdiction of a court of a higher grade to try the suit entertainable by a court of lower grade. When a suit triable by a court of lower grade is instituted in a court of higher grade, the latter court is not bound to return the plaint. It is only discretionary on the part of such latter court (*i.e.* to say the court of higher grade) either to try the suit itself or return the plaint for presentation in the court of lower grade. Clause 12 of the Letters Patent expressly confers jurisdiction on the Original Side of this Court to try all suits other than suits of a small cause nature of the value of Rs.100 and below. Not only has this jurisdiction not been taken away by subsequent legislation but the course of subsequent legislation has recognised and proceeded on the basis that the jurisdiction of the High Court even in Small Cause suits of the value of over Rs.100 is concurrent with that of the Small Causes Court. Thus it is seen that Sec.15 of the C.P.C. has no application to the High Courts exercising Ordinary Original Jurisdiction when there is conflict between the Original Jurisdiction of this Court and the City Civil Court constituted under the Madras City Civil Courts Act. Hence the question as to whether Sec.15 of the Code of Civil Procedure governs chartered High Court has to be answered in the negative. The Original Jurisdiction of this Court is derived under Clause 12 of the Letter Patent which empowered this Court in the exercise of its Ordinary Original Civil Jurisdiction. *[Paras 4, 5 and 6]*

Cases referred to:

Augustine v. Medlycott, I.L.R. 15 Mad. 241; Ramamirtham v. Rama Film Services, (1951)2 M.L.J. 121: A.I.R. 1951 Mad.93; Bank of Chettinad v. S.P.K.V.R. Firm, A.I.R. 1935 Rang. 517; Drona Vajjula Vidyamba v. Vallabhajosylu Lakshmi Venkayamma, A.I.R. 1958 A.P. 218: (1958)1 An.W.R. 40: 1958 A.L.T. 449; Mohini Mohan Das v. Kunjabhari Das, A.I.R. 1943 Cal. 450; M.Krishnamurthy v. Ramamurthi, 1956 An.W.R. 164: I.L.R. 1956 A.P. 162: A.I.R. 1957 A.P. 654; Venkateswaralu v. S.Satyanarayanan, A.I.R. 1957 A.P. 49: 1956 An.W.R. 117: 1956 An.L.T. 152: I.L.R. 1956 A.P. 262; Bipan Kumar v. Sham Sunder, A.I.R. 1977 H.P. 90; Communidade of Ponchovadi v. Silvia Riberio, A.I.R. 1971 Goa. Daman & Diu. 34; Bhuwaneshwari Kuer v. Raghubansh, A.I.R. 1954 Pat. 34; Ogeti Pedda Ranaganna v. Saieka Bevi, A.I.R. 1970 A.P. 124; A.T.Vasudevan v. A.S.Thiruvengada Mudaliar, A.I.R. 1949 Mad. 260; Union of India v. Ganapath Rai Sagarmull, A.I.R. 1983 Cal. 14; Hindustan Machine Tools Ltd. v.

Union of India, A.I.R. 1985 Mad. 130; Mohomed Yusuf v. Khadir Badsha Sahib, (1949)1 M.L.J. 503; Manindra Chandur v. Lal Mohan, (1929) I.L.R. 56 Cal. 940.

V.Ramachandran, Senior Advocate, for *K.Mani,* for Petitioner.

The Court made the following

ORDER:- The above original petition was filed under Sec.8(2) of the Hindu Minority and Guardianship Act, 1956 to permit the petitioner, father of the minors Miss.Usha Lakshmi and Miss Aruna to offer the vacant lands admeasuring approximately 1-1/2 grounds situate at No.24, Arunachalam Road, Saligramam, Madras, belonging to the minors as collateral security by way of equitable mortgage to Indian Bank, Saligramam Branch, Madras, against the additional working capital limit of Rs.20 lakhs sanctioned by the said Bank and for other consequential orders.

2. On 24.1.1992, the Original Side of this Court placed the entire papers before me for consideration and orders as to numbering the original petition. According to the office note, this Court has no jurisdiction to decide and that petition under Sec.8 of the Hindu Minority and Guardianship Act, 1956 has got to be filed only before the City Civil Court and that this Court need not entertain this petition. The Office has also placed before me the order dated 14.7.1972 made in Diary No.4904 of 1972 passed by Mr.Justice Gokulakrishnan (as he then was), while placing the maintainability note. In this connection, the office has also invited my attention to the earlier Full Bench decision of our High Court taking a contrary view on the applicability of Sec.15 of the Code of Civil Procedure to Chartered High Courts which are governed by Clause 12 of the Letter Patent. That decision is reported in *V.Ramamirtham v. Rama Film Services, (1951)2 M.L.J. 121: A.I.R. 1951 Mad.93.* On perusing the entire paper, I directed the office to post the matter before me for maintainability.

3. Accordingly Mr.V.Ramachandran, learned senior counsel advanced arguments on the question of maintainability and after hearing his arguments I directed the office to number the original petition and post the same for orders, after taking the view that the original petition is maintainable in this Court. On the arguments advanced by Mr.V.Ramachandran, learned senior advocate I pass the following order on the question of maintainability of such petition on the file of the Original Side of this Court. The Office note dated 24.1.1992 is reproduced hereunder:

<u>O.P.Diary No.1349 of 1992:</u>

In the matter of the Hindu Minority and Guardianship Act

and

In the matter of Miss Usha Lakshmi & Miss Aruna *- Minors.*

H.M.Mahesh *...Petitioner.*

This petition is filed under Sec.8(2) of the Hindu Minority and Guardianship Act, 1956 for offering the vacant lands mentioned in the Schedule of the petition as collateral security by way of equitable mortgage to Indian Bank, Saligramam, Madras.

This petition was returned by the Office as follows:

"Since this petition is filed under the Hindu Minority and Guardianship Act it may be stated how this petition is maintainable in this Court."

This petition is represented by the Advocate for the petitioner citing the O.P.No.557 of 1991 which was posted for arguing the maintainability before your Lordship and numbered as directed by your Lordship.

It is most respectfully submitted that the office is not aware of the order dated 14.7.1972 made in Diary No.4904 of 1972 by the Hon'ble Mr.Justice Gokulakrishnan while placing the maintainability note in D.No.18695 of 1991, later numbered as O.P.No.557 of 1991.

Kind attention is invited to the order dated 14.7.1972 in Diary No.4904 of 1972, by the Hon'ble Mr.Justice Gokulakrishnan in similar matter wherein His Lordship has dealt with the jurisdiction question and has decided that the petition under Sec.8 of the Hindu Minority and Guardianship Act, 1956 has to be filed only before the City Civil Court and the High Court need not entertain this petition.

The papers are placed before your Lordship for consideration and orders as to numbering the present Original Petition.

Respectfully submitted:

In this connection, it is submitted that an earlier Full Bench decision of this Honourable Court holds a contrary view on the applicability of Sec.15, C.P.C., to Chartered High Courts

which are governed by Clause 12 of the Letters Patent *Ramamirtham v. Rama Film Services, (1951)2 M.L.J. 121: A.I.R. 1951 Mad.93.*

Inld. dated 24.1.1992.

Post for maintainability.

Intd.

(AR. L.J.,)

26.1.1992."

4. In order to better appreciate the scope of the question raised in the reference and the contentions urged before me, it is necessary to set out briefly the relevant provisions that have a bearing on the question. Sec.8 of the Hindu Minority and Guardianship Act, 1956 is reproduced as under:

"*Sec.8: Power of natural guardian:* (1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts, which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court:

(a) mortgage, or charge, or transfer by sale, gift, exchange or otherwise-any part of the immovable property of the minor, or

(b) lease any part of such property for a term exceeding five years, or for a term extending more than one year beyond the date, on which the minor will attain majority."

Sec.4 of the Guardians and Wards Act, 1890, is reproduced hereunder:

"Sec.4(4): "District Court" has the meaning assigned to that expression in the Code of Civil Procedure (14 of 1882) and includes a High Court, in the exercise of ordinary original civil jurisdiction."

Sec.4-A Power to confer jurisdiction on subordinate Judicial Officers and to transfer proceedings to such Officers."

"(1) The High Court may by general or special order employ any officer, exercising original civil jurisdiction subordinate to a District Court, or authorise the Judge of any District Court, to empower any such Officer, subordinate to him, to dispose of any proceeding under this Act transferred to such officer under the provisions of this Section."

Sec.2(4) of the Code of Civil Procedure, is extracted hereunder:

"Sec.2(4) "District" means the local limits of the jurisdiction of a Principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court."

Sec.15 of the Code of Civil Procedure is extracted hereunder:

"Sec.15 court in which suits to be instituted: Every suit shall be instituted in the court of the lowest grade competent to try it."

The Rule in Sec.15, C.P.C., is intended for the protection of courts of higher grade and does not affect their jurisdiction. It has been uniformly held by our High Court starting with *Augustine v. Medlycott, I.L.R. 15 Mad. 241,* that there is no lack of jurisdiction for the superior court to try the Suit. In *Ramamirtham v. Rama Film Services, (1951)2 M.L.J. 121: A.I.R. 1951 Mad. 93 (F.B.),* Satyanarayana Rao, J. observed as follows:

"While it enjoins the institution of a suit in the court of the lowest grade competent to try it, it does not oust the jurisdiction of the court of a higher grade. Even if the court of a higher grade tries and disposes of a suit which could have been instituted in a court of a lower grade, the decision referred is not without jurisdiction and is not a nullity."

Sec.15, C.P.C. directs that a suit shall be instituted in the court of the lowest jurisdiction competent to try it and though O.7, Rule 10 empowers a court to return a plaint at any stage of the suit to be presented to the court in which the suit should have been instituted, still it has been held that if a suit triable by a court of lower grade is tried and decreed by a court of a higher grade, the decree is perfectly valid. The reason is that Sec.15, C.P.C., lays down a rule of procedure and not of jurisdiction of the superior court in such case. Sec.15, C.P.C. is not one of the sections excepted by Sec.120, but clearly it cannot apply to the High Court in the exercise of its original civil jurisdiction, *Bank of Chettinad v. S.P.K.V.R. Firm, A.I.R. 1935 Rang. 517 at 520.* In other words, Sec.15, C.P.C. lays down that a suit shall be filed in the court of the lowest grade competent to try the same. But this section enacts a rule of procedure and it does not affect the jurisdiction of a court of a higher grade to try the suit entertainable by a court of lower grade. When a suit triable by a court of lower grade is instituted in a court of higher grade, the

latter court is not bound to return the plaint. It is only discretionary on the part of such latter court (*i.e.* to say the court of higher grade), either to try the suit itself or to return the plaint for presentation in the court of lower grade.

5. Mr.Ramachandran, learned Senior Advocate has relied upon the following authorities for the above proposition: A Division Bench of Andhra Pradesh High Court in the decision reported in *Drona Vajjula Vidyamba v. Vallabhajosylu Lakshmi Venkayamma, A.I.R. 1958 A.P. 218: (1958)1 An.W.R. 40: 1958 A.L.T. 449,* held as follows:

"Civil Procedure Code, Sec.15 shall be instituted Section. If affects jurisdiction of superior court to try the suit--

What Sec.15 provides is that every suit shall be instituted in the court of the lowest grade competent to try it. Competency contemplated by the Section is only pecuniary competency and there is no lack of jurisdiction for the superior court, to try the suit. It was held that what Sec.15 provides is that every suit shall be instituted in the court of the lowest court competent to try it. Competency contemplated by the Section is only pecuniary competency and it has been unanimously held by the Madras High Court, starting with *Augustine v. Medlycott, I.L.R. 15 Mad. 241 (B),* that there is no lack of jurisdiction for the superior court to try the suit. Reference has been made to a Full Bench decision of the Madras High Court reported in *Ramamirtham v. Rama Film Services, (1951)2 M.L.J. 121: A.I.R. 1951 Mad. 93.* The Honourable Bench held that while it enjoins institution of a suit, in the court of the lowest grade competent to try it, it does not oust the jurisdiction of the court of a higher grade. Even if the court of a higher grade tries and disposes of a suit, which could have been instituted in a court of a lower grade, the decision referred is not without jurisdiction and is not a nullity. It was further held that the object of Sec.15 of C.P.C. was only to prevent superior courts being crowded or overcrowded with suits triable by courts of inferior grade and that the section merely regulated procedure and not jurisdiction. The court of superior grade, does not act, without jurisdiction in trying a suit which under Sec.15 might and ought by reason of its violation to have been tried by an inferior court. The reason is that Sec.15 of C.P.C. lays down a rule of procedure and not of jurisdiction of the superior court."

A Division Bench of the Calcutta High Court in the decision reported in *Mohini Mohan Das and others v. Kunjabhari Das and others, A.I.R. 1943 Cal. 450,* held as under:

"Sec.15 lays down rules of procedure not of jurisdiction and it does not divest of any court of jurisdiction which it otherwise possesses under the statute consisting of such courts."

A learned single Judge of Andhra Pradesh High Court in the decision reported in *M.Krishnamurthy v. Y.Ramamurthi, 1956 An.W.R. 164: I.L.R. 1956 A.P. 162: A.I.R. 1957 A.P. 654,* held as under:

"When a plaint is returned by a superior court to a lower court, it is not, strictly speaking, because the superior court is without jurisdiction to entertain it but only in conformity with the provision of Sec.15, C.P.C., which requires that "a suit shall be instituted in the court of the lowest grade competent to try it." The position is different when a suit which ought to be filed in a superior court is instituted in a lower court. That would be a case of real want of jurisdiction."

In the decision reported in *Bipan Kumar v. Sham Sunder, A.I.R. 1977 H.P. 90,* the learned Chief Justice of Himachal Pradesh High Court has held as follows:

"Sec.15 merely prescribes a rule of procedure. It does not deprive the court of a higher grade of jurisdiction to entertain the suit. Where therefore the plaint was filed before the District Judge although it should have been filed in the court of the senior subordinate Judge, the District Judge, as a court of higher grade, was competent to entertain in and it is that date which must be taken as the date on which the suit was instituted."

A Full Bench of Andhra Pradesh High Court in the decision reported in *Venkateswaralu v. S.Satyanarayana, A.I.R. 1957 A.P. 49: 1956 An.W.R. 117: 1956 A.L.T. 152: I.L.R. 1956 A.P. 262;* has held as follows:

"The intention of Rule 1 is not to deprive the jurisdiction of the Bench to hear appeals not exceeding Rs.7,500 in value but to empower a single Judge to hear them. This intention is carried out rather laconically and inartistically, by introducing an exception in Rule 2(2)(a) appears to be directory rather than mandatory

and a disobedience of it is only an irregularity and does not render the proceedings void."

A learned single Judge of Goa, Daman and Diu in the decision reported in *Communidade of Ponchovadi v. Silvia Riberio, A.I.R. 1971 Goa. Daman & Diu. 34,* held as under:

"Sec.15, C.P.C. merely lays down a rule of procedure. It has nothing to do with the jurisdiction of the court. Keeping in view the provisions of that section a court of higher grade before which a suit triable by a court of lower grade has been filed can return the plaint for presentation to proper court if it thinks fit. The court of higher grade has always jurisdiction to try the cases triable by the court of lower grade unless specially prohibited by law. In view of the facts that the lower court has commenced the trial and has recorded some evidence and no prejudice is caused to any party by the lower court trying and disposing of the suit on merits it is unnecessary to admit this petition and give direction to the lower court as prayed for by the petitioner. The petition is dismissed."

A Division Bench of the Patna High Court, consisting Ramaswami, J. and Jamuar, J. in the decision reported in *Bhuwaneshwari Kuer v. Raghubansh, A.I.R. 1954 Pat. 34,* held as under:

"...Sec.15 and O.7, Rule 10 are not imperative in their character and the court of higher grade has a discretion either to return the plaint or not to return the plaint for being presented to the court of the lower grade. The court of higher grade cannot be said to have committed any illegality in the exercise of its jurisdiction."

In the decision reported in *Ogeti Pedda Ranaganna v. Saieka Beevi and another, A.I.R. 1970 A.P. 124,* it has been held as follows:

"The jurisdiction of tribunal under Workmen's Compensation Act is not barred. What is barred is jurisdiction of civil court. Tribunals under High Court have concurrent jurisdiction-option lies with claimant to choose one or the other Tribunal and he cannot be compelled to choose a forum which would be convenient to the defendant. Once a particular forum is chosen, claimant cannot choose another forum though Application for compensation is not filed under Motor Vehicles Act; employer's remedy against Insurer under contract of Insurance is always available under General law."

In the decision reported in *A.T. Vasudevan v. A.S. Thiruvengada Mudaliar, A.I.R. 1949 Mad. 260,* a learned single Judge of our High Court held as under:

"Letters Patent Clause 17-minor member of joint Hindu family. High Court has jurisdiction to appoint guardians of person and property and sanction transfer of minor's share. In the exercise of its inherent jurisdiction vested in it under Letters Patent, this jurisdiction is preserved by Sec.3, Guardians and Wards Act, the High Court has power to appoint a guardian in respect of the person and property of the minor member of the joint Hindu family covering even his undivided interests in the joint family property and also to sanction a transfer of the minor's share by the guardian. It was held that the High Court has inherent jurisdiction to appoint a guardian of the property of the minor who is a member of the joint family. even where the minor's interests in the property is an undivided share in the Family property unlike under the Guardians and Wards Act. This jurisdiction is conferred by Clause 17, Letters Patent."

A Division Bench of the Calcutta High Court in the decision reported in *Union of India v. Ganapath Rai Sagarmull, A.I.R. 1983 Cal. 14,* held as follows:

"Letters Patent Clause 12 Railways Act, Sec.80 jurisdiction is conferred by Clause 12 of Letters Patent not effected by Sec.80 of the Railways Act, in respect of suits mentioned in that section-exclusion of jurisdiction not to be readily inferred Clause 2 of Letters Patent is not impliedly repealed by Sec.50 of Railways Act. The jurisdiction conferred by Clause 12 of the Letter Patent in the absence of any provision by Sec.4, C.P.C. is not affected by Sec.80 of the Railways Act, but Sec.40 being an enabling provision, only provides for additional forum for filing of the suits of the nature mentioned therein. Under Sec.80, a claim is given the option of taking advantage of an additional forum. Exclusion of jurisdiction is not to be readily inferred. There is a presumption against exclusion of jurisdiction of civil court by a statute. Very clear words will be required to oust altogether the jurisdiction of the court, in the matter of private rights. Although the legislature can exercise the power of repeal by implication, there is a presumption against an

implied repeal. Clause 12 of the Letters Patent has not been impliedly repealed by Sec.80 of the Railways Act. It was held that if there is any conflict between the general law and the special law, then the provisions of special law would prevail. It was further held that exclusion of the jurisdiction is not to be readily inferred and there is a presumption against exclusion of jurisdiction of Civil Code by a statute. Exclusion of the jurisdiction of civil courts, to entertain civil cases will not be assumed unless the relevant statute contains an express provision to that effect or lead to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies meant by itself necessarily exclude the jurisdiction of civil courts to deal with a case brought before it in respect of matters covered by the said statute. The general rule is that a jurisdiction of a superior court is not taken away except by express words or by necessary implication. Unless there is a clear thing in the statute, which is alleged to have that effect, the jurisdiction of the court must not be taken to be excluded. The general rule applicable to the construction of the statute is that there is nothing to be presumed without express words any authority to deprive the Court of jurisdiction it had previously exercised. Very clear words will be required to oust altogether the jurisdiction of the courts."

A Division Bench of this Court consisting of K.B.N.Singh, C.J., (as he then was) and Padmanabhan, J., in the decision reported in *Hindustan Machine Tools Ltd. v. Union of India, A.I.R. 1985 Mad. 130,* held as under:

"Sec.80 does not exclude the operation of Sec.20 and Clause 12. Sec.80 enables the plaintiff to file a suit for compensation, against the Railway for loss or damages to the goods in the court having the jurisdiction over the place. Under Sec.20, C.P.C. and Clause 12, Letters Patent, the plaintiff can file the suit in the court having jurisdiction over the place where the cause of action arises or the defendant resides or carries on business. Thus for suits based on cause of action, Sec.80 specifies the forums, but for suits based on the person for the defendant, Sec.80 says nothing. There is no express term or thing of Sec.80, repealing Sec.20, C.P.C. and Clause 12 of Letter Patent. Therefore Sec.80 does not exclude the operation of Sec.20, C.P.C. and Clause 12, Letter Patent in respect of suits against the railway for compensation and does not take away the power of the court, to entertain the suit if the defendant resides or carries on the business within the local limits of its jurisdiction. Therefore under Clause 12, Letter Patent the Madras High Court within the local limits of whose jurisdiction, the office of the General Manager of Southern Railway is situate has jurisdiction to entertain the suit filed on its original side."

A very important judgment on this aspect is the Judgment rendered by a Full Bench of our High Court reported in *V.Ramamirtham's case, (1951)2 M.L.J. 121.* At the instance of Mack, J. the following two questions have been referred to the Full Bench:

"1. Whether Sec.15, C.P.C., governs Chartered High Courts, and whether in view of it all suits below Rs.10,000 in value should not be instituted direct in the City Civil Court: and

2. Whether the City Civil Court is competent to try or dispose of suits filed in the High Court below Rs.10,000 in value which were instituted prior to the enhancement of its jurisdiction from Rs.8,000 to Rs.10,000 if so, can such transfers be legally made under either Sec.16, proviso (2), Madras City Civil Court Act or under Sec.24(1) C.P.C."

This reference was occasioned as Mack, J. was of the opinion that an earlier decision of Panchapagesa Sastri, J. in *Mohomed Yusuf v. Khadir Badsha Sahib, (1949)1 M.L.J. 503,* which held that the High Court had no power under Sec.16(2) of the Madras City Civil Court Act (VII of 1892), to transfer to the City Civil Court, suits instituted in the High Court on its original side before the date of the notification G.O.No.Ms.No.4175, Home, dated 11th November, 1948, required reconsideration. The learned Judges of the Full Bench after setting out the relevant provisions that have a bearing on the questions, particularly Clause 12 of the Letters Patent which empowered the High Court of Judicature at Madras in the exercise of its Ordinary Original Civil Jurisdiction held that this Court has practically unlimited original jurisdiction except that if the debt or damage or the value of the property does not exceed Rs.100 and the case is one which falls within the jurisdiction of the Small Causes Court at Madras, the High Court in

its original jurisdiction cannot try such a suit. They also referred to the other provisions. The first of the questions referred to the Full Bench of this Court in the said decision relates to the applicability of Sec.15 of the C.P.C. to Chartered High Courts. In other words, the question is if a suit is below Rs.10,000 in value, is the litigant bound to institute it in the City Civil Court as the Court of the lowest grade competent to try it. Sec.15 of the C.P.C. directs that suits shall be instituted in the court of the lowest grade competent to try it. Under Clause 12 of the Letters Patent, subject to one qualification, the High Court has unlimited original jurisdiction and this jurisdiction was saved under Sec.16, City Civil Court Act (VII of 1892). Competency contemplated by this Section is pecuniary competency and it has been held that this Section lays down a rule of procedure and not of jurisdiction. All the three learned Judges delivered a separate Judgment, in view of the importance of the question referred to them: Viswanatha Sastri, J. in his separate judgment has held as under:

> "In these circumstances the question for consideration is, whether Sec.15, C.P.C. applies to the High Court in the exercise of its original jurisdiction, and whether all suits below Rs.10,000 other than suits specially exempted from the jurisdiction of the City Civil Court under Sec.3, Madras City Civil Courts Act (VII of 1892), should be instituted in the City Civil Court. Rankin, C.J., in *Manindra Chandur v. Lal Mohan, (1929) I.L.R. 56 Cal. 940 at 951* and Braund, J. in *Bank of Chettinad v. S.P.K.V.R. Firm, A.I.R. 1935 Rang. 517 at 520,* and Mockeet, J. in *P.K.Kandasami Chetti v. Arumugha Naicker, C.S.No.53 of 1940,* expressed the opinion that Sec.15, C.P.C., had no application to suits instituted on the original side of the High Court. The practice of this Court has also been in conformity with this view. The opposite view might be put in a form which much resemble a syllogism. Unlike Secs.16, 17 and 20, Sec.15 is not excluded from application to the original side of the High Court by Sec.120, C.P.C. There is also nothing in the Original Side Rules of the High Court displacing Sec.15, C.P.C. O.1, Rule 3, Original Side Rules, recognises that the provisions of the Civil Procedure Code would be applicable to suits and proceedings on the original side unless a contrary provision is made in the rules. Sec.15, C.P.C., requires a suitor to file his suit in the court of the lowest grade competent to entertain it. The City Civil Court is a court of a lower grade than the High Court because its pecuniary jurisdiction is limited to Rs.10,000 while the jurisdiction of the High Court is unlimited and because appeals lie from the City Civil Court to the High Court. Though the City Civil Court might not come within the hierarchy of courts specified in Sec.3, C.P.C., which contemplates courts established under the Madras Civil Courts Act (III of 1873), still it is a court of a grade lower than the High Court within the meaning of Sec.15, C.P.C. Sec.15 would, therefore seem to apply to the High Court and compel a suitor to file his suit for less than Rs.10,000 in the City Civil Court even though both the High Court and the City Civil Court might have concurrent jurisdiction."

The learned Judge further observed as follows:

> "The object of Sec.15, C.P.C., is to prevent superior courts being flooded or overcrowded with suits triable by courts of inferior grade. The Section merely regulates procedure and not jurisdiction. It does not deprive courts of superior pecuniary grade of their jurisdiction to try suits which should ordinarily be tried by courts of inferior grades."

In my view Clause 12 of the Letters Patent expressly confers jurisdiction on the original side of this Court to try all suits other than suits of a small cause nature of the value of Rs.100 and below. Not only has this jurisdiction not been taken away by subsequent legislation, but the course of subsequent legislation has recognised and proceeded on the basis that the jurisdiction of the High Court even in small cause suits of the value of over Rs.100 is concurrent with that of the Small Causes Court.

6. Thus it is seen that Sec.15 of the C.P.C. has no application to the High Courts exercising ordinary original jurisdiction, when there is conflict between the original jurisdiction of this Court and the City Civil Court constituted under the Madras City Civil Courts Act. Hence, in my opinion, the question as to whether Sec.15 of the Code of Civil Procedure governs chartered High Court has to be answered in the negative. The original jurisdiction of this Court is derived under Clause 12 of the Letters Patent which empowered this Court in the

exercise of its Ordinary, Original Civil Jurisdiction.

7. In view of the Full Bench decision of this Court reported in *Ramamirtham v. Rama Film Services, (1951)2 M.L.J. 121: A.I.R. 1951 Mad.93,* referred to supra and the other authorities referred to above, the order of Mr.Justice Gokulakrishnan (as he then was) in Dairy No.4904 of 1972 dated 14th April, 1972 is no longer good law. The order of the learned Judge is reproduced hereunder:

"This comes on an office note as to whether the petition filed by the mother of the minors herein under Sec.8 of the Hindu Minority and Guardianship Act of 1956 for permission to raise a loan of one lakh rupees on the security of properties in which the minors are having shares should have been filed in this Court or before the City Civil Court, Madras. According to the Hindu Minority and Guardianship Act, XXXII of 1956, the City Civil Court is vested with the said power. But Sec.16 of the City Civil Court Act, no doubt, states that the powers of the High Court, in the exercise of its original jurisdiction are not taken away. As per Clause 17 of the Letter Patent Act, which is applicable to minors, the High Court has got the required powers to decide the question as regards disputes, such as, guardianship etc. Mr.Srinivasan, the learned counsel for the petitioner, relies upon Sec.16 of the City Civil Court Act and states that as per the said section, the High Court has to entertain the petition and the only thing that the High Court can do is that it need not give cost to the petitioner herein, if it finds that the matter ought to have been filed before the City Civil Court, and on the other hand, it can order does to the respondent, if need be. This means that the High Court has to simply entertain all the suits which can be filed before the City Civil Court in view of the Sec.16 of the City Civil Court Act. But, I am of the view that Sec.15 of the Civil Procedure Code is specific with regard to the institution of the suits. The petition herein filed is in the nature of a suit and hence Sec.15, C.P.C. will apply. Sec.15 says that a suit shall be instituted only in the lowest court competent to try it. It cannot be denied that the City Civil Court is competent to try the same and, therefore, when it is available, I do not think that the petitioner can be permitted to institute the petition in the High Court.

In the circumstances, the petitioner has to institute his petition only before the City Civil Court and the High Court need not entertain this petition."

In view of the Full Bench judgment of this Court and the other decisions mentioned above, the view taken by Mr.Justice Gokulakrishnan does not lay down the correct position of law. Hence, I respectfully but firmly dissent from the opinion of the learned Judge in the order made in Diary No.4904 of 1972, dated 14.7.1972.

B.S. ---- *Petition ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram* and *Thanikkachalam, JJ.*

W.A.No.1424 of 1988 *3rd October, 1991.*

Indian Airlines Corporation, represented by Regional Director, and another ...*Appellants*

v.

N.Sundaram ...*Respondent.*

(A) Indian Airlines Employees Standing Orders (Regulations) concerning Discipline and Appeals, S.O.32 - Standing Order expressly prohibiting outside representation in departmental enquiries - Corporation availing of services of a legally qualified and trained person as presenting officer - Employer denied assistance of legal practitioner - Principles of natural justice if violated.

It is true that the principles of natural justice may come into play when the statute or statutory rules are silent as to the procedure, and no statutory provision or statutory rule can be struck down where it makes a provision excluding application of principles of natural justice. But this principle cannot be viewed in the abstract and the endeavour must be to find out as to how far and in what manner the statutory provision or statutory rule could be stated to have excluded the application of the principles of natural justice. Despite the absence of any standing order enabling the

Corporation to avail of the services of a Presenting Officer and that too a legally qualified and trained one, the Corporation did avail of such services. In that context there cannot be a denial of a facility on par with the facility availed of by the corporation, to the employee. The anxiety and vigil of the court must be to keep the balance and not to countenance the bringing in and perpetuation of an imbalance in the conduct of disciplinary proceedings. By any act of the employer, the employee should not be put to disadvantage in the conduct of disciplinary proceedings. That is the cardinal rule that must prevail and guide and there cannot be prosecution of disciplinary proceedings in derogation thereof. *[Paras 7 and 8]*

(B) Disciplinary proceedings - Violation of principles of natural justice - Relief to be accorded does not depend on prejudice being caused.

Prejudice is not the test to be kept in the forefront to consider as to whether reliefs should follow or not, when there is a violation of the principles of natural justice. The rule is, the very violation of the principles of natural justice is prejudice and nothing more is required to apply the rule and accord the reliefs. *[Para 12]*

Cases referred to:-

A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: (1982)1 S.C.C. 272: 1982 S.C.C. (Crl.) 152: (1982)2 S.C.J. 68: 1982 Crl.L.J. 340; Board of Trustees, Port of Bombay v. Dilipkumar, A.I.R. 1983 S.C. 109: (1983)1 S.C.C. 124: 1983 Lab.I.C. 419: (1983)1 Lab.L.J. 1: (1983)1 S.C.J. 178: (1983)1 S.C.R. 828; S.L.Kapoor v. Jagmohan, A.I.R. 1981 S.C. 136: (1980)4 S.C.C. 579: (1981)1 S.C.J. 312: (1981)1 S.C.R. 746.

Appeal under Clause 15 of the Letters Patent against the Order of S.A.Kader, J., dated 17.8.1988 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.6208 of 1981 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to the order passed in MAA/RD/ADMN/1-6/581, dated 9.1.1981 confirming the order in Ref.No.MAACM.Admn. 1-6/11058, dated 4.9.1980 of the Respondents and quash the same.

N.G.R.Prasad, for *M/s.Row* and *Reddy*, for Appellants.

Vijay Narayan, for Respondents.

The Judgment of the Court was delivered by *Nainar Sundaram, J.*:- The writ appeal is directed against the order of the learned single Judge in W.P.No.6208 of 1981. The appellants in this writ appeal are the respondents in the writ petition. The respondent in this writ appeal is the petitioner in the writ petition. It will be convenient if we adopt the designations allocated to the parties in the writ petition while we refer to them in this judgment of ours.

2. The petitioner, who was in the employ of the Indian Airlines Corporation, hereinafter referred to as the Corporation, was charge-sheeted in the disciplinary action on three counts; (i) unauthorised absence, (ii) giving false information, and (iii) leaving the station/country without permission. We need not go into the details of the charges for the purpose of disposing of this writ appeal. The charge-sheet was issued on 6.6.1979. The petitioner submitted his explanation on 30.6.1979. On 25.6.1979 the Enquiry Officer was appointed. Not only that, one Mr.R.Pushpavanam, the Assistant Manager, Personnel Services, Madras, was appointed as the Presenting Officer. On 10.10.1979 the Enquiry Officer issued the notice for enquiry. The petitioner replied on 13.10.1979 in the following terms:

> "Please refer to your Memo No.HYD:PER: D15:5638, dated 10th October, 1979 delivered to me on 12th afternoon. I am unable to accept the date as intimated due to the inadequate notice of time. Further I propose to go on leave from the 26th to 31st October, 1979 for which necessary application has been submitted to the concerned officials in September itself.
>
> I have to bring to your kind notice a major point. The presenting officer, who is going to conduct the case on behalf of the management is well trained in conducting disciplinary proceedings. He has got legal qualifications also. If a person with a legal background qualifications in law and with a training to conduct disciplinary proceedings is to represent the management it would be necessary that an employee is also allowed to have such assistance. Since none of the employees whom I can approach for the purpose of representing me as a "friend" in the disciplinary proceedings is possessed of legal qualifications or equal training it has become necessary that I should be allowed to have the assistance of a lawyer to defend my case and to prove my innocence, without such an assistance I will be gravely prejudiced.

I therefore chose Mr.M.N.Krishnamani, Advocate, No.41, Law Chambers, Madras High Court, Madras-1, to whom necessary facilities may be granted to assist me as my friend during the enquiry. Any notice about the enquiry proceedings may be sent with adequate notice of time as I have to arrange for Mr.Krishnamani to travel from Madras to the venue of the enquiry by contacting him at Madras.

Thanking you,".

The response on the side of the respondents came by the letter, dated 31.10.1979/2.11.1979, and the contents of the said letter also needs extraction as follows:

"This has reference to your letter dated 13.10.1979 on the appointment of Presenting Officer *vide* our Memo No. MAA:GM:ADMN:1-6/11685, dated 25.9.1979.

Mr.Pushpavanam, who has been appointed as Presenting Officer, is a permanent employee of the Corporation and the fact that he is legally qualified is only incidental.

As you are already aware, as per the Standing Orders (Regulations) concerning Discipline and Appeals, applicable to you, you will be entitled to have the assistance of a friend who is a permanent employee of the Corporation, under your own arrangement. You are not permitted to have the assistance of any outsider. The very purpose of holding an Enquiry is to find out if the charges levelled against you are proved or not proved. You are given full opportunity to present your case in defence before the Enquiry Officer, who is an impartial person."

On 16.11.1979 the petitioner wrote back as follows:

"I acknowledge under protest your memo No.13124, dated 2.11.1979 rejecting my request to have the assistance of a legally qualified person to defend myself.

In the absence of any other alternative, although I am convinced that it is totally inadequate, I chose Mr.M.S.Dinakar, Traffic Superintendent, Madras Airport as my friend to assist me during the enquiry proceedings.

Necessary facilities may therefore please be granted to Mr.Dinakar to visit Vijayawada to render me assistance as a "friend" during the enquiry.

Thanking you,".

On 23.11.1979 the choice of Mr.M.S.Dinakar by the petitioner as put forth in his letter dated 16.11.1979 was acceded to. On 18.1.1980 the petitioner wrote a letter to the Enquiry Officer in the following terms:

"I had decided to boycott the above enquiry on the following grounds:

(1) Whereas the management is represented by a Presenting Officer who has had legal education and sufficient training, I am not being allowed the assistance of a legally qualified or trained person to assist me as a "friend";

(2) The enquiry is being held in the offices of the Station Manager, IA, Vijayawada where there is not only lack of privacy but there is every chance of unwanted disturbances during proceedings through telephone calls and frequent movement of staff;

(3) The enquiry begins late in the afternoon whereby an adjournment may be necessitated resulting in delay and granting an opportunity to the Presenting Officer to represent his case if adjourned and convened next day.

I have, however, reconsidered the matter and have decided to attend the enquiry under protest.

Although it is totally inadequate to face the proceedings without the assistance of a legally qualified or experienced person, I choose Mr.S.Ramanathan, Technical Assistant at Indian Airlines, Hyderabad, as my friend in view of refusal by management to allow a lawyer to defend me. Necessary facilities may be granted to Mr.Ramanathan when he approaches the Personnel Department at Hyderabad for the facilities.

As for the venue of the enquiry, may I hope that the Enquiry Officer will reconsider his decision after a personal appraisal of the situation?

Thanking you."

It is found from the records that the enquiry, in fact, did take place on 26.2.1980 and 27.2.1980 and the petitioner participated in the enquiry along with Mr.S.Ramanathan. The petitioner even in the course of the enquiry proceedings has been voicing forth a grievance with regard to his being put to a disadvantage on the denial of the assistance of a legal practitioner and the petitioner's participation in the enquiry along with Mr.S.Ramanathan was under protest. The following extract from the enquiry proceedings

prosecuted on 26.2.1980 brings out every clearly the above position.

"My educational qualification being limited, *i.e.*, a pass in the S.S.L.C. examination, it is essential that I have the assistance of a legally qualified person or a Lawyer. This is especially so in view of the fact that the Management has a Presenting Officer who has had not only legal education also requisite training in conducting disciplinary proceedings. I therefore demand that I be permitted the assistance of a Lawyer." At this the Enquiry Officer advised Shri Sundaram that his request made *vide* his letter dated 13th October, 1979 had been considered by the Commercial Manager in line with the provisions in the Standing Orders applicable to him (Shri Sundaram, N.) and he had accordingly advised Shri Sundaram *vide* his letter No.MAA:CM:ADMN:1-6:13124, dated 31/10. 2/11-1979 that he was entitled to have the assistance of a 'friend' who is a permanent employee of the Corporation, under his own arrangement. He had also advised that Sri Pushpavanam, who had been appointed as Presenting Officer is a permanent employee of the Corporation and the fact that he is legally qualified is only incidental.

The Enquiry Officer, therefore, asked Shri Sundaram under the circumstances, to let us know if he would like to have the assistance of a 'friend' who is an employee of the Corporation. Mr.Pushpavanam being legally qualified may be claimed as incidental, but it does not alter the fact. The Enquiry Officer may know that the repeated appointment of Sri Pushpavanam as Enquiry Officer or Presenting Officer where I am concerned in connection with earlier charge-sheets is significant. As such the management has advantage of his qualifications, to ensure the principles of natural justice are not violated, I should also be permitted similar facility. I do not have a 'friend' who is an employee of the Corporation with similar qualifications or experience. It will be totally inadequate to have some one else. As the management is refusing to allow a legally qualified person from outside I am left with no alternative than to choose Mr.S.Ramanathan as my 'friend' *under protest*."

The Enquiry Officer submitted his report and the findings of the Enquiry Officer were rendered against the petitioner and he found the petitioner guilty of all the charges levelled against him. On the basis of the findings of the Enquiry Officer and accepting the same, a notice was issued on 21.7.1980 to the petitioner to show cause as to why the punishment of removal from service should not be imposed on the petitioner. On 15.8.1980 the petitioner submitted his explanation. On 4.9.1980 the punishment of order of removal from service was imposed on the petitioner. The petitioner preferred a departmental appeal on 6.10.1980. This departmental appeal was rejected on 9.1.1981. The petitioner came to this Court, impugning the original order as well as the appellate order.

3. Before the learned single Judge, who heard and disposed of the writ petition, the main point urged on behalf of the petitioner, coveting interference in writ jurisdiction was the petitioner was denied a reasonable opportunity of defending himself in that while the Corporation had the services of a legally qualified and trained Presenting Officer in the person of Mr.R.Pushpavanam, the petitioner, who could not secure a legally trained co-employee, was denied the leave to secure the services of a legal practitioner the only other alternative and a total imbalance crept into the conduct of the disciplinary proceedings and the principles of natural justice stood violated. The learned single Judge, countenanced this plea advanced on behalf of the petitioner. The learned single Judge repelled the contention raised by the respondents that the writ petition is not maintainable and the petitioner ought to have resorted to the remedy under the Industrial Disputes Act, 1947. As a result, the learned single Judge allowed the writ petition, quashing the impugned proceedings and further observed that it is open to the respondents to order a fresh enquiry after giving the petitioner sufficient and reasonable opportunity to defend himself. This writ appeal is directed against the order of the learned single Judge.

4. Mr.N.G.R.Prasad, learned counsel for the respondents, would submit that there are Standing Orders (Regulations), concerning Discipline and Appeals, formulated pursuant to statutory provisions and Standing Order 32 enables the employee to have, under his own arrangements, the assistance of a friend during the course of the enquiry and such a friend must be an employee of the Corporation, and no outside representation shall be permitted in any circumstances, and in

that context, that alone must rule and the principles of natural justice must be held to have been excluded so far as what has been provided by the Standing Order. Learned counsel for the respondents would also submit that factually there was no imbalance as between the employer and the employee in the conduct of the disciplinary proceedings and the employee was not at all put to prejudice and he did have the assistance of one Mr.S.Ramanathan whose services he was allowed to avail of in the course of the conduct of enquiry.

5. Mr.Vijay Narayan, learned counsel for the petitioner, would submit that even on the basis, the Standing Orders should take the field, when the Corporation acted besides them, in employing a legally qualified and trained person as a Presenting Officer, it will be unfair on its part to deny an equal facility to the petitioner and even though the petitioner made known to the Corporation that the petitioner could not secure the services of a legally qualified and trained person from amongst the personnel of the Corporation to assist him in the disciplinary proceedings, the Corporation was unjust and unfair in declining the request of the petitioner and falling back upon the Standing Orders. Learned counsel for the petitioner would submit that the question of prejudice is not one to be taken note of so as to exclude the principles of natural justice and the very non-observance of the principles of natural justice is itself prejudice, and proof of prejudice independent of proof of denial of natural justice, is unnecessary. Learned counsel for the petitioner would submit that on the facts and circumstances of the case in the prosecution of the disciplinary proceedings, there was a warrant for affording of opportunity to the petitioner to avail of the services of a legal practitioner.

6. Standing Order 32 reads as follows:

> "An employee may be permitted, if he so desires, to have, under his own arrangements, the assistance of a 'friend' during the course of the enquiry. Such a 'friend' must be an employee of the Corporation. No outside representation shall be permitted in any circumstances."

It may be stated that the disciplinary action should adhere to the provisions of the Standing Orders (Regulations) concerning Discipline and Appeals. In that context Standing Order 32 has got a place. By the Standing Orders the Corporation is admittedly not permitted to have the assistance of a Presenting Officer and that too a legally qualified and trained Presenting Officer. But the Corporation chose to have that facility, which obviously it could command. If one should go by the Standing Orders, then this action on the part of the Corporation had no sanction under the Standing Orders. The Corporation travelled beyond the Standing Orders to secure this facility for itself in the conduct of disciplinary action. Facility that could be availed of by the employee under the Standing Order 32 is that he could secure the assistance of a friend and that friend could only be an employee of the corporation. After having found that a legally qualified and trained person has been appointed as the Presenting Officer by the Corporation, the petitioner rightly pointed out in his letter dated 13.10.1979 the unfair position, in which he was sought to be placed. In that letter the petitioner has categorically asserted "since none of the employees whom I can approach for the purpose of representing me as a friend in the disciplinary proceedings is possessed of legal qualifications of equal training, it has become necessary that I should be allowed to have the assistance of a lawyer to defend my case and to prove my innocence; without such an assistance I will be gravely prejudiced". But the reply by the Corporation on 31.10.1979/2.11.1979 was curt and they took up a stand that Mr.R.Pushpavanam is a permanent employee of the Corporation and that he is legally qualified is only incidental and further the petitioner, as per the Standing Orders, could have only the assistance of a friend, who is a permanent employee of the Corporation. As we stated earlier, if one should strictly stick on to the Standing Orders, one should not travel beyond them. But the Corporation did travel beyond the Standing Orders and settled for itself the facility of having a Presenting Officer, who is a legally qualified and trained person. At this juncture, we would like to take note of the factual assessment of the qualifications and the experience of Mr.R.Pushpavanam done by this Court in the earlier pronouncement dealing with a similar grievance by a similar employee of the Corporation and in which case also, Mr.R.Pushpavanam was appointed as the Presenting Officer by the Corporation in the disciplinary action against that employee, by adverting to the following passage in the said pronouncement.

"He is admittedly a law graduate and has

acquired expertise in conducting disciplinary proceedings. Inspite of being fully aware that there is no provision in Standing Orders for a Presenting Officer to be appointed. Corporation had chosen to enlist the services of a legally trained person." *vide: Pushpa Iyengar v. The Indian Airlines Corporation and others, (1988)1 L.L.J. 385."*

The petitioner left with no other alternative, first chose one Mr.M.S.Dinakar and later his choice was that of Mr.S.Ramanathan. Neither the services of Mr.M.S.Dinakar, though his name was suggested, his services were availed of by the petitioner - nor Mr.S.Ramanathan, who actually assisted the petitioner, was a legally qualified or experienced person, as was Mr.R.Pushpavanam, the Presenting Officer on behalf of the Corporation. At one stage, the petitioner decided to boycott the enquiry is evident from the letter dated 18.1.1980, the contents of which have been already extracted. The petitioner points out that he is at disadvantage with regard to the conduct of the enquiry, by the Corporation being represented by the Presenting Officer, who has legal qualifications and sufficient training and the petitioner is not able to secure the assistance of a legally qualified or a trained person. The choice of Mr.S.Ramanathan was done having no other alternative and there is a protest registered that it will be totally inadequate. Then the enquiry was prosecuted and it did culminate in findings of guilt being rendered against the petitioner and he has been ultimately penalized as we noted supra. Even in the course of the enquiry the petitioner was voicing forth a grievance with regard to the denial of the assistance of a legal practitioner for him as we could see from the extract from the enquiry proceedings made above.

7. It is true that the principles of natural justice may come into play when the statute or statutory rules are silent as to the procedure; and no statutory provision or statutory rule can be struck down where it makes a provision excluding application of principles of natural justice. But this principle cannot be viewed in the abstract and the endeavour must be to find out as to how far and in what manner the statutory provision or statutory rule could be stated to have excluded the application of the principles of natural justice. Despite the absence of any Standing Order enabling the Corporation to avail of the services of a Presenting Officer and that too a legally qualified and trained one, the Corporation did avail of such services. In that context there cannot be a denial of a facility on par with the facility availed of by the Corporation, to the employee. How even a constitutional inhibition with regard to availing of the services of a legal practitioner in the case of a person arrested and detained under any law providing for preventive detention as per Art.22(3)(b) could not be put forth to abrogate the principles of natural justice; when the Detaining Authority is trying to gain an advantage over the detenu, while justifying the detention orders before the Advisory Board by engaging a legal practitioner and the same facility is being denied to the detenu, has been succinctly dealt with in the pronouncement of *A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: (1982)1 S.C.C. 272: 1982 S.C.C. (Crl.) 152: (1982)2 S.C.J. 68: 1982 Crl.L.J. 340.* The relevant passage in paragraph 94 of the pronouncement runs thus:

"We must, therefore, hold regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Art.22(3)(b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner, but that the said facility should be denied to the detenu. In any case, this is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provision of Art.22. Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Art.14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner."

8. The anxiety and vigil of the court must be to keep the balance and not to countenance the bringing in and perpetuation of an imbalance in

the conduct of disciplinary proceedings. By any act of the employer, the employee should not be put to disadvantage in the conduct of disciplinary proceedings. That is the cardinal rule that must prevail and guide and there cannot be prosecution of disciplinary proceedings in derogation thereof. In *Board of Trustees, Port of Bombay v. Dilipkumar, A.I.R. 1983 S.C. 109: (1983)1 S.C.C. 124: 1983 Lab.I.C. 419: (1983)1 Lab.L.J. 1: (1983)1 S.C.J. 178: (1983)1 S.C.R. 828*, as to the nature of the domestic enquiry and the need to keep the scales even, this is what has been observed:

> "Let us recall the nature of enquiry, who held it, where it is held and what is the atmosphere? Domestic enquiry is claimed to be a managerial function. A man of the establishment dons the robe of a Judge. It is held in the establishment office or a part of it. Can it even be compared to the adjudication by an impartial arbitrator or a court presided over by an unbiased judge? The enquiry officer combines the judge and prosecutor rolled into one. Witnesses are generally employees of the employer who directs an enquiry into misconduct. This is sufficient to raise serious apprehensions. Add to this uneven scales, the weight of legally trained minds on behalf of employer simultaneously denying that opportunity to delinquent employee. The weighted scales and tilted balance can only be partly restored if the delinquent is given the same legal assistance as the employer enjoys. Justice must not only be done, but must seem to be done is not an euphemism for courts alone, it applies with equal vigour and rigour to all those who must be responsible for fair play in action."

9. An exception is being taken by the learned counsel for the respondents to the request of the petitioner to have the services of a legal practitioner, who is not an employee of the Corporation, but an outsider, and learned counsel for the respondents, points out that the Corporation was availing of only the services of one of its personnel, who could be a legally trained person. The petitioner exposed the factual position in his letter dated 13.10.1979 that he stood disabled because none of the employees whom he could approach for the purpose of representing him, is possessed of legal qualifications or equal training. There was no rebuttal of this stand in the curt reply which emanated from the Corporation by the letter, dated 31.10.1979/2.11.1979. The grievance of the petitioner was reiterated again on 18.1.1980, and also in the course of the enquiry proceedings; as we have already seen. When the petitioner could not secure the services of a co-employee who is/legally qualified and trained, we do not think that if he endeavours to secure the services of a legal practitioner from outside, that should be frowned upon as totally untenable. In the said circumstances, it would not certainly lie in the mouth of the Corporation to say that the person whose services, it has secured is not a legal practitioner, but only one of its personnel. The Supreme Court in the pronouncement of *A.K.Roy v. Union of India, A.I.R. 1982 S.C. 710: (1982)1 S.C.C. 272: 1982 S.C.C. (Crl.) 152: (1982)2 S.C.J. 68: 1982 Crl.L.J. 340*, did not annex significance to any such technical designation and it was prepared to characterise even the Officers of Government who appear before the Advisory Board and assist it with a view to justifying the detention order, as only legal advisers. The following passage reflects the discussion on this aspect:

> "...We are informed that officers of the Government in the concerned departments often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; and no one should be enabled to take shelter behind the excuse that such officers are not 'legal practitioners' or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser, we do hope that Advisory Boards will take care to ensure that the provisions of Art.14 are not violated in any manner in the proceedings before them. Serving or retired judges of the High Court will have no difficulty in understanding this position. Those who are merely 'qualified to be appointed' as High Court Judges may have to do a little home-work in order to appreciate it."

The duty of the court must be discountenance, to discourage, to weed out, and to strike down any element of disparity, inequality and imbalance in the conduct of disciplinary proceedings.

10. Mr.N.G.R.Prasad, learned counsel for the

respondents, would submit that Mr.M.S.Dinakar, earlier suggested by the petitioner in his letter, dated 16.9.1979 is a legally trained person and even otherwise there were others in the services of the Corporation, who could be stated to be legally qualified personnel and whose services the petitioner could have availed of. This stand has come to be expressed, we find in the additional counter affidavit, which the respondents seemed to have presented in court at a very belated stage of the hearing of the case before the learned single Judge. No such stand was expressed by the respondents when the petitioner even before the commencement of the disciplinary proceedings and in the course of the disciplinary proceedings, had been voicing forth a grievance over the disadvantage faced by him on account of the Corporation appointing a legally trained and qualified Presenting Officer and the petitioner being denied an equal facility. Even otherwise by merely pointing out that there were individuals in the personnel of the Corporation, who could be stated to be legally qualified, cannot by itself bring a solace to the petitioner, because the petitioner must with confidence, be in a position to secure the services of any such personnel; and equally so, such personnel must be shown to be willing, with boldness and without any fear or apprehension over, coming within the wrath of the Corporation, on this count to, assist the petitioner in the disciplinary proceedings prosecuted by the Corporation. All these are in the realm of hypothesis and presumptions and certainly they cannot be taken note of to ignore the grievance of the petitioner, which has legitimately arisen. The answers, belatedly sought to be given, by the respondents are purely afterthoughts, and do not require any scrutiny by court to find out their factual tenability. We must record that the filing of the additional counter affidavit on behalf of the respondents, was protested to be the learned counsel who appeared for the petitioner before the learned single Judge by making an endorsement therefor on the same. Further we do not get any indication that the learned single Judge did permit the filing of such additional counter affidavit at all.

11. Mr.N.G.R.Prasad, learned counsel for the respondents, would submit that the petitioner did not voice forth this grievance either in his reply to the second show cause notice or in his appeal petition. The petitioner stood wounded. His immediate anxiety at those junctures should have been only to get rid of on merits, the punishment proposed and ultimately imposed by the departmental authorities. As rightly contended by Mr.Viyay Narayan, learned counsel for the petitioner, this might prove to be an exercise in futility, because the pleas of the petitioner had been consistently rejected by the Corporation earlier. On the facts and circumstances of the case, we do not think, we should say that the petitioner totally forgot his rights. He was conscious of them throughout. We have already noted that immediately when the Presenting Officer was appointed, the petitioner put forth his stand and again at a subsequent stage, he took the very same stand with regard to denial of an opportunity to secure the services of a legally qualified and trained person to assist him in the enquiry. He protested even in the course of the conduct of the enquiry. His cry was one in the wilderness and it was not at all heeded to by the Corporation.

12. Mr.N.G.R.Prasad, learned counsel for the respondents, would also submit that on account of the petitioner not availing of the services of a legal practitioner, the petitioner did not suffer any prejudice in the course of the conduct of the disciplinary proceedings. Prejudice is not the test to be kept in the forefront to consider as to whether reliefs should follow or not, when there is a violation of the principles of natural justice. The rule is, the very violation of the principles of natural justice is prejudice and nothing more is required to apply the rule and accord the reliefs. In *S.L.Kapoor v. Jagmohan, A.I.R. 1981 S.C. 136: (1980)4 S.C.C. 579: (1981)1 S.C.J. 312: (1981)1 S.C.R. 746,* the proposition has been discussed in the following terms.

> "Linked with this question is the question whether the failure to observe natural justice does not at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it appears the non-observance of natural justice but because courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are

controversial, however slightly, and penalties are discretionary."

.....

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice, but because courts do not issue futile writs."

The Corporation did have the services of a legally qualified and trained person, who had considerable experience in the conduct of disciplinary proceedings. It is not claimed that either the petitioner or Mr.S.Ramanathan, who assisted the petitioner as a friend, was equal to the Presenting Officer, appointed by the Corporation. How far the petitioner could have achieved the result desired by him, namely, extricating himself from the charges if he had only the assistance of a legal practitioner, we cannot envisage and say a positive answer one way or the other. It would be unfair to do so also. The fact, indisputable as it is, remains that the petitioner was at a disadvantage in the course of the prosecution of the disciplinary proceedings and the ultimate result went against him. He must be accorded the reliefs. We must record that the question of maintainability of the writ petition was not argued before us. The result of our preceding discussion is, this writ appeal fails and the same is dismissed. No costs.

B.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

A.A.O.No.1006 of 1991 *17th March, 1992.*

V.C.Sasidharan ...*Appellant*

v.

Chenthamara ...*Respondent.*

Civil Procedure Code (I of 1908), O.38, Rule 5 - Interim attachment - Defendant executing pronote and giving immovable property as security by way of equitable mortgage by deposit of title deeds - Plaintiff suing on the pronote and praying for interim attachment of the property - Interim attachment if can be ordered - Practice of ordering interim attachment as a matter of course deprecated.

The order of the court below directing notice to the defendant and also directing him to furnish security by a certain date is wholly unsustainable in view of the fact that the plaintiff has admitted in his plaint that the property has been given to him as security by way of equitable mortgage by deposit of title deeds. The order shows that the court has not applied its mind to the facts of the case. It is the general complaint from the bar that on application for attachment of property, the courts do not at all apply their minds and they grant orders automatically as if it is a matter of course. This Court has repeatedly drawn the attention of the Subordinate judiciary to the provisions of O.38, Rule 5, C.P.C. and pointed out that orders of interim attachment shall not be passed as a matter of course. *[Para 2]*

Appeal against the order of the Civil Court (IV Assistant Judge, Madras dated 3.10.1991 and made in I.A.No.14617 of 1990 in O.S.No.6116 of 1991.

S.Subbiah, for Appellant.

M.S.Chandrasekaran, for Respondent.

The Court made the following

ORDER:- This appeal against the order of interim attachment, arises in the following circumstances. The respondent filed O.S.No.6116 of 1991 for recovery of a sum of Rs.59,820 said to be due on promissory note. Even in the plaint, the respondent admitted that the defendant had deposited his title deeds relating to his property bearing Plot No.9 though it is wrongly typed as No.8, Thailammal Kamakshi Nagar in Puliyur

Village, Egmore-Nungambakkam Taluk. In para.6 of the plaint it is stated that though the plaintiff is entitled to file a suit on the equitable mortgage, he is filing the suit only as one on promissory note. Nothing is stated in the plaint as to why the plaintiff is not proceeding against the security. Nor is it stated in the plaint that the plaintiff is giving up the security. Even in the cause of action paragraph, a reference is made to the deposit of title deeds.

2. Along with the plaint, the plaintiff filed I.A.No.14617 of 1991 for attachment of property which was already given to him as security under equitable mortgage. The court passed an order on 4.9.1991 directing notice to the defendant and also directing him to furnish security by 17.9.1991. That order is wholly unsustainable in view of the fact that the plaintiff has admitted in his plaint that the property had been given to him as security by way of equitable mortgage by deposit of title deeds. The order shows that the court has not applied its mind to the facts of the case. It is the general complaint from the Bar that on applications for attachment of property, the courts do not at all apply their minds and they grant orders automatically as if it is a matter of course. This Court has repeatedly drawn the attention of the Subordinate Judiciary to the provisions of O.38, Rule 5, C.P.C. and pointed out that orders of interim attachment shall not be passed as a matter of course.

3. After service of notice, the defendant filed vakalat on 17.9.1991 and prayed for time to file counter. He also filed an application on 23.9.1991 in I.A.No.16215 of 1991 to set aside the interim order directing him to furnish security. In spite of that application pending on the file, learned Judge has passed an order on 3.10.1991 granting interim attachment and granting time for counter till 11.12.1991. It should be mentioned that on two earlier occasions, namely, on 17.9.1991 and 30.9.1991 learned Judge passed orders adjourning the matter and directing the defendant to furnish security. Even at that stage, the court did not apply its mind and decide the question whether security should be furnished in the present case. It should have heard the defendant on that question and passed appropriate orders. Even when the defendant has filed the application to set aside the interim order directing him to furnish security, the court has not chosen to decide the question.

4. The grievance of the defendant/appellant is perfectly justified. The court below is in error in adopting this procedure and granting orders automatically to the plaintiff.

5. In any event in the present case, the defendant has in his affidavit in I.A.No.16215 of 1991 given an undertaking not to alienate or create further encumbrance over the property in question till the disposal of the suit. That is found in para.9 of the said affidavit. In the counter affidavit filed in I.A.No.14617 of 1991 the defendant has given the same undertaking in para.10. He has also pointed out in para.11 that the property which is given as security, is worth more than Rs.3,50,000 and the original title deeds are already with the plaintiff.

6. In the circumstances of the case, the undertaking given by the defendant in the two affidavits is recorded and in view of the undertaking, there is no necessity whatever for attaching the property. The order of interim attachment passed by the court below in I.A.No.14617 of 1991 in set aside. The application is dismissed. The civil miscellaneous appeal is allowed. There will be no order as to costs.

B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Srinivasan, J.*

W.A.No.8842 of 1989 *15th February, 1990.*

P.S.Viswanathan *...Petitioner*

v.

The Union of India represented by the Secretary, Ministry of Law and Justice, Government of India, New Delhi and another *...Respondents.*

Constitution of India (1950), Art.226 - Writ of mandamus - *If can be issued striking down certain sections of an Act or declaring that certain persons will be entitled to maintenance even in the absence of such a provision in the Act - Non-joinder of necessary party in writ petition - Petition not sustainable.*

The petitioner filed a writ petition for issuing a *mandamus* striking down Secs.18 to 21 of the Hindu Adoptions and Maintenance Act, 1956; as *ultra vires* of the Constitution of India and hence *null and void* or giving a ruling that sole surviving coparceners who follow the Hindu Law have to be maintained notwithstanding absence of such provision in the aforesaid Act.

Held: There is no question of issuing a *mandamus* striking down certain sections of a legislation nor a *mandamus* declaring that certain persons will be entitled to maintenance in the absence of a provision in a legislation to that effect. A writ cannot be issued in the abstract or in the vacuum declaring any particular provision of law to be void or invalid. *[Paras 3 and 4]*

The petitioner claims to be entitled to maintenance from his mother but he has not chosen to implead her as a party to the writ petition. The person who is interested and who would be opposing the petition with reference to the grant of relief in the writ petition is the mother of the petitioner but he has not impleaded her as a party. Hence, this writ petition is not sustainable on the ground of non-joinder of necessary party. *[Para 4]*

Cases referred to:

Santlal v. State of Punjab, A.I.R. 1988 S.C. 485; Kamalanimal v. Venkatalakshmi, A.I.R. 1965 S.C. 1340.

Petition under Art.226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents herein to strike down Secs.18 to 21. Sections of Hindu Adoptions and Maintenance Act, 1986 as *ultra vires* of the Constitution of India and hence *null and void* or give a ruling that sole surviving coparceners who follow Mitakshara Hindu Law have to be sanctioned notwithstanding absence of such provisions in the aforesaid Act.

P.S. Viswanathan, in person, for Petitioner.

T.Srinivasamoorthy, Additional Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER: The petitioner appeared in person and submitted his arguments.

2. The prayer in this writ petition is to issue a *mandamus* striking down Secs.18 to 21 of the Hindu Adoptions and Maintenance Act, 1956 as *ultra vires* of the Constitution of India and hence *null and void* or giving a ruling that sole surviving co-parceners, who follow that Hindu Law have to be maintained notwithstanding absence of such provisions in the aforesaid Act.

3. Even the prayer as framed in the writ petition cannot be granted by this Court. There is no question of issuing a *mandamus* striking down certain sections of a legislation nor a *mandamus* declaring that certain persons will be entitled to maintenance even in the absence of a provision in a legislation to that effect.

4. There is another obstacle to the maintainability of this writ petition, which is as follows: In this petition the two respondents are the Union of India represented by the Secretary, Ministry of Law and Justice, and the Secretary, Ministry of Parliamentary Affairs, Government of India, New Delhi. The petitioner claims to be entitled to maintenance from his mother, but he has not chosen to implead her as a party to the writ petition. A writ cannot be issued in the abstract or in the vacuum declaring any particular provision of law to be void or invalid. *vide: Santlal v. State of Punjab, A.I.R. 1968 S.C. 485.* The person who is interested and who would be opposing the petition with regard to the grant of relief in this writ petition is the mother of the petitioner, but he has not impleaded her as a party. Hence this writ petition is not sustainable on the ground of non-joinder of necessary party.

5. Apart from that the petitioner had filed earlier W.P.No.6835 of 1987. In that petition his prayer was to strike down Secs.18 to 20 of the Hindu Adoptions and Maintenance Act, 1956 as *null and void* and *ultra vires* of the Constitution. That writ petition was dismissed by this Court on 11.4.1988 after hearing the petitioner. Without challenging the correctness of that order by way of an appeal, the petitioner has filed the present writ petition for the very same relief. The writ petition is clearly barred by the principle of *res judicata* and it is not open to the petitioner to sustain this writ petition, when the order rendered in the earlier writ petition holds the field. Even otherwise, on the merits of the case, the petitioner's contention cannot be accepted. It is the argument of the petitioner that in *Kamalammal v. Venkatalakshmi, A.I.R. 1965 S.C. 1340*, the right of the sole surviving coparcener has been recognised and upheld by the Supreme Court. He placed reliance on paragraphs 7 and 8 of the judgment in that case. The Supreme

Court held in that case, after referring to the earlier text of Hindu Law, that a disqualified member of the joint Hindu family is entitled to take and enjoy the whole estate, when he becomes the sole surviving member of the family. The Supreme Court referred to the provisions of the Hindu Inheritance (Removal of Disabilities) Act 71 of 1928 and pointed out that prior to the said Act, a disqualified heir, who was congenitally a deaf-mute, become by birth a coparcener with his father, so that the ancestral family properties vest in him as sole surviving coparcener on the death of his father without other male issue. The Supreme Court also referred to Saraswati Vilasa written by Prataparudradeva, a recognised authority in Southern India and held that the liability to provide for maintenance of the disqualified heir under the Hindu Law fell into two categories; one from the existence of a particular relationship independent of the possession of any property and the other on possession of property. According to the Supreme Court, a disqualified heir falls in both categories *vis-a-vis* the right to maintenance. The ruling of the Supreme Court does not apply to the present case. As per the ruling of the Supreme Court, the petitioner is entitled to a share in the property and he may be entitled to the entire estate as the sole surviving coparcener. But the present writ petition is to nullify certain sections of the Hindu Adoptions and Maintenance Act on the ground of unconstitutionality. If the petitioner places reliance on the judgment of the Supreme Court his remedy is to file a suit for recovery of possession of his properties, if according to him he is the only person entitled thereto, or to file a suit for partition, if according to him other persons are also entitled to a share therein. He has already filed a suit for partition. Admittedly, the petitioner became blind only at the age of 29 and he was not congenitally blind. After the Hindu Inheritance (Removal of Disabilities) Act, 1928, even congenitally blind person is not disqualified under Hindu Law to inherit property. Hence, the petitioner cannot in any sense of the term call himself a disqualified heir and thus bring himself within the ruling of the Supreme Court. Since according to him, he is a sharer in the property he cannot claim any maintenance from any person. If at all, his right is only to proceed against the person in possession and recover his share of the property.

6. For the above reasons, this writ petition is without any merit and hence it is dismissed. There will be no order as to costs.

B.S. -------- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

L.P.A.No.1 of 1988 *22nd January, 1992.*

M/s. Venkataswami Motor Service, Coimbatore *...Appellant*

v.

C.K.Chinnaswamy and others *...Respondents.*

(A) Motor Vehicles Act (IV of 1939), Sec.95(2)(b)(iv) read with Sec.95(1), proviso (ii) - Passenger - Who is - Person alighting from vehicle but not reaching a place of safety - If a passenger.

To establish that a certain person was a passenger, it should be seen, how he acted and how those responsible to carry him as a passenger behaved. It is not in doubt and it cannot be doubted that a person becomes a passenger by contract express or implied. The expression 'passenger' ultimately refers to one who travels either in a bus or a vehicle or a ship or a train. This expression means one who travels and nothing else. When the relationship of a carrier and a passenger begins with reference to the vehicle concerned, must be found varying from fact to fact and case to case. A person rushing to a vehicle and attempting to board when in fact it had started moving, the Court found, not to be a passenger. One who had not entered the vehicle is obviously not a passenger. One who had alighted from the vehicle is also not a passenger. But a passenger alighting from a vehicle may still be a passenger until he had reasonable opportunity to reach a place of safety, meaning thereby that he was away from the vehicle. While there can be no hesitation in holding that insurance of a motor vehicle against third party risks is a sort of indemnity to the insured it cannot be visualised that in

the garb of enjoying such indemnity a negligent carrier can escape the liability for damages. How can he be allowed to say: 'look here, my vehicle is insured; therefore I can throw out a passenger and then say that since he was found on the street, he was not a passenger.' *[Para 21 and 22]*

(B) Motor Vehicles Act (IV of 1939), Sec.96(2) - Defences open to the Insurer - Tribunal holding that victim was a passenger and fixing compensation payable by insurer on that basis - Owner of vehicle contending in appeal that the victim was a third party and not a passenger - Insurer, if can take the defence that victim was a passenger.

It is one thing to say as to what defence is available to the insurer and quite another as to whether any person including the owner of the vehicle can saddle the insurer with something beyond its liability. The statute had fixed a limit. The insurer is obliged to act as provided thereunder. If something more than the law is said and done, the insurer can always say that anything beyond the law shall not bind it. Here is a case in which the Tribunal has recognized the statutory limitation and fixed the liability of the insurer strictly in accordance with law. The owner of the vehicle had appealed and suggested that it is not his but that of the insurer's liability because the victim was a third party and not a passenger. How then the insurer cannot say that the victim was not a third party and that he was a passenger. In such cases, the argument that the insurer can raise no defence other than the defence made available to it under Sec.96(2) of the 1939 Act cannot be accepted. *[Para 27]*

(C) Motor Vehicles Act (IV of 1939), Sec.95(2) - Motor Vehicles Act (LIX of 1988), Secs.147(1) and (2) - Motor accident - Liability of insurer - Appeal against award of compensation under old Act pending - If governed by new or old Act.

Unlike Sec.95(2) of the 1939 Act wherein there is mention of a limit as to insurer's liability for each individual passenger etc., there is no provision in the 1988 Act imposing any such limitation. It however, must be borne in mind that Sub-sec.(2) of Sec.147 of the new Act is controlled by Sub-sec.(1) thereof. It will be thus for the insured to see that there is a policy insuring against the death of or bodily injury to any passenger of a public service vehicle or against any liability which may be incurred in other cases. A public service vehicle cannot be confused with any State owned operation. It has a definite connotation under the Act and that can be gathered from the definition. Sec.2(35) has defined 'public service vehicle' to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and included a maxi cab, motor cab, contract carriage and stage carriage. In view of the above it is not possible to find any change introduced by the new law that would destroy what actually accrued as a right to the claimants and or the insurer or in the same view to find any such right accruing to the owner of the vehicle which can enter into a claim arising under 1939 Act. The mention in Sub-sec.(4) of Sec.217 of Sec.6 of the General Clauses Act, 1897 shall automatically make such claims subject to the principles that are generally recognised under the said provision. *[Paras 29, 30 and 31]*

Cases referred to:-

Govind Prasad v. Surjit, A.I.R. 1978 Cal. 108; Uvaraja v. Parvathi Ammal, 99 L.W. 265; M/s.Southern Motors, Madurai v. C.Sivajothi Ammal, (1982)1 M.L.J. 410: A.I.R. 1982 Mad. 219; Sivakumar Transports v. Mani & Palaniswami, (1989) T.L.N.J. 236; National Insurance Company Ltd. v. Sundaravalli, 1989 T.L.N.J. 31; Pandit Ram Swaroop v. Balbir Singh, (1989)65 Com. Cases 158; B.I.G. Insurance Company v. Itbar Singh, A.I.R. 1959 S.C. 1331; United Fire and General Insurance Company Ltd. v. Parvathamma, A.I.R. 1981 A.P. 227; T.Srinivasalu Sastry v. C.Govardana Naidu, A.I.R. 1990 A.P. 289; Oriental Fire and General Insurance Company Ltd. v. Shantabai S.Chume, A.I.R. 1987 Bom. 52; Zimmermann v. Mednikoff, 162 N.W. 349, 350, 165 Wis 333; Illinois Cent R. Co. v. Cotter, 103 S.W. 279, 280, 31 Ky. Law Rep. 679; Benjamin v. Metropolitan St. Ry. Co., 151 W. 91, 94, 245 Mo 598; Dahline v. City of Seattle, 5 p 2 1010, 1012, 165 Wash 683; Hatcher v. Quioncy Horse Railway and Carrying Co., 181 III App. 30; Heva v. City of Seattle, 272 P. 41, 43, 150 Wash 61; Kentucky Highlands R. Co. v. Creal, 179 S.W. 41, 418, 166 Ky. 469, I.R.A. 1916 B. 830 Ann. Cas. 1917 C. 1205; Bradley v. Williams, 101 So. 808, 809, 20 Ala. App. 308; United States Fidelity & Guaranty Co. v. Aschenbrenner, COA, Cal. 65 F. 2d. 976, 980; Weaver v. Sprague, 71, N.E. 2d. 106, 330 III App. 331; North Chicago St. Ry. Co. v. Williams, 29 N.E. 672, 675, 140, 111, 275; Lacks v. Wells, 44 S.W. 2d 154, 156, 329 Mo. 327; Columbus R. Co. v. Asbell, 66 S.E. 902, 903, 133 Ga. 573; Louieville Ry. Co. v. Kennedy, 172 S.W. 970, 971, 162 Ky. 560 Ann.

Cas 1916E, 996; Lackey v. Missouri & K.I.Ry. Co., 264 S.W. 807, 808, 305 No.260; El Pase Electic Co. v. Ludlow, Tax. 291 S.W. 619, 621; Illinois cent R. Co. v. Mcnillion, 129 III App. 27, 237; Zaiewaki v. Milwaukee Electric Railway & Light Co. 263 N.W. 577, 219 Wis. 541; Wittkower v. Dallas Ry. & Terminal Co., Tex. Civ. App., 73 S.W. 2d 867, 869; Wittkodwer v. Dalls Ry. & Terminal Co., Tex. Civ. App. 73 S.W. 2d 867, 869; Gallagher v. St. Louis Public Service Co., 59 S.W. 2d 19, 322 Mo. 944; Whilte v. Allghany Cab Co., 29 N.Y.S. 2d 272, 273; McAlpine v. Los Angeles Ry. Corp. 154 P.2d 911, 912, 67 Cal. App. 2d 486; Green v. Baltimore & O.R.Co.63 A. 63, 214 Pa. 240; King v. Travellers Ins. Co.28 S.E. 661, 662, 101 Ca.64, 65 Am. St. Rep. 288; Ferguson v. Kansas City Public Service Co., 156p. 2d. 869, 875, 159 Kan 520; Wullbrandt. v. City of Seattle, 84 P. 2d 123, 125, 196 Wash 645; Buckner v. Southern Ry. Co.96 S.W. 2d. 600, 601, 20 Tenn. App. 212; Will v. Miluaukee Electric Ry. & Light Co., 17 N.W. 658, 659, 169 Wis. 38; Quinn v. New York Life Ins. Co., 195 N.W. 427, 429, 234 Kich. 641; Loggins v. Southern Public Utilities Co., 106 S.E. 822, 823, 181 N.C. 221; Melton v. Birmingham Ry., Light & Power Co., 45 Sc. 151, 153, Ala. 95, 16 L.R.A.N.S. 467; McBridge v. Georgia Ry. & Electic Co., 54 S.E. 674, 676, 125 Ga. 515; Flynn v. St. Louis Transit Co., 87 S.W. 560, 562, 113 Mo. App. 185; Keller v. Chicago Rys. Co. 183 III App. 399; Devoy v. St. Louis Transit Co., 91 S.W. 140, 143, 192, Mo. 197 citing Clerk Street Rye. (2d Ed.) 3; Schepers v. Union Depot Ry. Co. 29 S.W. 712, 126 Mo. 665; Barth v. Kansas City El. Ry. Co. 44 S.E. 778, 142 No.535; Booth Street Ry. Law 326; Gillis v. Duluth Casualty Ass'n., 158 N.W. 252, 253, 133 Minn. 238; Payne v. Illinois Cent R. Co., 155 F. 73, 76, 83 C.C.A. 589; Louisville & N.R. Co. v. Hobhe, 159 S.W. 682, 683, 155 Ky. 130, 47 L.R.A. N.S. 1149; Garrett v. Atlantic City & S.R. Co., 74 A. 273, 274, 79 N.J.L. 127; Houston & T.C.R. Co. v. Batchler, 83 S.L. 902, 904, 37 Tax Civ. App. 116; Legge v. New York, N.H. & H.R. Co., 83 N.E. 367, 368, 197 Mass. 86, 23 L.R.A. N.S. 633; Atlantic City Ry. Co. v. Kiefer, 66 A 930, 931, 932, 75 N.J.L. 54; Baltimore & C.R. Co. v. State, 60 Md. 449, 462; Crammer v. West End St. Rly. Co., 31 N.E. 391, 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456; Allerton v. Boston & M.R.R., 15 N.E. 621, 623, 146 Mass. 241; Turner v. Walash Ry. Co., Mo. 211 S.W. 101, 103; Gulf C. & S.F. Ry. Co. v. Glank, 30 S.W. 278, 278, 9 Tex. Civ. App. 599; Mckimble v. Boston & M.R.R. 2 N.E. 97, 98, 139 Mass. 542; St. Louis S.W. Ry. Co. of Texas v. Griffith, 35 S.W. 741, 743, 12 Tex. Civ. App. 631; Painter v. Chicago, B. & Q. Ry. Co. 140, N.W. 787, 789, 93 Neb. 419; Commonwealth v. Boston N.R.R. 129 Mass. 500, 501, 37 Am. Rep 382.

Appeal under Clause 15 of the Letter Patent against the order of Swamikkannu, J., dated 1.9.1987 and made in the exercise of the appellate jurisdiction of the High Court in appeal against order No.678 of 1981 (M.C.O.P.No.14 of 1980 on the file of the Motor Accident Claims Tribunal (Principal Subordinate Judge), Coimbatore.

V.Manivannan, for Appellant.

Raju K.Lukose and *R.Balasubramanian,* for Respondents.

The Judgment of the Court was delivered by

Mishra, J.:- The third respondent, owner of a Motor vehicle in M.C.O.P.No.14 of 1980 before the Motor Accident claims Tribunal, Coimbatore, and appellant in A.A.O.No.678 of 1981 has preferred this appeal under Clause 15 of the Letters patent of this Court against the award of compensation to the claimants/respondents 1 to 4 herein amounting to Rs.36,000 out of which Rs.5,000 is payable by the Insurer and the balance by the owner/appellant.

2. The claimants who are the husband and minor sons and daughters of the victim Kamalam moved the Tribunal under Sec.110-A of the Motor Vehicles Act, 1939 (since repealed) alleging that Kamalam was travelling in a town bus plying in route No.32-C and bearing Registration No.TNE 6517 along goods shed Road on 16.7.1979 at about 7.45 a.m. when the bus approached the bus stop near the junction of Big Bazaar Street, and Goods shed Road, West of St. Michael's High School, she got down from the bus at that stop, but before she could stabilise herself on the road, the conductor instructed the driver to move the vehicle and accordingly the driver started the bus rashly and negligently with the result that Kamalam was knocked down and dragged along by the body of the bus. In that process, she sustained multiple injuries and succumbed to them in the C.M.C.Hospital. The claimants impleaded the driver, the conductor, the owner of the vehicles and the insurer as party respondents in the proceeding before the tribunal.

3. The driver pleaded in his return that there was no bus stop in the Goods Shed Road near St.Michael's High School and that Kamalam got

down from the running bus and lost her balance due to which she met with the accident which caused her death. The conductor and the owner of the Bus (appellant) adopted the said counter and thus maintained that Kamalam met with the accident entirely on account of her own fault and not on account of any rash or negligent act of the driver or the conductor.

4. The insurer in a separate counter-affidavit alleged that the driver was plying the bus at a moderate speed from north to south along Goods Shed Road. The victim was one of the passengers travelling in the bus. When the bus approached the junction of the Goods Shed Road and Big Bazaar Street, the driver slowed down the vehicle. At this point of time, despite the warning given by the conductor, the victim jumped out of the bus. Since the bus was still moving, she fell down and sustained injuries, to which injuries, she succumbed later in the day. The insurer maintained that its maximum liability was Rs.5,000 only.

5. The tribunal, on a consideration of the evidence, both oral and documentary, found that the accident took place only on account of the rash and negligent act of the driver and conductor of the bus and that there was no contributory negligence on the part of the victim. It, however, held that the victim did not cease to be a passenger within the meaning of proviso (ii) to sub-sec.(i) of Sec.95 of the Motor Vehicles Act and so the liability of the insurer was restricted to Rs.5,000. The tribunal concluded that the claimants/respondents were entitled to a compensation of Rs.36,000 and awarded compensation accordingly with interest at 6% per annum from the date of the petition.

6. In the appeal against the Tribunal's awarding compensation, the appellant maintained that it was the insurance company that had to pay the entire amount of compensation that had been awarded by the Tribunal and that the findings of the tribunal with regard to the negligence of the driver and the quantum of compensation were not proper and not sustainable.

7. Swamikkannu, J. who eventually heard the appeal, however, has held that the victim Kamalam was still a passenger within the meaning of Sec.95(2)(b) read with proviso (ii) to sub-sec.(1) thereof and thus the insurer's liability was limited to the limits under the Act, that there was no force in the contention of the appellant in view of the evidence on record that the accident was not as a result of the rash and negligent driving and that the quantum of compensation awarded was correct.

8. Before we proceed into the contentions, we propose to have the foundation of facts that (1) Kamalam travelled in the town bus plying in route No.32-C bearing Registration No.T.N.E. 5517 on 16.7.1979 at about 7.45 a.m. along Goods shed Road, (2) the accident took place when the Bus approached the bus stop near the junction of Big Bazaar St., and Goods Shed Road, the West of St. Michael's High School, and (3) the bus belonged to the appellant.

9. It is on record in the evidence of the witnesses, which has not been seriously challenged before us, that the bus stopped near the junction of Goods Shed Road and Big Bazaar Street and that three women alighted from the bus along the front Exit including the victim Kamalam. When she was placing one foot on the ground and another foot on the foot-board of the bus, the conductor gave the whistle and the bus began to move slowly. Kamalam was holding the post near the front exit when the bus moved and dragged her to a distance of about 10 feet. The passengers in the bus shouted and the bus was stopped. The bus ran over her and caused serious injuries, to which injuries she later succumbed.

10. Chapter VIII of the 1939 Act contained a special provision as to Insurance of motor vehicles against third party risks and in Sec.95 thereof, fixed the limits of liability in these words.

> "(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy.......
>
> (2) Subject to the proviso to sub-sec.(1), a policy of Insurance shall cover any liability incurred in respect of any one accident upto the following limits, namely,-
>
> (a) Where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of or bodily injury to, employees (other than the driver) not exceeding six in number, being carried in the vehicle);
>
> (b) Where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of contract of employment-
>
> (i) in respect of persons other than passengers carried for hire or reward, a limit of fifty

thousand rupees in all;
(ii) in respect of passengers-
(1) a limit of fifty thousand rupees in all where the vehicle is registered to carry not more than thirty passengers;
(2) a limit of seventy-five thousand rupees in all where the vehicle is registered to carry more than fifty but not more than sixty passengers;
(3) a limit of one lakh rupees in all where the vehicle is registered to carry more than sixty passengers; and
(4) subject to the limits aforesaid, ten thousand rupees for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passenger in any other case;
(c) save as provided in clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;
(d) irrespective of the class of the vehicle, a limit of rupees two thousand in all in respect of damage to any property of a third party."

11. It is nobody's case that in case victim Kamalam was a passenger in the bus at the time of the accident, the Insurer's liability will be higher than rupees five thousand as fixed under clause (4) of sub-sec.(2) of Sec.95 above quoted. The controversy herein is whether Kamalam was still a passenger, when, according to the learned counsel for the appellant, Kamalam had ceased to be a passenger, for she had moved out of the bus. According to him, the Insurer in such a situation should be held liable for the whole amount of compensation payable to the claimants.

12. A Bench of the Calcutta High Court in *Govinda Prasad v. Surjit, A.I.R. 1978 Cal. 108,* dealt with a case of a minor school student, who after the school hours, tried to board a private bus at the bus stop opposite the school, but before he could board the bus, it started moving on the signal of the conductor. The boy lost balance and fell down on the road and the rear wheel of the bus rolled over his right leg. The principal contention before the court was that the tribunal should have held that the insurer was liable for the whole amount of compensation and that Sec.95(2)(b) of the Motor Vehicles Act, 1939, was not applicable as the boy who did not board the bus but only made an attempt to board the same, could not be said to be a passenger within the meaning of the said provision. The Calcutta Court observed.

"Clause (b) of Sub-sec.(2) of Sec.95 *inter alia* provides that subject to the proviso to sub-sec.(1), where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, if the Vehicle is registered to carry more than six passengers excluding the driver, a policy of insurance will cover any liability incurred in respect of any accident up to the limit of two thousand rupees in respect of individual passenger. In the instant case, there is no dispute that the vehicle in question is registered to carry more than six passengers excluding the driver. Even assuming that the respondent was not a passenger as he was only attempting to board the bus, still the limit of the liability of the insurer would be in terms, of Sec.95. The proviso (ii) to Sec.95 (1) which has been quoted above, clearly lays down that where the vehicle is a vehicle in which passengers are carried for hire or reward, as in the present case, policy of the insurer would cover the liability for death or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises. Sub-sec.(2) having been made subject to the proviso to sub-sec.(1), it covers the liability for death or bodily injury to persons caused in the circumstances stated above. The word 'passengers' in clause (b) of sub-sec.(2) of Sec.95 also includes within it any person meeting with death or bodily injury under the circumstances mentioned in the proviso (ii) to sub-sec.(1) where the vehicle is one in which passengers are carried for hire or reward or under a contract of employment. The limit of liability of the insurer will be as specified in Clause (b) of sub-sec.(2). In our view, there is no substance in the contention of the appellant that the respondent was not a passenger as he had only attempted to board the bus at the time of the accident happened and accordingly, the Insurer should be held liable for the whole amount of compensation as awarded. As the vehicle is registered to carry more than six passengers excluding the driver, the tribunal was perfectly justified in fixing the liability of the insurer at Rs.2,000 only in view of Clause (b) of sub-sec.(2) Sec.95 of the Act."

13. In the case of *Uvaraja v. Parvathi Ammal, 99*

L.W. 265, a learned single Judge of this Court dealt with a case of a victim of a motor accident, who was about to get into the moving bus, but slipped down due to rush and ultimately got under the wheel and set with his death. Referring to an earlier Division Bench judgment of this Court in C.M.A.No.558 of 1979, dated 28th July, 1981, which was a case on facts that the deceased was about to get into the moving bus, the court said,

> "I must straightway point out that the facts are on all fours with those found in a decision rendered by a Division Bench of this Court in C.M.A.No.558 of 1979, dated 28th July, 1981. In this case, the finding is that the deceased was about to get into the moving bus, but then before he could get into the bus, he slipped down due to rush and ultimately got under the wheel and not with his death. It is now relevant to notice the facts in the unreported case referred to above. The deceased was not a passenger in the bus and there was a scramble between the persons who were waiting for the bus at the bus stand and it is at that scramble the deceased fell down and was run over by the bus. On the said facts, the Bench held, "Therefore, we can safely say that a person attempting to get into the bus but who did not succeed in getting entry into the bus, cannot be taken to be a passenger in the bus."
>
> If that is no, in the instant case, the deceased cannot be said to be a passenger in the bus. Unless the deceased was a passenger, the insurance company cannot call to its aid Sec.95(2)(b)(ii) and (4) of the Motor Vehicles Act. Then, the insurance company is alone liable to pay the entire claim."

14. A Bench of this Court in *M/s.Southern Motors, Madurai v. C.Sivajothi Ammal, (1982)1 M.L.J. 410: A.I.R. 1982 Mad. 219*, has said,

> "Though the learned counsel for the insurer contends that all persons who are authorised to travel in the bus by the issue of tickets should be taken to be passengers of the bus, we are not in a position to accept such a wide proposition. As a matter of fact in a judgment of this Court, Natarajan, J. in *The Madras Motor and General Insurance Co. Ltd., Tirunelveli v. Perumal Kumar, C.M.A.Nos.7 and 25 of 1972*, held that a person travelling on the foot board without actually entering the bus cannot be taken to be a passenger and that if death or injury is caused to such a passenger, there cannot be any limit on the insurer's liability. However, it is unnecessary for us to go to the extent of saying that a person travelling on the foot board is not a passenger, as in this case we are not concerned with a person travelling on the foot board but a person who did not actually get into the bus fell down and sustained injuries by a fall from the moving bus in his attempt to get an entry into the bus while it was moving."

15. In *Sivakumar Transports v. Mani & Palaniswami, 1989 T.L.N.J. 236*, a learned single Judge of this Court again considered the case of a person, who met with an accident while attempting to board a bus and said as follows:

> "The expression 'passenger' normally refers to one who travels either in a bus or a vehicle or a ship and the predominant idea conveyed by the expression 'passenger' is one who travels. It is further seen from the elaborate provisions and the rules under the Motor Vehicles Act that what is contemplated is that a person could be regarded as a passenger, when he travels either by being seated inside the bus in the seats provided for occupation by passengers who travel or by standing, where such passengers are allowed to travel by standing. The entrance and the exit provided in a bus are only for the purpose of securing ingress and egress and they are not meant for travel. Therefore, any person found on the foot-board at the time of the accident cannot normally be regarded as a passenger travelling by the vehicle concerned. The attempted entry into the bus through the exit from the foot-board could at best be regarded as having been done with a view to begin or commence travel by the bus. A person in the position of the first respondent making an attempt to get into the bus and failing in it cannot be regarded as travelling by the bus as a passenger. In C.M.A.No.558 of 1979, judgment dated 28.7.1981, a Division Bench of this Court had occasion to consider whether a person attempting to get into a moving bus would be a passenger. The Division Bench held that a person attempting to enter a bus but falling down as a result of the bus being suddenly started before he could enter the bus, cannot be said to be a passenger. To similar effect is the decision in *Uvaraja v. Parvathi Ammal, 1986 A.C.J. 506*, wherein it

has been laid down that when a person attempts to get into a moving bus, but before getting into the bus slips down and meets with a fatal accident, the deceased could not be regarded as a passenger in the bus and the insurance company cannot call to its aid Sec.95(2)(b)(ii) and (4) of the Motor Vehicles Act."

16. The cases above cited, however, are cases of persons, who were yet to enter the bus and thus found not travelling in the bus.

17. In *National Insurance Company Ltd. v. V.K.Sundaravalli, 1989 T.L.N.J. 31*, a learned single Judge of this Court, however, dealt with a case of a person, who met with an accident while getting down from a bus at the bus stop. That was a case in which before the victim could rest his foot on the ground, the driver of the bus moved the vehicle in a rash and negligent manner as a result of which he was thrown out and sustained serious injuries to which he succumbed later in the hospital. After referring to the various authorities in cases of accidents taking place causing injuries to persons, who were yet to enter into the bus, the learned judge has taken notice of two judgments, one in C.M.A.No.55 of 1981 and another in *1988 A.C.C. 571*, the former being a judgment in which a learned single Judge of this Court held that the person who was alighting from the bus and had set one foot on the ground when the bus was moved was not a passenger at the time of the accident, and the latter in which on similar facts, a learned single Judge held that the deceased, who was getting down from the bus and was killed since the driver moved the vehicle before he could safely get down was to be treated as a passenger, and thereafter said,

"Though some of the decisions of this Court and some decisions of other courts holding a person getting inside a vehicle as a third party, had been placed before the learned judge, the decisions referred to by me in the preceding paragraph, rendered by S.A.Kader, J., in Judgment in C.M.A.No.55 of 1981 and cross objections dated 24.12.1986 had not been placed before the learned single Judge. Learned Judge, therefore, without any further discussion observed that the facts and circumstances of the case before him, were different from the facts and circumstances of the cases cited before him."

and added,

"The Oxford Universal Dictionary, Third Edition, gives the meaning of the word "Passenger" as hereunder:-

"*Passenger*: One who travels in some vessel or vehicle esp. of boardship or in a factory of passage boat; inter applied also to travellers by any public conveyance entry by ferry or contract."

The paramount idea conveyed by the term 'passenger' is that a passenger travels. A passenger, therefore, is one who travels.

"The Act, as well as the Rules framed by the State Government thereunder give an indication regarding the mode by which one would travel in vehicles. Suffice it to refer to the relevant provisions dealing with the mode of travel in public conveyance carrying pass travel, is travelling in the seating accommodation provided in the vehicle. Sec.70(2)(b) of the Act enables the State Government to make rules relating to the seating arrangement in public service vehicles and protection of passenger against the Weather, Rule 360 of the Tamil Nadu Motor Vehicles Rules, 1940 and the subsequent rules prescribe the manner in which seating accommodation is to be provided for the passengers who travel in the vehicle. For each passenger a reasonably comfortable seating space of not less than thirty-eight centimetres square measured on straight lines along and at right angles to the front of each seat with a distance of 135 c.m. from the backs of the seats on the other side is to be provided. Detailed rules have been framed regarding alignment of seats in different types of stage carriages, body-built of stage carriages and other matters. Travel, therefore, is only by remaining seated in the accommodation provided. Rule 363(2) provides an exception to this mode of travel, wherein the transport authority could permit travel by standing, except when the stage carriage is running as express service or running on that road. Total passengers capacity of each vehicle, is fixed with reference to the seating accommodation available within the body of the bus. Similarly, the number of passengers who could be permitted to travel by standing is also fixed with reference to the space available in the bus. For passengers who are permitted to travel by

standing grab-rails are being provided to ensure safe travel.

Rule 368 provides that in every public service vehicle, other than a motor car, there shall be on the left side of the vehicle an entrance in the rear or rear overhang and an exit in the front, each having a width of not less than 53 cms. and of sufficient height. Rule 370 regulates, the measurement of entrance or exit passage in the bus. The top of the tread of the lowest step shall not be more than 45 cm. or less than 25 cm. above the ground and the steps shall not be leas than 23 cm. wide and should be with non-slip treads.

A combined reading of these provisions clearly show that one could travel in a passenger vehicle only in two ways *viz.*, either by remaining seated in the seating accommodation provided or by standing in vehicles where travel by standing is specially permitted. The steps that are provided in the vehicle for the purpose of entry or exit are for entry and exit. They are not meant for travel. When, therefore, one is actually using the exit or entry passage, at that point of time, one cannot be said to be travelling. Such a person, therefore, cannot be considered a passenger. He is using that entry passage for the purpose of commencing or continuing his travel and he is using the exit passage for the purpose of getting down from the vehicle, either after completing the travel or for any other reason. It, therefore, follows that one who is either getting into the vehicle or is getting down from the vehicle cannot be said to travel at that point of time. Such a person is not a passenger. The Act, as well as the Rules, do not permit of any other interpretation."

18. A learned single Judge of the Delhi High Court dealt with a case in *Pandit Ram Swaroop v. Balbir Singh, (1989)65 Com.Cases 158,* in which a person suffered an accident while getting down from the bus and said,

"For complying with the provisions of Sec.95(2)(b)(ii)(4), it must be shown that the deceased was a passenger at the time when the accident took place. A person is called a passenger when he buys a ticket for the bus from the boarding point to the point of destination and actually travels in the bus. He is a passenger by virtue of a contract between him and the owner of the bus, the consideration being payment of the bus fare and obligation on the part of the owner of the bus being to carry the person from the boarding point to the point of destination. In the present case, the deceased boarded the bus at the "General Stores bus stop" and his destination point was the bus stop at "Ordinance Depot, Shakurbasti". He had purchased the ticket for the said journey. If the bus had stopped at the Ordnance Depot bus stop, the deceased would have got down and the contract would have come to an end. As soon as he had alighted from the bus and touched the ground, he would not have remained a "passenger". What has happened in the present case is that bus No.DLP 6059 did not stop at the Ordnance Depot but stop and thus prevented the deceased from getting down at the point of destination. The bus went much ahead and when the deceased was trying to get down, the bus started and its rear wheel ran over the deceased and killed him. In these circumstances, I am of the opinion that at the bus stop at the Ordnance Depot, the status of the deceased as a "passenger" came to an end. Theory of the respondents that the deceased jumped out of the bus and suffered injury because of the fall, has been rejected by the Tribunal, as no evidence was furnished by the respondents. I, therefore, hold that when the accident was caused and the deceased was run over by the bus, he was not a "passenger" of the bus and, therefore, the insurance company cannot claim limited liability under Sec.95(2)(b)(ii)(4). I have no hesitation in holding that the insurance company is liable on the principle of third party liability and hence its liability is unlimited in the present case."

19. The consensus of judicial opinion thus is in favour of a person being treated as a passenger when he actually entered into the bus and not when he was attempting to get into the bus but not succeeded in getting into the bus. Two Judges of this Court, one in the impugned judgment and another in the case reported in *1988 A.C.C. 571,* have taken the view that the victim, who was getting down from the bus and met with the accident before he could safely get down was to be treated as a passenger and one in C.M.A.No.55 of 1981 and another in *National Insurance Company Ltd. v. V.K.Sundaravalli, 1989 T.L.N.J. 31,* have taken the view that a person who was alighting

from the bus and had set one foot on the ground when the bus moved was not a passenger at the time of the accident. They are in the company of a learned single judge of this Court in the case reported in *Pandit Ram Swaroop v. Balbir Singh, (1989)65 Com.Cases 158.*

20. Words are Phrases (Permanent Edition) 31A has many cases to refer wherein it is said that a pedestrian crossing a street to board a waiting street car with open gates is a passenger; person in the act of getting upon a street car is a passenger; one becomes "passenger" of street car when setting foot on step after car stopped with intention of becoming passenger and one who attempts to board a rapidly moving train does not become a passenger, though he may have a ticket for it some of the citations in the book are:

> "pedestrian crossing a street to board a waiting street car with open gates is a passenger. *Zimmermann v. Mednikoff, 162 N.W. 349, 350, 165 Wis. 333.*
>
> One who attempts to board a rapidly moving train does not become a passenger, though he may have a ticket for it. *Illinois Cent R. Co. v. Cotter, 103 S.W. 279, 280, 31 Ky. Law. Rep. 679.*
>
> A person in the act of getting upon a street car is a "passenger". *Benjamin v. Metropolitan St. Ry. Co., 151 W. 91, 94, 245 Mo. 598.*
>
> One becomes "passenger" of street car when setting foot on step after car stopped, with intention of becoming passenger. *Dahline v. City of Seattle, 5 p. 2 1010, 1012 165 Wash 683.*
>
> A person boarding a car for the purpose of meeting a friend intending to become a passenger if the friend was on the car, otherwise not, is not a "passenger" *Hatcher v. Quioncy Horse Railway & Carrying Co., 181-III App.30.*
>
> Person becomes a "passenger" of street car as soon as he sets his foot on step or running board in the act of getting into the car after it has stopped, with the intention of becoming a passenger. *Heva v. City of Seattle, 272 P.41, 43, 150 Wash 61.*
>
> One who attempts to board a moving train is not a "passenger", though he may have purchased a ticket entitling him to passage thereon. *Kentucky Highlands R. Co. v. Creal, 179 S.W. 417, 418, 166 Ky. 469, I.R.A. 1916B, 830, Ann.Cas. 1917C, 1205.*
>
> Where street car stops at usual place of receiving passengers and opens door, persons proceeding to board car are "passengers" within law fixing status of parties. *Bradley v. Williams, 101 So. 808, 809, 20 Ala. App. 308.*
>
> Person does not become "passenger" on train by getting on moving train until he actually reaches place of safety inside car. *United States Fidelity & Guaranty Co., v. Aschenbrenner, COA. Cal. 65 F.2d. 976, 980.*
>
> One injured while boarding elevated railway train when door thereof was suddenly closed on his foot and train started was a "passenger" at time of accident, though train conductor rang bell for motorman to proceed. *Weaver v. Sprague, 71, N.E. 2d. 106, 330 III App. 331.*
>
> The relation of carrier and passenger may be implied from an attempt to enter in a proper manner a street car as a passenger, with the intention of being transported therein. *North Chicago St. Ry. Co. v. Williams, 29 N.E. 672, 675, 140, 111, 275.*"

The book also contains citations of cases in which a person stepping out of the car was either held to be a passenger or not a passenger. Such citations in the book are:

> "*Persons leaving car or grounds*: One who has alighted from street car and is in safety in highway is not "passenger," as regards care required by carrier. *Lacks v. Wells. 44 S.W. 2d 154, 156, 329 Mo. 327.*
>
> Where a "passenger" has safely alighted from a car at his destination, he ceases to be a passenger. *Columbus R.Co. v. Asbell, 66 S.E. 902, 903, 133 Ga. 573.*
>
> A passenger alighting from a street car is still a "passenger" until he has had a reasonable opportunity to reach a place of safety. *Louieville Ry. Co. v. Kennedy, 172 S.W. 970, 971, 162 Ky. 560 Ann. Cas. 1916E, 996.*
>
> A passenger remains such until he has alighted from carriers vehicle and while alighting carrier owes him duty of a very high degree of care. *Lackey v. Missouri & K.I.Ry. Co., 264 S.W. 807, 808, 305 No. 260.*
>
> After woman had alighted from street car and was standing on pavement near car, she was no longer "passenger" and company did not then owe her duty of carrier to passenger. *El Pase Electric Co. v. Ludlow, Tax. 291 S.W. 619, 621.*
>
> The relation of passenger and carrier ceases at the end of the journey when the passenger has had a reasonable time and opportunity to leave

the premises of the carrier. *Illinois cent R. Co. v. Mcmillion, 129 III App. 27, 237.*

Street car "passenger" ceased to be such as soon as she had safely stepped on to public street and had reasonable opportunity to step into place of safety. *Zaiewaki v. Milwaukee Electric Railway & Light Co. 263 N.W. 577, 219 Wis. 541.*

Child struck by motor cycle after stepping from street car to street held not "passenger" at time of injury, as respects street car company's liability as carrier for her injuries. *Wittkower v. Dallas Ry. & Terminal Co., Tex. Civ. App., 73 S.W. 2d 867, 869.*

Person leaving street car ceases to be "passenger" as soon as he steps from car into public street at regular alighting place and has had reasonable opportunity to leave place at which he alights. *Wittkodwer v. Dalls Ry. & Terminal Co., Tex. Civ. App. 73 S.W. 2d 867, 869.*

One who had alighted from street car upon street in safety ceased to be "passenger" and, as regards injuries sustained in tripping over object dangling from rear of street car, had status of ordinary pedestrian. *Gallagher v. St.Louis Public Service Co., 59 S.W. 2d 619, 332 Mo. 944.*

Generally, status of "passenger" continues until he has stepped safely from carrier conveyance and has had reasonable opportunity to leave place at which he alights, and he may alight from conveyance during journey without losing his status as passenger. *Whilte v. Allghany Cab Co., 29 N.Y.S. 2d 272, 273.*

A passenger who had alighted from street car and walked about 50 feet along the safety zone where she intended to transfer to another street car, but was injured before doing so, was no longer a "passenger". *McAlpine v. Los Angeles Ry. Corp. 154 P.2d 911, 912, 67 Cal. App. 2d 486.*

Where a woman who had been a "passenger", left the train, and in passing through the depot fell over a cuspidor on the floor and was injured, she had ceased to be a passenger, and the burden was on her to show affirmatively negligence on the part of defendant *Green v. Baltimore & O.R.Co.63 A.603, 214 Pa.240.*

A person injured while attempting to alight from a moving street car was a "passenger" thereon, within the meaning of an accident insurance policy providing for the payment of double insurance if insured was injured while riding as a passenger in any passenger conveyance. *King v. Travellers' Ins. Co.28 S.E.661, 662, 101 Ca.64, 65 Am.St.Rep.288.*

An adult passenger in possession of normal faculties, after alighting safely from street car where there is no traffic or anything else to interfere with his movements, ceases to be a "passenger" and becomes a "pedestrian", and street car company owes him no duty greater than it owes to other pedestrian. *Ferguson v. Kansas City Public Service Co., 156 p.2d. 869, 875, 159 Kan. 520.*

One who alights from street car upon street and is in safety from any contract or collision with street car ceases to be a "passenger", and as regards injuries sustained in tripping over some object or being struck by another vehicle, has status of ordinary "pedestrian," *Wullbrandt. v. City of Seattle, 84 P.2d 123, 125, 196 Wash 645.*

Where railroad provided work train to carry yard workmen to depot from place of work, workman ceased to be a "passenger" when he disembarked at depot, as regards degree of care railroad owed workman killed while riding on tender of engine to his home after he left depot. *Buckner v. Southern Ry. Co.96 S.W. 2d 600, 601, 20 Tenn. App. 212.*

Generally, a person ceases to be a "passenger" as soon as he safely steps from the car into a public street and has had a reasonable opportunity to leave the place at which he alights, provided he is set down at a place which is reasonably safe and proper for that purpose, *Will v. Milwaukee Electric Ry. & Light Co., 17 N.W. 658, 659, 169 Wis. 38.*

If the insured had safely alighted on the pavement from a street car when struck by taxicab, he was not a "passenger on a street car," within policy; but if he was in the act of alighting, or had not safely alighted, from the car when struck, he was a "passenger," within the policy. *Quinn v. New York Life Ins. Co., 195 N.W. 427, 429, 234 Kich. 641.*

A passenger on alighting from a street car at the end of his journey loses his status as a passenger when he has stepped from the car to a place of safety on the street, or on the highway, the question depending, not on number of steps he has taken but on the circumstances and conditions under which he alights. *Loggins*

v. Southern Public Utilities Co., 106 S.E. 822, 823, 181 N.C. 221.

The relation of a street car passenger does not and wen he leaves the car, but continues until he has reasonable opportunity to leave the carrier's roadway, after the car reaches the place to which he is entitled to be carried. *Melton v. Birmingham Ry., Light & Power Co., 45 Sc. 151, 153, Ala. 95, 16 L.R.A.N.S. 467.*

Where a person becomes a "passenger" he continues one until he is safely deposited at his point of destination, and until he has left or had reasonable time within which to leave the premises of the carrier, unless the relation of carrier and passenger be sooner terminated by the voluntary act of the passenger. *McBridge v. Georgia Ry. & Electric Co., 54 S.E. 674, 676, 125 Ga. 515.*

Where defendant's street car conductor committed an unprovoked assault on plaintiff, an old man, as he was endeavouring to alight, and pushed or threw him from the car, but plaintiff attempted to get his umbrella, which remained on the platform, and the conductor kicked him, plaintiff had not entirely ceased to be a "passenger" at the time he was kicked, and the company was liable therefor. *Flynn. v. St. Louis Transit Co., 87 S.W. 560, 562, 113 Mo.App.185.*

Where passenger had not left street car at time it was started forward but then had one foot on step of car and had hold of an iron attached to car with one hand for purpose of assisting her in alighting, she was still a "passenger", *Keller v. Chicago Rys. Co. 183 III App. 399.*

The law deems the relation of carrier and passenger to exist, and treats one as a "passenger" who is properly on the steps leaving the car. *Devoy v. St.Louis Transit Co., 91 S.W. 140, 143, 192, Mo.197, citing Clerk Street Rye. (2d Ed.) 3, Schepers v. Union Depot Ry.Co.29 S.W.712, 126 Mo. 665, Barth v. Kansas City El.Ry.Co., 44 S.E. 778, 142 No.535, Booth street Ry. Law 326.*

A policy of accident insurance provided for double indemnity when the injury was sustained "while riding as a passenger on any railway passenger car." It is held that the insured when on the platform of a car preparatory to getting off, in the way provided by the carrier, or in the act of doing so, was within the meaning of the policy riding as a passenger on a railway passenger car. *Gillis v. Duluth Casualty Ass'n., 158 N.W. 252, 253, 133 Minn. 238.*

A passenger on a railroad train alighted in the night at the town where he resided. The station, the town, and his home were all on the west side of the track, and the doors of the cars, which were vestibuled, were opened on that side. After his train had departed, he was killed by another train on a track to the eastward. Held, that he had ceased to be a "passenger" prior to his death, and the company at that time owed no duty to him as such. *Payne v. Illinois Cent R.Co. 155 F. 73, 76, 83 C.C.A. 589.*

Where a passenger after alighting from a train passed outside the station grounds and along a path on the railroad's right of way to a point 345 feet from the station, on her way home, where she lost her way in the darkness and fell into a turntable pit, she was not a 'passenger' at the time; the duty that the railroad company owed her as a passenger having terminated when she left the depot grounds. *Louisville & N.R.Co. v. Hobhe, 159 S.W. 682, 683, 155 Ky. 130, 47 L.R.A. N.S., 1149.*

The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. A traveller on a railroad train ceases to be a 'passenger' when, after alighting from his train upon the railroad platform, he has passed from that platform and off the railroad property to a public highway on which he intends to cross the tracks. *Garrett v. Atlantic City & S.R. Co., 74 A. 273, 274, 79 N.J.L. 127.*

When a person on a coach of a railway company pays his fare to a point of destination on its line, he becomes a passenger and remains such till the journey for which he has paid has ended, and until a reasonable time, to be determined from all the attendant circumstances, within which he should have left the carrier's premises, has elapsed; and this is true without regard to the object of the passenger's journey or his reason for stopping at the station which is the end of the journey. *Houston & T.C.R.Co. v. Batchler, 83 S.L. 902, 904, 37 Tax Civ.App. 116.*

Where a carrier has made proper arrangements for the exit by passengers from its

station grounds, a passenger must use the ways provided, and where he knowingly fails to do so, and without invitation makes his exit in some other way, he ceases to be a passenger, and becomes at most a mere licence; and it makes no difference that he goes where others, with the knowledge of the carrier, have gone before him, unless there is some invitation on the part of the carrier, and knowledge of such use does not of itself amount to such invitation. *Legge v. New York, N.H. & H.R. Co., 83 N.E. 367, 368, 197 Mass. 86, 23 L.R.A. N.S. 633.*

Whether a person who has alighted from a standing train at a station, and who is crossing the railway tracks, by a planked way provided by the company for that purpose, after the train from which he has alighted has moved out, is still a 'passenger', entitled to so cross without looking or listening is a question of fact for the jury, where under the proof, reasonable men may differ as to whether he was proceeding from the station platform to a place of safety within a reasonable time after he had alighted from the train. The relation of 'passenger' and carrier, when established, does not terminate until the 'passenger' has reached his destination, alighted from the train, and has had reasonable time in which to leave the place where 'passengers' are discharged. *Atlantic City Ry. Co. v. Kiefer, 66 A 930, 931, 932, 75 N.J.L. 54.*

While one is passing from one train to another, as required by the conditions of his ticket, he remains a passenger and is entitled to all rights as such. *Baltimore & C.R. Co. v. State, 60 Md. 449, 462.*

A passenger on a street car, who steps from the car into a public street, ceases to be a passenger the moment he leaves the car. *Crammer v. West End St. Rly Co., 31 N.E. 391, 156 Hass. 320, 16 L.R.A. 490, 32 Am St. Rep. 456.*

A person ceases to be a passenger when he has alighted from a train, gone on the sidewalk of the highway, and thence started to cross the track, on his way from the station. *Allerton v. Boston & M.R.R., 15 N.E. 621, 623, 146 Mass. 241.*

That an aged and infirm passenger did not get off a railway coach with the other passengers, but waited five minutes for assistance before attempting to alight alone, did not deprive him of his status as a passenger. *Turner v. Walash Ry. Co., Mo. 211 S.W. 101, 103. . .*

An approach to a railway depot on premises belonging to the company constitutes a part of such premises, and the relation of carrier and passenger continues until the passenger has passed beyond such approach. *Gulf C. & S.F. Ry. Co. v. Glank, 30 S.W. 278, 279, 9 Tex Civ. App. 599..*

Where a person had a ticket giving him a right to ride as a passenger, and had no opportunity to surrender it or pay his fare, but left the train after it had stopped at a station where passengers were accustomed and had a right to leave the train, and was injured while so doing by a train on another track, he still continues a passenger up to the time of the injury. *Mckimble v. Boston & M.R.R. 2 N.E. 97, 98, 139 Mass 542.*

Plaintiff, a married woman, while travelling alone with her baby, was transferred to a station of defendant's railway, over which she had a valid ticket, purchased from a connecting line, and which included her transfer from one road to the other. The station was kept open at all times, both day and night, for the use of passenger; and plaintiff remained there to await her train, which would not arrive for 10 hours, with the assent of defendant's agent. While alone in the waiting room at night, she was assaulted by defendant's night agent, *held*, that she was a passenger, and that defendant was liable for act of its employee. *St. Louis S.W. Ry. Co. of Texas v. Griffith, 35 S.W. 741, 743, 12 Tex Civ. App. 631.*

Where a passenger places himself under the charge of the carrier as he begins his journey, he is a passenger being transported, and is within the protection of Sec. 3, Art. 1, C. 72 Comp. St. 1911, until he is afforded an opportunity to leave the premises of the carrier at his destination; but if it appears that the passenger, having reached the end of his journey has departed from the car, and has had a reasonable time and opportunity to avoid injury from the operation of the train, or further necessity of relation of the servants of the carrier, he ceases to be a passenger, and thereafter is not within the protection afforded by the statute. *Painter v. Chicago, B & Q. Ry. Co. 140, N.W. 787, 789, 93 Neb. 419.*

While it is undoubtedly true that none who has brought a ticket or otherwise become entitled

to transportation on a train of cars of a railroad corporation, is ordinarily a passenger from the time when he reasonably and properly starts from the ticket office or waiting room of the station to take his seat in the car of the train until he has reached the station to which he is entitled to be carried, and has had an opportunity by safe and convenient means to leave the train or roadway of the corporation at that station, he loses his character as a passenger by getting off the train at his destination before the train stops. *Commonwealth v. Boston & N.R.R. 129 Mass. 500, 501, 37 Am.Rep. 382.*"

21. What is striking, however in all such situations is the fact that to establish that a certain person was a passenger, it should be seen, however, how he acted and how those responsible to carry him as a passenger behaved. It is not in doubt and it cannot be doubted that a person becomes a passenger by contract, express or implied. The expression 'passenger' ultimately refers to one, who travels either in a bus or a vehicle or a ship or a train. This expression means one who travels and nothing else. When the relationship of a carrier and a passenger begins with reference to the vehicle concerned must be found varying from fact to fact and case to case. A person rushing to a vehicle and attempting to board when in fact it had started moving given in the circumstances of the case, we found, not to be a passenger. One who has not entered the vehicle is obviously not a passenger. One who has alighted from the vehicle is also not a passenger. But a passenger alighting from a vehicle may still be a passenger until he had reasonable opportunity to reach a place of safety, meaning thereby that he was away from the vehicle.

22. While we have no hesitation in holding that insurance of a motor vehicle against third party risks is a sort of indemnity to the insured, we cannot visualise that in the garb of enjoying such indemnity a negligent carrier can escape the liability of damages. How can he be allowed to say: "Look here, my vehicle is insured; therefore I can throw out a passenger and then say that since he was found on the street, he was not a passenger".

23. Learned counsel for the insurer expressed this concern and we share his anxiety for the simple reason that while it may appear beneficial to the claimants to hold that the insurer will have the liability not limited to Rs.5,000 or Rs.10,000 as the case may be, it will indeed be a freedom to the owners, drivers and others to escape any consequences of their rash and negligent acts. It is with this concern, one has to understand the problems in each case and solve in the light of the principles that would determine whether the victim was a passenger or Not - A person who was yet to become a Passenger in the sense that he had not been booked or that he wanted to enter forcibly into a vehicle, which was moving or was soon to move may not be a passenger. Similarly, a person who was entering into the bus or any other vehicle, but was prevented by any rashness or negligence of the owner, driver, conductor or any other agent or servant of the owner may be taken to be a passenger. The same test may apply to a person leaving the car or vehicle, A passenger alighting from the vehicle may cease to be a passenger if he had left the vehicle for good. If he stepped out of the vehicle into the street, he was a pedestrian and not a passenger in the vehicle. However, this safety catch in a given circumstance can be used as an incisive scissor and when and how the chord of relationship of the carrier and the passenger would be cut could still depend not on speculation but on facts.

24. There has been another serious argument and we must take notice of that before we advert to the last contention that the learned counsel for the appellant has raised, *viz.*, whether the insurer's liability will be under the new Act or will be under the repealed Act. This argument is based upon sub-sec.(2) of Sec.96 of the 1939 Act, which reads as follows:

"No sum shall be payable by an insurer under sub-sec.(1) in respect of any judgment unless before or after the commencement of the proceedings, in which the judgment is given, the insurer had notice through the court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely."

25. Learned counsel for the appellant has placed reliance upon a judgment of the Supreme Court in *B.I.G. Insurance Company v. Itbar Singh, A.I.R. 1959 S.C. 1331,* in which it has been observed.

"Now the language of sub-sec.(2) seems to us

to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given "shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely", after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute.......

We therefore think that sub-sec.(2) clearly provides that an insurer made a defendant to the action is not entitled to take any defence which is not specified in it...... Sub-sec.(2) in fact deals with defences other than those based on the conditions of a policy. Thus clause (a) of that sub-section permits an insurer to defend an action on the ground that the policy has been duly cancelled provided the conditions set out in that clause have been satisfied. Clause (c) gives him the right to defend the action on the ground that the policy is void as having been obtained by non-disclosure of a material fact or a material false representation of fact. Therefore it cannot be said that in enacting sub-sec.(2) the legislature was contemplating only those defences which were based on the conditions of the policy.

It also seems to us that even if sub-sec.(2) and sub-sec.(3) were confined only to defences based on the conditions of the policy that would not have led to the conclusion that the legislature thought that other defences not based on such conditions, would be open to an insurer. If that was what the legislature intended, then there was nothing to prevent it from expressing its intention. What the legislature has done is to enumerate in sub-sec.(2) the defences available to an insurer and to provide by sub-sec.(6) that he cannot avoid his liability excepting by means of such defences. In order that sub-sec.(2) may be interpreted in the way the learned Solicitor - General concedes this and says that the only word that has to be added is the word "also" after the word "grounds". But even this the rules of interpretation do not permit us to do unless the section as it stands is meaningless or of doubtful meaning neither of which we think it is. The addition suggested will, in our view, make the language used unhappy and further effect a complete change in the meaning of the words used in the sub-section.

26. Reliance has also been placed upon somewhat similar observations as in the above judgment of the Supreme Court by a learned single Judge of the Andhra Pradesh High Court in *United Fire and General Insurance Company Ltd. v. Parvathamma, A.I.R. 1981 A.P. 227.* In that judgment it is observed,

"It is only under Sec.110-C of the Act, that the insurer is permitted to raise all objections to the claim of the motor vehicle accident victim. But under Sec.110-C of the Act, the insurer cannot and would not become a contesting party to the claim normally. The insurer would become entitled to implead himself as a party-respondent and oppose the claim only where the Accident Claims Tribunal was satisfied that there was collusion between the claimant and the person against whom the claim was made or the person against whom the claim had been made had failed to contest the claim. In the absence of collusion between the claimant and the insured and negligence or indifference on the part of the insured in contesting the claim, the insurer cannot implead himself as a party. It follows from the above that the claimant is under no obligation to make on his own the insurer a party-respondent to his claim and it is wholly for the insurer to implead himself as a party-respondent either under Sec.110-C of the Act or under Sec.96(2) of the Act. If the insurer impleads himself under Sec.110-C of the Act, it would be open to the insurer to raise all objections to the granting of the claim which would have been raised by the insured. But, as in this case, as there was no finding by the Accident Claims Tribunal that the insured was colluding with the claimant or that there was any negligence or indifference on the part of the insured and the insurer was impleaded from the commencement of the proceedings the insurance company cannot avail itself of the provisions of Sec.110-C of the Act. The only other section of which it can take benefit of is Sec.96(2) of the Act. As we have already noted that under Sec.96(2) of the Act, it is not open to the insurance company to

oppose the claim on all and every ground, it can only raise such of those objections which are enumerated in Sec.96(2)(a), (b) and (c) of the Act. The question then arises whether the present argument of the insurer falls under Sec.96 of the Act. In this case, the argument of the insurance company is that the Accident Claims Tribunal ought not to have saddled the insurance company with any liability exceeding Rs.5,000 fixed by Sec.95(2)(4) of the Act. But the question is whether this argument is open for the insurance company to be raised....."

27. The observation in the judgment of the Supreme Court, which evidently is a statement of law, is binding on all concerned. The judgment of the Andhra Pradesh High Court, also appears to be sound, salutary and convincing. However, they do not appear to cover the whole field particularly the type of the case with which we are dealing. It is one thing to say as to what defence is available to the insurer and quite another as to whether any person including the owner of the vehicle can saddle the insurer with something beyond its liability. The statute has fixed a limit. The insurer is obliged to act as provided thereunder. If something more than the law is said and done, the insurer can always say that anything beyond the law shall not bind it. Here is a case in which the Tribunal has recognised the statutory limitation and fixed the liability of the insurer strictly in accordance with law. The owner of the vehicle has appealed and suggested that it is not his but that of the insurer's liability because the victim was a third party and not a passenger. How then the insurer cannot say that the victim was not a third party and that he was a passenger. It is a case quite distinguishable on facts and in such cases,in our opinion, the argument that the insurer can raise no defence other than the defence made available to it under Sec.96(2) of the 1939 Act cannot be accepted.

28. The third and the last argument to which we have already made a reference is developed on the basis of a Division Bench judgment of the Andhra Pradesh High Court in *T.Srinivasalu Reddy v. C.Govardana Naidu, A.I.R. 1990 A.P. 289* and a judgment of the Bombay High Court in *Oriental Fire and General Insurance Company Ltd. v. Shantabai S.Dhume, A.I.R. 1987 Bom. 52.* In the latter case, a learned single Judge of the Bombay High Court has taken the view that Sec.92A introduced in the Motor Vehicles Act by the Amending Act 47 of 1982 which came into force with effect from 1.10.1982 was retrospective in operation. The same view has been expressed in the judgment of the former case by the Andhra Pradesh High Court in these words:

> "Applying the ratio of the aforementioned Supreme Court case, we have no hesitation in coming to the conclusion that Sec.92-A of the Motor Vehicles Act applies even to pending proceedings. This provision is a social welfare legislation and dispenses with the proof of negligence on the part of the owner or the driver of the vehicle and imposes a no fault liability. We accordingly hold that all actions for compensation pending on the day when the provision came into force are governed by this provision irrespective of the fact whether the accident took place prior or subsequent thereto. Since the law dispenses with the proof of negligence, it can be done in any pending proceeding, irrespective of the date of accident. The words "the owner or the owners of the vehicles shall, jointly and severally, be liable to pay compensation" occurring in Sec.92A(1) and the words "claimants" shall not be required to plead and establish that the death of permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner" are prospective and shall apply to pending and future claims."

29. On the strength of these observations, it is suggested before us that the insurer's liability should be fixed in accordance with the provisions in Chapters X and XI of the Motor Vehicles Act, 1988, which Act has repealed 1939 Act and has come into force during the pendency of the appeal. Chapter X of 1988 Act deals with liability without fault in certain cases. It fixes the responsibility on the principle of no fault liability upon the owner of the vehicle in the case of death (Sec.140) and in the case of permanent disability (Secs.141 and 142). Chapter XI however deals with the provisions similar to the provisions in Chapter VIII of the 1939 Act. Sec.147 deals with the requirements of policies and limits of liability and says in Sec.147(1) as follows:

> "In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-sec.(2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

Provided that a policy shall not be required.

(i) to cover liability in respect of the death, arising out of and in the course of his employment of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation: For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injury or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

Sub-sec.(2) thereof, however, fixes the limit of the liability of the insurer in certain cases. Unlike, however, Sec.95(2) of the 1939 Act wherein there is mention of a limit as to insurer's liability for each individual passenger, etc., there is no provision in the new Act imposing any such limitation. It, however, must be borne in mind that sub-sec.(2) of Sec.147 of the new Act is controlled by sub-sec.(1) thereof. It will be thus for the insured to see that there is a policy insuring against the death of or bodily injury to any passenger of a public service vehicle or against any liability which may be incurred in other cases. A public service vehicle cannot be confused with any State owned operation. It has a definite connotation under the Act and that can be gathered from the definition. Sec.2(35) has defined 'public service vehicle' to mean any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward and includes a maxi-cab, a motor cab, contract carriage and stage carriage.

30. In view of the above, it is not possible to find any change introduced by the new law that would destroy what actually accrued as a right to the claimants and/or the insurer or in the same view to find any such right accruing to the owner of the vehicle, which can enter into a claim arising under 1939 Act.

31. This apart, the cases of claims arising under the Motor Vehicles Act, 1939 have to be viewed in the light of Sec.217 of the 1988 Act, which provides as follows:

"*Repeal and savings*: (1) The Motor Vehicles Act, 1939 (4 of 1939) and any law corresponding to that Act in force in any State immediately before the commencement of this Act in that State (hereafter in this section referred to as the repealed enactments) are hereby repealed.

(2) Notwithstanding the repeal by sub-sec.(1) of the repealed enactments.

(a) any notification, rule, regulation, order or notice issued, or any appointment or declaration made or exemption granted, or any confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or any other thing done, or any other action taken under the repealed enactments, and in force immediately before such commencement shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been issued, made, granted, done or taken under the corresponding provision of this Act;

(b) any certificate of fitness or registration or licence or permit issued or granted under the

repealed enactments shall continue to have effect after such commencement under the same conditions and for the same period as if this Act had not been passed;

(c) any document referring to any of the repealed enactments or the provisions thereof, shall be construed as referring to this Act or to the corresponding provision of this Act;

(d) the assignment of distinguishing marks by the registering authority and the manner of display on Motor Vehicles in accordance with the provision of the repealed enactments shall, after the commencement of this Act, continue to remain in force until a notification under sub-sec.(6) of Sec.41 of this Act is issued;

(e) any scheme made under Sec.68-C of the Motor Vehicles Act, 1939 (4 of 1939) or under the corresponding law, if any, in force in any State and pending immediately before the commencement of this Act shall be disposed of in accordance with the provisions of Sec.100 of this Act;

(f) the permits issued under sub-sec.(1-A) of Sec.68-F of the Motor Vehicles Act, 1939 (4 of 1939), or under the corresponding provisions, if any, in force in any State immediately before the commencement of this Act shall continue to remain in force until the approved scheme under Chapter VI of this Act is published.

(3) Any penalty payable under any of the repealed enactments may be recovered in the manner provided by or under this Act, but without prejudice to any action already taken for the recovery of such penalty under the repealed enactments.

(4) The mention of particular matters in this section shall not be held to prejudice or affect the general application of Sec.6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals."

The mention in sub-sec.(4) of Sec.217 of Sec.6 of the General Clauses Act, 1897 shall automatically make such claims subject to the principles that are generally recognised under the said provision. Sec.6 of the General Clauses Act reads as follows:

"*Effect of repeal:-* When this Act or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in Force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under; or

(c) affect any right, privilege, obligation or liability required, accrued under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

32. A welfare or beneficial legislation, which will only introduce certain procedural provisions without affecting any right, privilege, obligation, or liability penalty forfeiture or punishment as indicated in this provision undoubtedly will be welcome as applied in a pending proceeding not however when a night. Privilege, obligation or liability is likely to be altered.

33. For the reasons as above, we are of the opinion that the judgment of the learned single Judge does not suffer from any of the infirmities pointed out by the learned counsel for the appellant. We, however, clarify and emphasise that the rule as to whether a certain person is a passenger or not has to be carefully applied in every case.

34. It is represented on behalf of the learned counsel for the appellant that a sum of Rs.32,610 has already been deposited towards compensation and the balance amount with interest alone remains to be payable to the claimants. After giving credit to the said sum, the claimants are entitled to recover the balance amount of compensation with interest as per the award of the tribunal.

35. In the result, the appeal is dismissed. No costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Kanakaraj, J.*

W.P.No.181 of 1987 *9th November, 1990.*

B.P.Agraharam Co-operative Agricultural Bank Ltd., B.P.Agraharam, Erode ...*Petitioner*
v.
Veerappa Thevar and others ...*Respondents.*

(A) Tamil Nadu Co-operative Societies Act (LIII of 1961), Secs.71 and 73 - Decision in proceedings under Sec.71 - It bars proceedings under Sec.73 by res judicata.

The proceedings under Sec.71 are totally different from the proceedings under Sec.73 of the Act. Surcharge under Sec.71 arises on account of wilful negligence or inaction resulting in loss to the petitioner-bank. A proceeding under Sec.73 is totally different and relates to disputes touching the constitution of the committee or touching the management or business of the petitioner bank or disputes between the members of the petitioner co-operative bank. Therefore, the finding of the Tribunal that the claim is barred by *res judicata* is totally unsustainable. *[Para 2]*

(B) Tamil Nadu Co-operative Societies Rules (1961), Rule 56 (2) Proviso - Claim under Sec.73 of the Act - Filing of - Limitation for.

Under Proviso to Rule 56(2) of the Tamil Nadu Co-operative Societies Rules, a claim under Sec.73 should be filed within a period of three years from the date of commission or omission. Therefore, counting the period of limitation from that date, it is seen that the claim under Sec.73 had been filed only on 13.11.1978 after a lapse of six years. Relying on the judgment in *K.Bashu Sahib v. Chandrasekaran, (1988)2 L.W. 359,* it is contended that the Secretary and Treasurer occupied the position of trustees and therefore there is no question of limitation for preferring the claim and that the period during which action had been taken under Sec.71 of the Act should be excluded for the purpose of calculating the period of limitation. The ratio of that decision cannot at all apply to the facts of this case. In fact, while arguing the plea of *res judicata*, the petitioner rightly contended that the proceedings under Sec.71 are totally different from the proceedings under Sec.73. Therefore, it follows that the claim not having been filed within three years in accordance with Rule 56, it was definitely barred by limitation. *[Para 4]*

Case referred to:

K.Bashu Sahib v. Chandrasekaran, (1988)2 L.W. 359.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to C.M.A.No.210 of 1983 on the file of the Special Tribunal for Co-operative Cases, Madras the 4th respondent herein, and quash the order dated 27.3.1986, in C.M.A.No.210 of 1983 on the file of the 4th respondent herein.

V.Narayanaswamy, for Petitioner.

M.Govindarajan, Additional Government Pleader, for Respondents.

The Court made the following

ORDER:- The first respondent was treasurer in the petitioner-co-operative bank from the year 1966 to 1972. One Dharmaraj was the paid-Secretary of the Co-operative Bank from 20.11.1968 to 19.11.1969. The petitioner, Co-operative bank is a society registered under the Tamil Nadu Co-operative Societies Act, 1961. During an inspection under Sec.66 of the Act, it was noticed that there was a deficiency in the assets of the Bank to the tune of Rs.14,032.91. Surcharge proceedings were initiated under Sec.71 of the Act by the third respondent against the legal heirs of Dharmaraj who had passed away on 22.11.1969 and against the first respondent, treasurer. By an order dated 27.3.1975, the third respondent held that the first respondent as well as the heirs of the deceased Dharmaraj were liable for the said amount of Rs.14,032.91. Two appeals were filed by the first respondent and the heirs of Dharmaraj before the Special Tribunal for co-operative cases. Both the appeals were allowed. So far as the appeal of the first respondent is concerned, it was observed that the ingredients necessary for surcharging the first respondent were not available. There was, no doubt, an observation that it was open to the petitioner-bank to proceed against the first respondent under Sec.73 of the Act. Thereupon, the petitioner filed an arbitration claim under Sec.73 of the Act claiming a total sum of Rs.42,981.46 comprising of Rs.14,032.91 being the amount said to have been misappropriated, interest thereon

amounting to Rs.28,943 and expenses. The claim was made against the first respondent as well as heirs of Dharmaraj. The first respondent and the heirs disputed the claim on several grounds including the plea of limitation. An award was passed in favour of the society by the second respondent, the first respondent filed appeal C.M.A.No.210 of 1983. The tribunal by order dated 27.3.1986 held that the first respondent was not wilfully negligent that the claim was barred by *res judicata* under Sec.11, C.P.C. that the claim cannot be maintained under Sec.73 of the Act and that, in any event, the claim was barred by limitation. It is the said judgment of the fourth respondent-Tribunal that is challenged in this writ petition.

2. The first contention is that the finding of the Tribunal that the claim is barred by *res judicata* is totally unsustainable. I am not inclined to accept this argument because the proceedings under Sec.71 are totally different from the proceedings under Sec.73 of the Act. Surcharge under Sec.71 arises on account of wilful negligence or inaction resulting in loss to the petitioner-bank. A proceeding under Sec.73 is totally different and relates to disputes touching the constitution of the committee, or touching the management or business of the bank or disputes between the members of the petitioner co-operative bank.

3. Similarly, the finding of the tribunal that the claim cannot be maintained under Sec.73 of the Act is not well founded. Sec.73 of the Act provides for determination of any dispute between the members of the petitioner-bank. It is the contention of the petitioner-bank that the first respondent has caused loss to the tune of Rs.14,032.91. The claim for Rs.14,032.91 is made on the ground that the Secretary and the first respondent signed the cash chitta on 19.11.1969. But it was found that the said amount had not been brought into account in the Day Book. Therefore, there is no reason why such a claim should not be made as a dispute under Sec.73 of the Act. The Arbitrator can take evidence and decide the question whether the first respondent and the Secretary are liable for the said amount or not. The reasons given by the Tribunal that the claim is not maintainable because there is no dispute touching the Committee or the Management, is based on a superficial understanding of the said section. The reasons given by the tribunal for holding that the amount, if at all, can be claimed under surcharge proceedings are totally uncalled for. In this connection, the tribunal has not taken note of the judgment in the Appeal C.M.A.No.51 of 1975 wherein the tribunal had rendered a finding that the claim was not maintainable under surcharge proceedings.

4. However, the last point on which the tribunal reversed the findings of the second respondent seems to be well founded. The cause of action for the misappropriation admittedly took place between 28.11.1968 and 22.11.1969. In fact, the cash chitta is said to have been signed on 19.11.1969. Under Proviso to Rule 56(2) of the Tamil Nadu Co-operative Societies Rules, a claim under Sec.73 should be filed within a period of three years from the date of commission or omission. Therefore, counting the period of limitation from that date, it is seen that the claim under Sec.73 had been filed only on 13.11.1978 after a lapse of six years. The argument of the learned counsel for the petitioner on the question of limitation is that the Secretary and Treasurer occupied the position of trustees and, therefore, there is no question of limitation for preferring the claim. Secondly, the period during which action had been taken under Sec.71 of the Act should be excluded for the purpose of calculating the period of limitation. In this connection, the learned counsel for the petitioner relies on the judgment in *K.Bashu Sahib v. Chandrasekaran, (1988) 2 L.W. 359.* That was a case where a suit was filed to set aside the sale held under the Co-operative Societies Act. The plaint was returned after nine years for want of pecuniary jurisdiction and later on represented in the District Court. It is under those circumstances that Sec.14 of the Limitation Act was invoked and the court upheld the plea that the time taken during the pendency of the plaint in the District Munsif Court can be excluded. The ratio of that decision cannot at all apply to the facts of this case because in that case, the suit had been filed in time before the Court of the District Munsif. In this case, that is not the position. In fact, while arguing the plea of *res judicata*, the petitioner rightly contended that the proceedings under Sec.71 are totally different from the proceedings under Sec.73. Therefore, it follows that the claim not having been filed within three years in accordance with Rule 56, it was definitely barred by limitation. The order of the tribunal is, therefore, upheld only on the question of limitation. Consequently, the writ petition fails

and it is dismissed. There will be no order as to costs.

B.S. --- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.1865 of 1983 *12th February, 1992.*

Deluxe Road Lines represented by its Partner, Kushalchand B.Shah ...*Petitioner*
v.
P.K.Palani Chetty ...*Respondent.*

(A) Evidence Act (I of 1872), Sec.34 - Accounts produced - Requirements of section is satisfied.
It is a well settled proposition of law that mere production of accounts will not be sufficient to charge any person with any liability. The requirements of Sec.34 of the Evidence Act will not be satisfied by the production of accounts simpliciter. *[Para 9]*
(B) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), Sec.10(2)(1) and Explanation - Wilful default - Unexplained default, if wilful - Tenant, to prove that default was not wilful - Landlord not issuing notice as envisaged by Explanation - Default if can be held wilful.
An unexplained default is undoubtedly wilful. A reading of the main section and Proviso makes it clear that it is for the tenant to prove that his default is not wilful. It is only the tenant who knows the relevant facts and he should plead the same and prove them before the Controller in order to satisfy the controller that the default was not wilful. If the tenant is not able to satisfy the controller that there were circumstances which prevented him from carrying out his contractual or statutory obligation of having paid the rent, then the necessary consequential inference is that the default is wilful. No doubt, the explanation introduced by the Amending Act of 1973 is to the effect that a default should be construed as wilful if the tenant fails to pay even after issue of two months' notice by the landlord claiming the rent. But it is not necessary in every case that a notice should have been issued by the landlord to the tenant in order to hold that the default is wilful. Even in cases where there was no notice calling upon the tenant to pay the rent, the default could still be held to be wilful. *[Para 12]*
(C) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), Sec.10(2)(1) - Tenant committing wilful default in payment of rent - Court, if has discretion to exempt tenant from consequence.
There is no substance in the contention that the court has a discretion to exempt the tenant from the consequence of wilful default and refuse to pass an order of eviction. *[Para 22]*
Cases referred to:
Chandi Ram Deka v. Janani Kanta Deka, A.I.R. 1952 Assam 92; Chandradhar Goswami v. Gauhati Bank Ltd., A.I.R. 1967 S.C. 1058: (1967)1 Com.L.J. 98: (1967)1 S.C.R. 898: 87 Com. Case 108; V.K.Abraham v. N.K.Abraham, (1978)1 M.L.J. 331: A.I.R. 1978 Mad. 56; Zonna Sorabji and others v. Mirbella Hotel Company (P) Ltd., A.I.R. 1981 Bom. 446; Vasvambal v. Chennia Gounder, 93 L.W. 578; K.Ramachandran v. K.Kumaraswamy, 76 L.W. 569; A.M.Chakrapani Reddiar v. Issa Munirathnam Chetti, 79 L.W. 600; S.Balachandran v. A.Chamnalal Jain, (1980)1 M.L.J. 116; Marudachala Udayar v. Dhandapani, (1980)1 M.L.J. 169; Durgai Ammal v. R.T.Mani, (1989)1 L.W. 155; G.K.Jose v. Ramathal, 92 L.W. 315: T.C.A.Anandalvar v. The Second Judge, Court of Small Causes Madras and another, 62 L.W. 307: (1949)1 M.L.J. 528; Ministry Premjibhi Vithaldas v. Ganeshbhai Keshavji, (1977)3 S.C.R. 569; Ganpat Lathia v. Shashikant Vishnu Shinde, (1978)2 S.C.C. 573; Ratilal Balabhai Nazar v. Ramchodhbai Shankerbhai Patel, A.I.R. 1968 Guj. 172; Arjun Khamal Mahijani v. Jamnadas C.Tuliani and others, (1989)4 S.C.C. 612.
G.Subramaniam, Senior Counsel, for *Himmatmal Mardia*, for Petitioner.
S.K.L.Ratan for *Raju K.Lukose* and *R.Balasubramaniam*, for Respondent.
The Court made the following
ORDER:- This revision petition is at the instance of the tenant against whom an order of eviction has been passed by the Appellate Authority on the ground of wilful default in payment of rent.
2. There is no dispute that the petitioner is bound to pay a rent of Rs.1,225 per mensem as tenant in premises No.243, ground-floor, Govindappa

Naicken Street, Madras-1. The respondent filed the petition for eviction alleging that the petitioner had committed wilful default in payment of rent for four months from August, 1981 to November, 1981. The petition was presented on 18th January, 1982. The petitioner contested the same stating that he was paying rent regularly and there was no wilful default on his part. With regard to the period in question, he stated that he paid the rent for August, 1981 on 19.9.1981 to the respondent's son, who returned it on 26.2.1981 directing the petitioner to pay it to the respondent himself. On 5.10.1991, the petitioner paid the rent for August and September, 1981 to the respondent, who promised to send the receipt therefor later, but did not send the receipt. Again the petitioner paid the rent for the month of October on 14.12.1981 and for the month of November, 1981 on 17.12.1981 to the respondent's son. The amounts were returned on 12.12.1981 by the respondent's son with a direction to pay it to the respondent in lump sum for the months of October, November and December, 1981 and January, 1982. The petitioner was shocked to receive a notice in the petition for eviction and on the first hearing date *viz.*, 5.2.1982 he offered to pay the arrears of Rs.4,900 and there was nobody on behalf of the respondent to receive the same in court. The tender was noted by the court on the docket and the matter was postponed to another date. The petitioner sent the rental arrears by a demand draft through registered post on 12.2.1982 along with a covering letter.

3. The Rent Controller held that the petitioner was not guilty of wilful default and dismissed the petition for eviction. On appeal, the Appellate Authority by his order dated 25.1.1983 reversed the conclusion of the Rent Controller and held that the petitioner was guilty of wilful default. Consequently, he ordered eviction.

4. The petitioner filed this revision petition which was posted for hearing on 24.11.1986. On that date, nobody appeared for the petitioner and this court dismissed the petition. The matter was taken to the Supreme Court by the petitioner by obtaining special leave. The Supreme Court passed an order imposing a condition that the petitioner should pay a sum of Rs.1,000 by way of costs to the respondent within a week from 18.12.1986 for restoration of the revision petition in order to be heard on merits. Accordingly, the petitioner paid the costs and the Supreme Court remanded the matter directing this court to restore this revision petition to file and dispose of the same on merits.

5. Learned counsel for the petitioner contends that wilful default is a mixed question of law and fact and on the facts and circumstances of this case, the Appellate Authority is in error in holding that the petitioner is guilty of wilful default. Learned counsel refers to the following circumstances: There was a tender of the entire arrears of rent on 5.3.1982, the first date on which the petition for eviction was posted before court. As there was none to accept the amount on behalf of the respondent, it was sent on 12.2.1982 by demand draft. That will show that the petitioner was quite conscious of his duties and obligations and if there was any deliberate intention on his part to avoid payment of rent, he would not have tendered the money on the date of first hearing. Secondly, it is submitted, that for about 12 years prior to the period in question, the petitioner had been paying rent very regularly without any default. The condut of the petitioner during the prior period and immediately after the filing of the petition for eviction will prove that any default on his part is not wilful. Thirdly it is argued that there was no demand on the part of the respondent before filing the petition for eviction. In order to prove before the court that a default is a wilful default, the landlord should have made a demand for payment of rent and only if the rent is not paid even after such demand, can be construed to be wilful. Fourthly it is urged that there was no refusal on the part of the petitioner to pay the rent at any time. The fifth contention is that the petitioner is carrying on business in the premises in question for quite a long time and it is the discretion of the court to grant an order of eviction or not and in the present case, the discretion should be exercised only in favour of the petitioner. It is also submitted that the Rent Controller should grant time to the tenant to pay rent and only if there is failure to pay thereafter, an order for eviction should be made.

6. *Per contra*, learned counsel for the respondent contends that the petitioner was never regular in payment of rent and he had always been irregular. It is submitted that the respondent as P.W.1 has given evidence that the petitioner used to pay rent always after delay and the said statement has not been challenged in cross-examination. It is also pointed out that even according to the versions

put forward by the petitioner and the documents filed by him in support of his case, it is clear that the petitioner had not been regular in payment of rent. It is next argued that the books of accounts produced by the petitioner are fabricated and no reliance can be placed thereon. It is pointed out that very strangely the day book is said to have been maintained for the period from 1.9.1981 to 26.10.1981 and it is crystal clear that the said book has been prepared only for the purpose of this case to cover the period in question. It is also submitted that the alleged payments claimed by the petitioner have not been proved by examining the person who is said to have paid actually to the respondent's son and later to the respondent. The non-production of the ledger to corroborate the entries in the day books is a clinching circumstance which goes against the petitioner. It is argued that the petitioner had not availed himself, of the procedure prescribed in the Act for payment of rent in the event of the landlord refusing to accept the rent when tendered. It is pointed out that the only person who is examined by the petitioner is the manager of the firm and he is not competent to give evidence on the relevant facts. It is, therefore, contended that the petitioner not having complied with the mandatory provisions of the Act is not entitled to claim any privilege and argued that the court should exercise its discretion in his favour. It is also pointed out that there is no discretion left with the court and if wilful default is found, the only order that could follow is one of the eviction and the court cannot save the petitioner from the consequences of such wilful default.

7. Both sides have referred to certain authorities in support of their respective propositions. Before taking up the authorities cited, it is necessary to set out the following circumstances which are relied on by the Appellate Authority to hold that the petitioner is guilty in payment of rent for the period August, 1981 to November, 1981.

> "(a) Ex.P-4, the receipt book produced by the respondent proves that the rent was being paid always to the respondent and he was issuing receipts. The case of the petitioner that he used to pay rent to the respondent's son is disproved by Ex.P-4.
>
> (b) The case of the petitioner that he had been paying rent regularly on the last day of the month or the first day of the next month, is not proved. The very averment that he had paid the rent for August, 1981 on 19.9.1981 to the respondent's son itself disproves his case. Even according to the petitioner, the rent paid on 19.9.1981 to the respondent's son was returned on 26.9.1981 in order to be paid to the respondent. But, he did not pay it to the respondent immediately. According to him, he paid it only on 5.10.1981 along with the rent for September 1981. There is no explanation as to why it was not paid to the respondent soon after it was returned by the respondent's son. On the other hand, the case of the respondent is that no rent was paid for August and September, 1981. Similarly, the rent for October, 1981 is sad to have been paid only on 14.12.1981 and the rent for November is said to have been paid on 17.12.1981. That also disproves the case of the petitioner that he was paying the rent on the first day of next succeeding month.
>
> (c) It is not in dispute that the respondent has been issuing receipts whenever rent is paid. But, according to the petitioner, the respondent would not issue receipts immediately and he would send them on a later date. That does not appear to be correct. On the other hand, the case of the respondent is that he used to prepare the receipts and keep them ready on the first of every succeeding month and as and wen the rent is paid, he used to issue the receipt immediately. That version is substantiated by the fact that rent receipts bearing No.19 and 20 in Ex.P-4 are kept ready and the respondent has also signed the same. They bear the dates 1.9.1981 and 1.10.1981 respectively. They were intended to be used as soon as payments were made. As the petitioner has not paid the amount according to the respondent, the receipts continued to be in Ex.P-4 without being detached.
>
> (d) While according to R.W.1, the respondent's only witness, the rent was actually paid by Ganesan, the cashier of the firm to the respondent's son, the said Ganesan was not examined. R.W.1 is not in a position to say whether Ganesan paid the rent to the respondent or his son. Therefore, the alleged payment for August and September, 1981 has not been proved at all. In the notice issued by the petitioner, marked as Ex.P-1 there is no reference to the payment through Ganesan. It merely states that the rent had been paid.

(e) If the respondent had assured the petitioner that he would send the receipts for the payment for August and September, 1981, the petitioner would have demanded a receipt after waiting for some time. He never did so. Even after the filing of the petition, the petitioner has issued Ex.P-1 in which he made an offer to pay the rent for August and September, 1981 alleging that it was a second payment. If really the rent for the two months had been paid, the petitioner would never have offered to pay the same once again. The Manager of the petitioner firm examined as R.W.1 has not been able to produce any record to show that his principals or employers permitted him to make a second payment for August and September, 1981.

(f) There is no explanation for not paying the rent for October, 1981 in November, 1981. Even according to the petitioner that was paid only on 14.12.1981 to the respondent's son and within a few days thereafter, the rent for November, 1981 was also paid to the respondent's son. Both are supposed to have been returned on 19.12.1981 by the respondent's son. The version is wholly unbelievable as it appears to be a cock and bull story.

(g) The petitioner claims to have sent the rent by money order and the evidence that the money orders had been returned on refusal. But, no refused money order has been produced before court. There is absolutely no scrap of paper to prove that the petitioner sent rent by money order.

(h) The petitioner did not admittedly call upon the respondent to name the bank in which the rent could be deposited. The petitioner never adopted the procedure prescribed in the Act therefor.

(i) There is no statement either in the notice Ex.P-1 or in the counter filed in the eviction petition that the petitioner was sending rent by money order which was refused by the respondent.

(j) The evidence of the petitioner's only witness R.W.1 runs counter to the statements contained in Ex.P-1 notice and the counter statement filed in the eviction petition.

(k) The books of accounts produced by the petitioner are not reliable. The ledgers corresponding to the Day Book have not been filed in court."

8. I agree with the reasons given by the Appellate Authority. Learned counsel for the petitioner places considerable reliance on the account books produced by the petitioners and submits that they prove beyond doubt the payments made by him and the return thereof by the respondent's son. I am unable to accept the contention. As rightly pointed out by learned counsel for the respondent, the first Day Book is for the period from 1.9.1981 to 26.10.1981. It is really strange that there is a Day Book for such a short period. It is not as if the prior Day Book upto 31.8.1981 got completed and a new Day Book had to be opened for the period from 1.9.1981. There is no reference whatever in the Day Book to any period Day Book. If it is a continuing one for the year in question, the prior Day Book would have been referred and the relevant page number would have been noted. There is no such entry. Ex.P-2 is an entry at page 44. It is dated 19.9.1981. It reads that a sum of Rs.1,225 was paid towards rent to B godown for the month of August, 1981. There is no mention as to how it was paid and through whom it was paid. At page 57 relating to the date 26.9.1981, a reverse entry is found. It reads that the amount has been received from the party *viz.*, M/s.Palani Chettiar and Company. Here again it is not clear as to how it was returned. An entry is found at page 73 and it is marked as Ex.P-10. It reads,

"Mr.Palani Chettiar A/c - Amount returned to above Vide C.N.No.3476/26.9.1981 D.N.No.-5176/1225.00".

It is stated that the said amount was paid to the respondent by way of rent for August 1981. According to the petitioner, the rent for August and September 1981 was paid together to the respondent on 5.10.1981. But, there are two different entries on the same date. One of the entries has been referred to above. The other entry is at page 75 which is marked as Ex.P-8. It is written that an amount of Rs.1,225 was paid towards 'B' godown rent. The book is written only upto 26.10.1981 upto page 126. The book contains totally 470 pages 344 pages are not written up and they are blank. There is no explanation for having a Day Book of this kind. The other Day Book which is produced by the petitioner contains entries marked as Exs.P-14, P-15 and P-30 at pages 119, 126 and 130 respectively. In this book the entry reads as if the amount is paid towards rent account

for the petition premises. There is nothing in the entry to show as to whom the amount was paid. Similarly, the entry at page 126 does not disclose as to whom the amount was paid and as to how that was paid. The reverse entry is found at page 130 as if the entire amount of Rs.2,450 was returned. The court below is justified in rejecting the account books.

9. Significantly, the person who wrote the accounts has not been examined. The person who is said to have made the payments mentioned in the accounts has not been examined. It is only the Manager, who had nothing to do with either the payment or the writing of the accounts, who has been examined. There is no explanation for not examining the others. It is a well settled proposition of law that mere production of accounts will not be sufficient to charge any person with any liability. The requirements of Sec.34 of the Evidence Act will not be satisfied by the production of accounts simpliciter. In *Chandi Ram Deka v. Jamini Kanta Deka, A.I.R. 1952 Assam 92,* it has been held that where the books produced are merely the ledger not supported by any book or containing no entries of transactions as they took place, the books do not fulfil the requirements of Sec.34 of the Evidence Act. In *Chandradhar Goswami and others v. Gauhati Bank Ltd., A.I.R. 1967 S.C. 1058: (1967) 1 Com.L.J. 98: (1967) 1 S.C.R. 898: 87 Com.Case 108,* it is held that no person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business and there has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them. In *V.K.Abraham v. N.K.Abraham, (1978) 1 M.L.J. 331: A.I.R. 1978 Mad. 56,* A Division Bench of this court has, after referring to all the authorities on the subject, held that the accounts books by themselves are not sufficient to charge any person with liability and the party has to show by some independent evidence that the entries in his books represented real and honest transactions and that the moneys paid or the transactions took place, in accordance with those entries. In *Zonna Sorabji and others v. Mirbella Hotel Company (P.) Ltd. and others, A.I.R. 1981 Bom. 446,* the Bombay High Court held that in order that a document could be relied upon as a book of accounts, it must have the characteristic of being fool-proof, and the ledger by itself could not be a book of account of the character contemplated by Sec.34 of the Evidence Act. The learned Judge held that the corresponding journal or Rojmal or day-book should be produced in order to place reliance on the ledger.

10. I have already referred to the suspicious circumstances attending to the preparation of the day-books produced by the petitioner. The non-production of the ledger, the non-examination of the person who wrote the accounts and the non-examination of the person who is said to have made the payment taken along with the suspicious circumstances are sufficient to hold that no reliance can be placed on the books of accounts produced by the petitioner. The Appellate Authority is, therefore, justified in rejecting the same. The Appellate Authority has also pointed out that the relevant vouchers said to be existing have not been produced.

11. There is absolutely no doubt whatever in this case that the petitioner is guilty of default in payment of rent for the period from August, 1981 to November, 1981 as alleged in the petition for eviction. His case of payment of rent for August, 1981 and September, 1981 has not been proved. His case of payment to the respondent's son of the rent for October and November, 1981 and the return thereof by the latter is also not proved. The only question that remains to be considered is whether the default is wilful default or not.

12. The explanation put forward by the petitioner for non-payment of rent for October and November, 1981 has been found to be false. The plea of payment for August and September, 1981 is also found to be false. Hence, there is no explanation on whatever for the non-payment of rent for the said period of four months. An unexplained default is undoubtedly wilful. It is for the tenant to plead and prove the circumstances under which he failed to pay the rent required by the statute. The obligation to pay rent is not merely contractual but also statutory. Sec.10(2)(1) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act) reads that if the controller after giving the tenant a reasonable opportunity of showing case against the application for eviction, is satisfied that the tenant has not paid or tendered the rent due by him in respect of

the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which is the rent payable, he shall issue a direction evicting the tenant. The proviso to the section reads that if the Controller is satisfied that the tenant's default was not wilful, he may give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him. A reading of the main section and proviso makes it clear that it is for the tenant to prove that his default is not wilful. It is only the tenant who knows the relevant facts and he should plead the same and prove them before the Controller in order to satisfy the Controller that the default was not wilful. If the tenant is not able to satisfy the Controller that there were circumstances which prevented him from carrying out his contractual or statutory obligation of having paid the rent, then necessary consequential inference is that the default is wilful. No doubt, the explanation introduced by the Amending Act of 1973 is to the effect that a default should be construed as wilful if the tenant fails to pay even after issue of two months notice by the landlord claiming the rent. But it is not necessary in every case that a notice should have been issued by the landlord to the tenant in order to hold that the default is wilful. Even in cases where there was no notice calling upon the tenant to pay the rent, the default could still be held to be wilful. *Vasvambal v. Chennia Gounder, 93 L.W. 578.*

13. In *K.Ramachandran v. K.Kumaraswamy, 76 L.W. 569;* Anantanarayanan, J., held that if the explanation given by the tenant for non-payment of rent is false, it is a circumstance which could be considered along with others in arriving at the conclusion that the default was wilful. The learned Judge observed that after all wilful default or intentional default is a default accompanied by a particular state of mind, which cannot be directly proved, but has to be inferred from the entire complex of circumstances.

14. In *A.M.Chakrapani Reddiar v. Issa Munirathnam Chetti, 79 L.W. 600,* it has been held by this Court that a default for even one month could be held to be wilful default.

15. In *S.Balachandran v. A.Chamnalal Jain, (1980)1 M.L.J. 116,* Ratnam, J., held that there could be no automatic adjustment of advance paid by the tenant as against unpaid rent and even if some amount remained with the landlord, the default in payment of rent could be wilful default. The learned Judge observed:

> "There is no explanation whatever for the non-payment of the rents by him for nearly a period of five months. In the circumstances, the default in the payment of rents is clearly wilful."

16. In *Marudachala Udayar v. Dhandapani, (1980)1 M.L.J. 169,* it was held that the court could not ignore the implications of Sec.8 of the Act and assess the controversy without reference to such implications. It was pointed out that where the tenant had not availed of the provisions of Sec.8 of the Act it would be a relevant circumstances to be taken into account for deciding the question of wilful default.

17. Learned counsel for the petitioner places reliance on the following observations of a Division Bench of this Court in *Durgai Ammal v. R.T.Mani, (1989)1 L.W. 155:*

> "It is then argued that even at the agreed rate of Rs.16 per month, not only the respondent has not sent the rent to the petitioner but also has not deposited it as she is enabled under Sec.9 and therefore she must be deemed to have committed wilful default in payment of rent. In support of this plea reliance is placed on the decision in *G.K.Jose v. Ramathal, 92 L.W. 315.* In that case the rent sent by the tenant was refused by the landlord but nevertheless it was found by Ramanujam, J., that the tenant committed wilful default for the reason that she has not deposited the arrears of rent in a bank or before the Rent Controller, and therefore the default should be taken as wilful. On the basis of this judgment it is argued in this case that when there is a *bona fide* doubt or dispute as to the person who is entitled to receive the rent the tenant has the right to deposit the rent before the Rent Controller but she did not do so and hence it follows that she committed wilful default. But with great respect we are unable to agree with the learned Judge. Sec.8 provides that in case the landlord refuses to receive rent tendered by the tenant the tenant can call upon the landlord to name a bank where she can deposit it an did he fails to do so the tenant can send it by money order and if even that money order is not received,

the tenant can deposit the rent before the Rent Controller. But it is nowhere stated that if the tenant does not do so it will amount to wilful default. When a landlord refuses to receive the rent sent by the tenant it is his fault. He cannot subsequently say that the tenant has not exercised his right given under Sec.8 and, therefore, he must be taken to have committed wilful default. Similarly, if the tenant has not deposited the rent before the Rent Controller in case of *bona fide* doubt as to the person who is entitled to receive the rent and the person concerned does not help to remove the doubt of the tenant, the tenant cannot be said to have committed wilful default in payment of rent."

18. In the case before the Division Bench, there was a refusal to accept the rent on the part of the landlord. In the present case, the alleged payment or tender has not been proved at all. This is not a case of refusal on the part of the landlord to accept the rent. Hence, the observations made by the Division Bench could have no bearing on the present case.

19. At any rate, it is necessary to point out that an earlier ruling of a Division Bench of this Court has not been taken note by the Bench in *Durgai Ammal v. R.T.Mani, (1989)1 L.W. 155.* That is a judgment in *T.C.A.Anandalvar v. The Second Judge Court of Small Causes Madras, 62 L.W. 307: (1949)1 M.L.J. 528.* The Division Bench comprising of Rajamannar, C.J., and Raghava Rao, J., held that merely because the rent due for one month has been improperly refused by the landlord when tendered, the rent for succeeding months is neither due nor payable. The Division Bench held that under Sec.7(2) of Madras Act of 1946 corresponding to Sec.10(2) of the present Act a duty was cast on the tenant to make a payment or tender every month, if he desired to take advantage of the provisions of the Act. It is not necessary for me in the present case to elaborate further on that subject. On the facts of this case, there can be no doubt whatever that the petitioner has committed wilful default in payment of rent.

20. In *Ministry Premjibhi Vithaldas v. Ganeshbhai Keshavji, (1977)3 S.C.R. 569,* the Apex Court held that the statutory protection given by the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, to a tenant was available only on the terms on which it was permissible under the Act. It was observed that to prove readiness and willingness of the tenant to pay the rent, he should have complied with the provisions of the Act and that the Act did not cover the case of a person who was unable to pay owing to want of means, but was otherwise ready and willing. The relevant passage in the judgment reads thus:

"The readiness and the willingness of the tenant to pay could be found only if he had complied with the provisions of the Act. The Act does not cover the case of a person who is unable to pay owing to want of means but is otherwise ready and willing. Such a case is no doubt a hard one. But, unfortunately, it does not enable courts to make a special law for such hard cases which fall outside the statutory protection."

21. In *Ganpat Latha v. Shashikant Vishnu Shinde, (1978)2 S.C.C. 573,* under the same Bombay Act it was held that once it is found that the conditions prescribed by the Act are not fulfiled, the protection given by the Act will not be available to the tenant and the Court has no discretion whatever to be exercised in favour of the tenants. The relevant passage in the judgment is very instructive. It reads thus:

"It is clear to us that the Act interferes with the landlord's right to property and freedom of contract only for the limited purpose of protecting tenants from misuse of the landlord power to evict them, in these days of scarcity of accommodation, by asserting his superior rights in property on trying to exploit his position by extracting too high rents from helpless tenants. The object was not to deprive the landlord altogether of his rights in property which have also to be respected. Another object was to make possible eviction of tenants who fail to carry out their obligation to pay rent to the landlord despite opportunities given by law in that behalf. Thus Sec.12(3)(a) of the Act makes it obligatory for the court to pass a decree when its conditions are satisfied as was pointed out by one of us (Bhagawati, J.) in *Ratilal Balabhai Nazar v. Ramchodhbai Shankerbhai Patel, A.I.R. 1968 Guj. 172.* If there is statutory default or neglect on the part of the tenant, whatever may be its cause, the landlord acquires a right under Sec.12(3)(a) to get a decree for eviction. But where the conditions of Sec.12(3)(a) are not satisfied, there is a further opportunity given to the tenant to protect himself against

eviction. He can comply wit the conditions set out in Sec.12(3)(b) and default the landlord's claim for eviction. If, however, he does not fulfil those conditions, he cannot claim the protection of Sec.12(3)(b) and in that event, there being no other protection available to him, a decree for eviction would have to go against him. It is difficult to see how by any judicial valour discretion exercisable in favour of the tenant can be found in Sec.12(3)(b) even where the conditions laid down by it are satisfied to be strictly confined within the limits prescribed for their operation. We think that Chagla, C.J., was doing nothing less than legislating in *Kalidas Bhavan case (supra) 60 Bom. L.R. 1359,* in converting the provisions of Sec.12(3)(b) into a sort of discretionary jurisdiction of the court to relieve tenants from hardship. The decisions of this Court referred to above, in any case, make the position quite clear. Sec.12(3)(b) does not create any discretionary jurisdiction in the court. It provides protection to the tenant on certain conditions and these conditions have to be strictly observed by the tenant who seeks the benefit of the section. If the statutory provisions do not go far enough to relieve the hardship of the tenant the remedy lies with the legislature. It is not in the hands of courts."

The same view was reiterated in *Arjun Khamal Mahijani v. Jamnadas C.Tuliani, (1989)4 S.C.C. 612.*

22. Thus, there is no substance in the contention of learned counself for the respondent that the court has a discretion to exempt the tenant from the consequence of wilful default and refuse to pass an order of eviction. Learned counsel places reliance on the judgment of the Supreme Court in *S.Sundaram Pillai, etc., v. V.R.Pattabiraman,* and contends that a default in order to be wilful, must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing therefrom. He refers to the following passage in judgments:

"Thus, a consensus of the meaning of the words wilful default appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequence flowing therefrom. Taking for instance a case where a tenant commits default after dealt despite oral demands or reminders and fails to pay the rent without any just or lawful cause, it cannot be said that he is not guilty of wilful default because such a course of conduct manifestly amounts to wilful default as contemplated by the Act or by other Acts referred to above."

23. The Supreme Court has only given an example. It is not exhaustive. Each case has to be considered on the facts thereof and the question whether there is wilful default or not must be decided only on the fact of the case. It cannot be decided on the basis of any axiomatic propositions of law. In the present case, it is found that there is absolutely no explanation for non-payment of rent during the relevant period on the other hand, the petitioner has come forward with false explanations. The petitioner has gone to the extent of preparing books of accounts for the sole purpose of the case, for limited periods. That is enough to hold that the petitioner does not deserve any indulgence. Even if the court has got a discretion in the matter, I am of the view that there is no discretion left with the court once it is found that the tenant is guilty of wilful default.

24. In the result, the civil revision petition fails and it is dismissed with costs. Counsel's fee Rs.1,000.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Janarthanam, J.*

C.R.P.No.431 of 1991 *21st February, 1991.*

V.Ganthimathi ...*Petitioner*

v.

The Commissioner, Pudukottai Municipality, Pudukottai ...*Respondent.*

Civil Procedure Code (V of 1908), Sec.115 - Revisional jurisdiction of High Court under - When can be invoked - 'Case decided' - What is..

Under the amended provisions of Sec.115 of the Code of Civil Procedure, revisional jurisdiction can be invoked, only if the order under revision amounts to a 'Case decided'. The clauses (a) to (d) of the said section set out the circumstances in which the jurisdiction is to be exercised. The two

parts of the section are not only separate and distinct but have entirely different ambit and role. The first part prescribes the basic conditions for invoking the revisional jurisdiction while the second part enumerates the circumstances in which the jurisdiction may be exercised. Although for invoking the revisional jurisdiction the condition prescribed in the first part of the section would suffice, yet for exercising the jurisdiction, in addition to the satisfaction of the condition laid in first part, the attraction of any one or more of clauses (a) to (d) is also required. The term 'case decided' is not confined to the decision of the case as a whole but would also include part of a case which decides a substantial question in controversy between the parties. The touchstone, therefore, would be to find out if the order under revision has determined some right or claim between the parties which is legally enforceable. If it has, it would be a case decided and jurisdiction under Sec.115, C.P.C., may be invoked and not otherwise.

[Paras 3 and 4]

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Pudukottai, dated 7.2.1991 and passed in I.A.No.121 of 1991 in O.S.No.421 of 1990.

A.R.L.Sundaresan, for Petitioner.

The Court made the following

ORDER:- Pudukottai Municipality owns a farm growing grass going by the name 'Maruppini Pul Pannai'. The right to cut and remove the grass from the said farm for the period between 1.4.1990 and 31.3.1991 had been auctioned, on 22.2.1990. The maximum bid in the auction was Rs.4,23,010. One Ganthimathi submitted a letter to the Municipal Council offering Rs.4,33,035 for the licence to be granted in her favour to cut and remove the grass during the said period. As a consequence, the auction in favour of the highest bidder was not at all confirmed. Pending consideration of the offer of the said Ganthimathi, the Municipality, on appraisal of the relevant provisions, decided to reauction. Aggrieved by such decision, the said Ganthimathi, as plaintiff, filed O.S.No.421 of 1990 on the file of the District Munsif's Court, Pudukottai against the Commissioner, Pudukottai Municipality as defendant on 4.4.1990 seeking the relief of declaration of her right to cut and remove the grass from the farm during the period from 1.4.1990 to 31.3.1991 and for permanent injunction restraining the defendant and his men from re-auctioning the said right. She also filed I.A.No.128 of 1991 on 18.1.1991 praying for the relief of interim injunction restraining the defendant and its men from interfering with her peaceful possession and enjoyment of the suit property namely, grass farm.

2. Learned District Munsif posted the said I.A. to 23.1.1991 for filing counter, on which date, counter had been filed and it was posted, for enquiry, to 24.1.1991, on which date, it was adjourned to 28.1.1991 besides making an order of interim injunction till then. On 28.1.1991, learned District Munsif was on casual leave and consequently, it was adjourned to 31.1.1991, on which date, both sides were not ready and consequently, it was further adjourned to 7.2.1991, of course, after extending the interim injunction till then. On 7.2.1991, learned District Munsif addressed a letter to the District Judge for the transfer of the case to the file of some other court for certain obvious personal embarrassment, adjourning the case to 27.2.1991 awaiting necessary orders. In so doing, no order was passed extending interim injunction. Therefore, the plaintiff has come forward with the present action, as an aggrieved person, under Sec.115, C.P.C., as no order was passed extending the interim injunction.

3. Under the amended provisions of Sec.115 of the Code of Civil Procedure, revisional jurisdiction can be invoked, only if the order under revision amounts to a 'case decided'. The clauses (a) to (d) of the said section set out the circumstances in which the jurisdiction is to be exercised. The two parts of the section are not only separate and distinct but have entirely different ambit and role. The first part prescribes the basic conditions for invoking the revisional jurisdiction while the second part enumerates the circumstances in which the jurisdiction may be exercised. Although for invoking the revisional jurisdiction the condition prescribed in the first part of the section would suffice, yet for exercising the jurisdiction, in addition to the satisfaction of the condition laid in first part, the attraction of any one or more of clauses (a) to (d) is also required.

4. The term 'case decided' is not confined to the decision of the case as a whole, but would also include part of a case, which decides a substantial question in controversy between the parties. The touchstone, therefore, would be to find out if the

order under revision has determined some right or claim between the parties, which is legally enforceable. If it has, it would be 'a case decided' and jurisdiction under Sec.115, C.P.C., may be invoked and not otherwise.

5. In the case on hand, it cannot be stated that any part of the controversy between the parties had been decided by not extending the order of interim injunction earlier granted and in this view of the matter, it goes without saying that the revision filed as such is rather incompetent and deserves outright dismissal even at the admission stage.

6. I am rather pained to state that the revision petition knocked at the door of the court with all sorts of trickery device with dirty hands. A cursory glance or perusal of the plaint would reveal that the right to cut and remove the grass in the farm has not been conferred in her favour by issuance of any order from the Municipality. However, there is no specific allegation that she entered into possession of the said farm pursuant to any order granted by the Municipality in her favour. The relief that had been prayed for in the suit would also indicate the declaratory relief of recognition of her right to cut and remove the grass from the said farm for the period between 1.4.1990 and 31.3.1991 and consequential relief of permanent injunction for restraining the defendant and his men from reauctioning the said right. Curiously enough, she would incorporate averments in the affidavit filed in support of the I.A., as if she had been inducted into possession of the farm and prayed for the interim relief of injunction restraining the defendant and his men from interfering with her peaceful possession and enjoyment, which is not at all the relief prayed for in the suit, leave alone the other lacuna of seeking the said relief as a separate one by paying necessary court fee. However, I may hasten to add that the trial court should not at all get influenced by any of the observations made by me in this order.

7. For the above reasons, the civil revision petition is dismissed even at the admission stage.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Kanakaraj, JJ.*

A.A.O.No.31 of 1986 *21st August, 1990.*

R.Dhanaraj and another ...*Appellants*
v.
Rubia and others ...*Respondents.*

Motor Vehicles Act (IV of 1939), Secs.3(1) and 110-A - Motor accident - Driver of tourist vehicle not having licence to drive tourist vehicle but having licence to drive a light motor vehicle - Insurance policy not insisting on driver having a licence to drive a tourist vehicle - Insurance company, if can be held liable to pay compensation.

The tourist car TMV.8481 was involved in an accident resulting in the death of one Ethiraj. In a claim petition by the parents of the deceased, the insurance company contended that the driver of the tourist car had no licence to drive a taxi vehicle and that therefore it was not liable to pay any compensation. This was accepted by the Motor Accidents Claims Tribunal. The claimants appealed for a decree against the insurance company.

Held:- The words 'holds a driving licence at the time of the accident' are definitely satisfied in this case because the driver of TMV.8481 did have licence to drive a light motor vehicle. In *E.Enjana Devi v.Arumugam, (1983) A.C.J. 625,* it is seen that as against the word 'driver' it was stated that the vehicle could be given by the insured or any other person in his employ holding a licence to drive the vehicle. The reference to the vehicle is missing in the policy in the present case. Further, the words 'or had held a permanent driving licence (other than a learner's licence) and is not disqualified from holding or obtaining such a licence' suggest that even if the driver had a permanent driving licence and is subsequently not disqualified from holding or obtaining such a licence, the insurance company cannot escape liability. The words seem to suggest that even if on the date of the accident, the driver did not have a licence, the fact that he had earlier a permanent licence and is not disqualified on the date of the accident is sufficient to fasten the liability on the insurance company.

[Para 5]

Cases referred to:

E.Enjana Devi v. Arumugam, (1983) A.C.J. 625; M/s.National Insurance Company Ltd. v. Mahadevayya, (1981) T.L.N.J. 170; Canara Motor and General Insurance Company Ltd. v. Abdul Hamid Khan Saheeb, 1984 A.C.J. 467; Houghton v. Trafalgar Insurance Company Ltd., (1954) 1 Q.B. 247; Savitri v. Lakshmichand, 1988 A.C.J. 909; National Insurance Company Ltd. A.Babu, (1990) 1 L.W. 188; New India Insurance Company Ltd. v. C.B.Shankar, (1986) S.C.J. 82.

V.Ramesh, for Appellants.

Sadasivam, for Respondents.

The Judgment of the Court was delivered by *Kanakaraj, J.*:- The parents of the victim in a motor accident are the appellants before this Court. The appellants filed a claim petition M.O.P.No.378 of 1982 on the file of the Motor Accident Claims Tribunal, Chengalpattu claiming a sum of Rs.1 lakh as compensation, arising out of the accident on 24.3.1982 resulting in the death of their son. The case of the appellants is that on 24.3.1982 at about 11. A.M., their son Ethiraj had parked an Ambassador car driven by him on the left hand side of the G.S.T. Road and was standing outside the car by keeping the right hand side-door open. At that time, the Ambassador car, bearing registration No. TMV.8481 coming in the opposite direction and driven rashly and negligently, had dashed against the deceased Ethiraj causing fatal injuries. The first respondent owner of the car TMV.8481 remained *ex parte*. The second respondent-insurance company filed a counter statement contending *inter alia* that the driver of the tourist car TMV.8481 had no licence to drive a taxi vehicle and therefore the insurance company is not liable to pay any amount. The other particulars regarding the quantum of compensation were also generally denied.

2. P.W.3 was examined as an eye-witness to the occurrence. He spoke to the facts as set out in the claim petition that the maroon colour Ambassador car bearing No.6161 was standing on the left hand side of the road near the Pakkam railway station in G.S.T. Road. The car TMV.8481 coming in the opposite direction from Tindivanam to Madras was being driven at a high speed and in a rash and negligent manner. It hit the driver of the parked car 6161 who was standing outside the car with the door open. The respondents did not seriously dispute the fact that the accident was caused (*sic.*) TMV.8481. In fact they did not elicit any useful information in the cross-examination of P.W.1 nor did they examine any witness to the contrary. The tribunal, therefore, rightly held that the accident was due to the rash and negligent driving of the car TMV.8481.

3. However, the second respondent sought to escape liability on the ground that the car TMV.8481 was a tourist taxi and the driver did not have an endorsement permitting him to drive a tourist taxi. Therefore, under the insurance policy, the second respondent is absolved of liability. To prove the above facts, R.W.2 was examined. R.W.2 is an assistant in the office of the Transport Authorities, Chepauk, Madras. He maintains the tourist taxi register. According to the witness, TMV.8481 was permitted to run as a tourist taxi from 13.9.1978 till 13.9.1983. It was also stated that the vehicle had been transferred to and in favour of the first respondent on 29.9.1981. He marked Exs.B-1 to B-4 in support of the above contention. The tribunal, therefore, rightly concludes that the car TMV.8481 was a tourist taxi on the date of the accident. To prove the fact that the driver of TMV.8481 had no endorsement the second respondent examined R.W.3 who is the motor vehicle assistant Tiruvarur. He deposed that the driver of TMV.8481 had a licence only to drive light motor vehicles and he had no licence to drive a tourist taxi. The insurance claim investigator was examined as the 4th witness. He deposed that he obtained the driving licence of the driver of the car, TMV.8481 at the time of the accident and took a xerox copy of the same. The said xerox copy was marked as Ex.B-8. From these documents and the oral evidence of Respondent's witnesses 2 to 4, the tribunal came to the conclusion that the insurance company is not liable to pay any compensation because the driver of the insured did not have the necessary licence to drive a tourist taxi.

4. The tribunal proceeded to find that the first respondent-owner is liable. Regarding the quantum of compensation, the deceased Ethiraj was shown to have received a salary of Rs.253 per month at the time of the accident. He was aged about 25 years. The first appellant was aged 58 years on the date of the accident and the second appellant was aged 50 years at the time of the accident. Taking 65 years as the period of longevity, the Tribunal held that the claimants were legitimately entitled to contribution from the

deceased for a period of 15 years. Deducting Rs.103 for the personal expenses, of the deceased the contribution was fixed as Rs.150 per month. Assuming that the deceased would have remained unmarried for a period of 5 years, a sum of Rs.9,000 was arrived at, for the balance of 10 years, the tribunal took only Rs.50 as monthly contribution and worked out the total amount at Rs.6,000. For the shock and mental pain, a sum of Rs.5,000 was awarded. The total compensation was arrived at Rs.20,000 and the claimants were awarded Rs.10,000 each.

5. The appeal by claimants is not only for enhancing the compensation, but also for a decree against the insurance company. A similar question arose before this Court in *E.Enjana Devi v. Arumugam and another, 1983 A.C.J. 625,* this Court posed the following point for determination.

> "The substantial question that arises in this case is to determine whether a driver of a tourist car is required under the Motor Vehicles Act, to have a special authorisation in addition to the usual licence to drive a light motor vehicle to enable him to drive the tourist car as contended by the learned counsel for the insurance company."

The insurance company in that case showed that the vehicle had been registered as a tourist taxi and it can be used only in connection with the insured's business of running it as a tourist vehicle. Further under the head 'driver' the policy in that case had stated that the vehicle could be driven by the insured or by any other persons in his employ holding a licence to drive the vehicle. Relying on Sec.3(1) of the Motor Vehicles Act, it was held that the driver did not have a valid licence to drive a tourist taxi. It was, therefore, held that the insurance company was not liable to meet the compensation. In the case before us, there is some proof that the driver of TMV.8481 did not have a licence to drive a tourist vehicle. But the question that still remains is whether the policy in this case insisted on the driver having a licence to drive a tourist vehicle. It is not disputed that the driver did have a licence to drive a light motor vehicle like the car TMV.8481. Ex.P-7 is the policy issued by the second respondent company for the period from 28.9.1981 to 27.9.1982. As against the column, business/profession, (*sic.*), it was left blank. Therefore, the endorsement in the policy about usage in connection with the insured's business does not convey any meaning, because the business is not indicated. This is a vital point of difference between the judgment in *E.Enjana Devi v. Arumugam and another, 1983 A.C.J. 625,* because in that case, it is seen from the judgment that the insured's business was running a tourist taxi. Secondly, as against the word 'driver', it is stated as follows:

> "(a) The insured.
>
> (b) any other person provided he is in the insured's employ and is driving on his order or with his permission.
>
> "Provided that the person driving holds a valid driving licence at the time of the accident or had held a permanent driving licence (other than a learner's licence) and is not disqualified from holding or obtaining such a licence."

The words "holds a driving licence at the time of the accident" are definitely satisfied in this case because the driver of TMV.8481 did have a licence to drive a light motor vehicle. In the judgment quoted above, it is seen that as against the word "driver", it was stated that the vehicles could be driven by the insured or by any other person in his employ, holding a licence to drive the vehicles. The reference to the vehicle is missing in the policy before us. Further, the words "or had held a permanent driving licence (other than a learner's licence) and is not disqualified from holding or obtaining such a licence" suggest that even if the driver had a permanent driving licence and is subsequently not disqualified from holding such a licence, the insurance company cannot escape liability. The words seem to suggest that even if on the date of the accident, the driver did not have a licence the fact that he had earlier a permanent licence and is not disqualified on the date of the accident is sufficient to fasten the liability on the Insurance Company. Learned counsel for the appellants relied on Rule 5(b) of the Motor Vehicles Rules to say that the eligibility for getting a licence to drive a tourist vehicle is only one year experience as a driver.

6. Therefore, on facts, we are of the opinion that the judgment in *E.Enjana Devi v. Arumugam and another, 1983 A.C.J. 625,* will not apply to the present case. To the same effect is the judgment in *M/s.National Insurance Company Ltd. v. Mahadevayya and others, 1981 T.L.N.J. 170.* On the other hand, learned counsel for the appellants relies on the decision in *Canara Motor and General*

Insurance Company Ltd. v. Adbul. Hamid Khan Saheeb and another, 1984 A.C.J. 467. In that case, it was no doubt held, that the words "held a licence to drive the motor vehicle" appearing in the policy refers more to the type of vehicle rather than the mode of its user. There is thus difference of opinion between the Court and the Bombay High Court in this aspect. We do not propose to go into the question as to which view is acceptable because, in this case on facts we are satisfied that the policy does not insist on the driver having a licence to drive a tourist taxi. However, we may refer to *Houghton v. Trafalgar Insurance Company Ltd., (1954)1 Q.B. 247.* In that case, it has been held that if there is ambiguity in the policy documents, the ambiguity will be resolved in favour of the insured.

7. In this case, we have a further difficulty because the driving licence as such was not produced. What is produced before this Court is a xerox copy of the driving licence, said to have been obtained from the owner of TMV.8481 by the Investigator R.W.4. There is evidence to say that unless the original is produced, it may not be possible to correctly find out whether the driver had an endorsement for driving a tourist taxi. In this connection, learned counsel for the appellants relies on the decision in *Savitri and others v. Lakshmichand and others, 1988 A.C.J. 909,* wherein it was held that the Insurance Company failed to prove that there was any violation of the condition of policy. Similarly, in *National Insurance Company Ltd. v. A.Babu, (1990)1 L.W. 188,* (to which one of us was a party), it was held that the plea of the Insurance Company that accident was caused by a person driving a vehicle with a temporary licence has to be established only by the insurance company and in the absence of proof, the insurance company cannot escape liability. That judgment also supports the view expressed by us that on the date of the accident, the driver need not have a licence provided it is established that he had a permanent licence and he was not disqualified on the date of the licence from holding or obtaining a licence.

8. In *New India Insurance Company Ltd. v. C.B.Shankar and others, (1986) S.C.J. 82,* the following observations support the case of the appellants:

> "It is not the case of the insurance company that the nature of things is such that we can presume that the driver could not have had any licence at all. The driver was not shown to be a minor or any other person with legal infirmity who could not hold any driving licence at all for any reason. In the circumstances, therefore, we agree with the order of the tribunal that the insurance company is liable for the amount awarded."

9. Having regard to all the facts and circumstances of the case and on the basis of the terms of the insurance policy in this case, we are satisfied that the insurance company cannot escape liability.

10. So far as the question of quantum of compensation is concerned, we are satisfied that the tribunal has taken note of the correct principles. The salary of the deceased was only Rs.253 per month. The argument is that the salary would not have remained the same for ever and the tribunal should have taken note of the higher salary that the deceased would have secured in course of time. We are unable to accept this contention because there is no evidence on that aspect and we have to take note of the other uncertainties in life while determining the compensation. The multiplier applied by the tribunal is also correct, having regard to the age of the appellants. We are, therefore, not inclined to interfere with the quantum of compensation.

11. In the result, the appeal is partly allowed holding that the compensation as awarded by the tribunal is payable jointly and severally by both the respondents. In other respects, the appeal is dismissed. There will be no order as to costs.

B.S. ---- *Appeal partly allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Venkataswami* and *Abdul Hadi, JJ.*

C.M.A.No.694 of 1991 *20th September, 1991.*

K.Nandakumar ...*Appellant*

v.

The Managing Director, Thanthai Periyar Transport Corporation Ltd., Villupuram ...*Respondent.*

Motor Vehicles Act (XLVII of 1982), Sec.92-A(4) - Scope and ambit of - Motor accident - Deceased or injured person in accident found negligent - If can

claim compensation from other party who was not negligent.

On a reading of Clause (4) of Sec.92-A of the Act, at the first blush it appears that even though the petitioner-claimant alone was negligent, he could be awarded compensation under the said clause. On a deeper consideration, it is clear that in such a case, no compensation could be awarded to the claimant even under Sec.92-A of the Act. Sec.92-A of the Act was introduced only because there may be difficulty on the part of the claimants to prove the negligence of the driver of the offending vehicle. That is why, even though they are unable to prove the said negligence, Sec.92-A of the Act was introduced to say that in the case of accident resulting in death or permanent disablement, the minimum compensation prescribed therein must be given despite the fact that the claimant was unable to prove the negligence of the driver of the offending vehicle. The Supreme Court has also made it clear that Sec.92-A of the Act will apply only when there is no negligence on the party of the deceased or injured person, as the case may be. *Vide: G.S.R.T. Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690.* Further, it cannot be social justice if a person is asked to pay compensation to another when there is no fault on his part at all but there is fault only on the part of the other person. A person can make a claim for compensation against another only when the other person is at fault and not when he alone is at fault. May be, in view of certain circumstances, he is unable to prove the fault on the part of another person from whom he claims compensation. Only in such a case, Sec.92-A of the Act steps in and says that despite the abovesaid fact of inability to prove the negligence of the other party, he will be entitled to a particular minimum compensation. Social justice, is thereby sought to be rendered to him since in view of certain justifiable circumstances, he is only unable to prove the negligence on the part of the other person. *[Para 6]*

Therefore, the only interpretation that could be put at clause (4) of Sec.92-A of the Act is that even when there is some negligence or default on the part of a person in respect of whose death or permanent disablement, the claim has been made, his claim for compensation from the other party whose negligence he is unable to prove, shall not be defeated. In other words, the said clause (4) only negates totally the concept of contributory negligence. It must be noted here that only to the above extent, the substantive law has been modified in this regard and not to the extent that even where the deceased or injured, as the case may be, is negligent and not the other party, the former can claim compensation. Where the former is negligent, there is no scope at all for himself claiming any compensation from the other party for his own fault. That is the substantive law. That part of the substantive law has not at all been modified by Sec.92-A of the Act. Such a modification cannot be the intention of the Legislature since it is totally contrary to the general law of torts and basic principle of law. An interpretation leading to absurdity has also to be avoided. *[Paras 7 and 8]*

Cases referred to:

G.S.R.T. Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690; Minu B.Mehta v. Balakrishna, A.I.R. 1977 S.C. 1248; Express Mills v. Municipal Committee, A.I.R. 1958 S.C. 341; Inja Venkatarao v. Sundara Barik, A.I.R. 1991 Orissa 104; Vatchala Uttam Mors v. Shivaji Dnyanu Patil, A.I.R. 1991 Bom. 234; Krishna Pillai v. Jalal Ahamed and others, 1990 A.C.C. 111; Manne Bala Saraswathi v. P.Subbarao, (1990)1 A.C.C. 202 (D.B.).

M.Swamikkannu, for Appellant.

P.Sathasivam and *G.Muniratnam,* for Respondents.

The Judgment of the Court was delivered by

Abdul Hadi, J.:- This civil miscellaneous appeal by the claimant is against the dismissal of his M.A.C.T.O.P.No.773 of 1988 of the file of the Motor Accidents Claims Tribunal (Chief Judge of Court of Small Causes), Madras.

2. In the said claim petition the appellant petitioner claimed a compensation of Rs.2,00,000 on the ground that he was injured in the motor accident that took place on 15.11.1987 at 9.45 P.M. According to him, he was going in a motor cycle, east to west on the road in question and the respondent's but TML 8774 came in the opposite direction and hit against his motor cycle and caused severe injuries to him and despite the fact that he had to take treatment as inpatient till 2.12.1987, he remained handicapped and disabled, etc., the respondent-Corporation denied that its driver was negligent and contended that only the appellant was negligent. Though the tribunal observed that if compensation could be awarded to the claimant, it could be fixed at Rs.50,900 it found that the accident took place only because of the negligence of the appellant himself and that the driver of the

respondent-Corporation was not at all negligent. It also found that there was criminal prosecution only against the appellant for his rash and negligent driving of his motor cycle and that in that criminal proceedings, the appellant admitted his guilt and paid penalty on being convicted. While so, the tribunal has also observed that the appellant has abused the process of Court by filing the present claim petition in the tribunal, claiming compensation as if the respondent's vehicle's driver was negligent. That is why, the tribunal, while dismissing the petition, directed the petitioner to pay a sum of Rs.1,000 as cost.

3. Before us, the learned counsel for the appellant initially argued that the tribunal erred in holding that the driver of the respondent's bus was not negligent. He also argued that the tribunal should have at least granted compensation on the ground of no fault liability prescribed under Sec.92-A of the Motor Vehicles Act (hereinafter referred to as 'the Act').

4. Regarding the negligence aspect, it is clear that the appellant is alone negligent in view of the fact that criminal prosecution was launched only against him and not against the driver of the respondent bus and the fact that he admitted his negligent and rash driving and accordingly he was convicted. Further, Ex.R-2 sketch that was filed in the above said criminal prosecution shows that the appellants motor cycle hit the left rear side of the bus as (*sic.*) was deposed by P.W.1, the claimant. Further, we find from the evidence of P.W.1 that even though he deposed that he had driving licence, he did not produce the same. Further even though he deposed that his motor cycle was checked by the Motor Vehicles Inspector and there was documentary proof to that effect, he did not produce the same. Further, the appellant was coming from Taluk Office Road, which meets the main road, *viz.*, Mount Road at Chinnamalai junction near Maraimalai Adigal bridge (Saidapet) and the respondent's bus was coming from Parrys corner and as already stated the respondent's bus's rear left side alone had been hit by the appellant's motor cycle. So, it is quite clear that the appellant alone was negligent.

5. However, the learned counsel for the appellant contended that the appellant should have been at least granted the abovesaid no fault liability compensation under Sec.92-A of the Act. In this connection, he drew our attention to Sec.92-A of the Act, particularly to Clause (4) therein Sec.92-A of the Act runs as follows:

"92-A. *Liability to pay compensation in certain cases on the principle of no fault:-* (1) where the death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-sec.(1) in respect of the death of any person shall be a fixed sum of fifteen thousand rupees and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of even thousand five hundred rupees.

(3) In any claim for compensation under sub-sec.(1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-sec.(1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death of permanent disablement."

6. According to the learned counsel for the appellants, even where the injured claimant alone is negligent, he should be at least given the above referred to minimum compensation fixed under Sec.92-A of the Act. No doubt, on a reading of clause (4) of Sec.92-A of the Act, at the first blush it appears that even though the petitioner-claimant alone was negligent, he could be awarded compensation under the said clause. On a deeper consideration, it is clear that in such a case, no compensation could be awarded to the claimant even under Sec.92-A of the Act. Sec.92-A of the Act was introduced only because there may be

difficulty on the part of the claimants to prove the negligence of the driver of the offending vehicle. That is why, even though they are unable to prove the said negligence, Sec.92-A of the Act was introduced to say that in the case of accident resulting in death or permanent disablement, the minimum compensation prescribed therein must be given despite the fact that the claimant was unable to prove the negligence of the driver of the offending vehicle. That is why, the statement of Objects and Reasons of the Amending Act 47 of 1982, which introduced the above said Sec.92-A, states as follows:

"Having regard to the nature of circumstances in which road accidents take place, in a number of cases, it is *difficult to secure adequate evidence to prove negligence.* Further, in what are known as "hit-and-run" accidents, by reason of the identity of the vehicle involved in the accident not being known, the persons affected cannot prefer any claims for compensation. It is, *therefore,* considered necessary to amend the Act suitably to secure strict enforcement of road safety measures and also to make, *as a measure of social justice,* suitable provisions, first for compensation *without proof of fault or negligence on the part of the owner or driver of the vehicle* and, secondly, for compensation by way of solatium in cases in which the identity of the vehicle causing an accident is unknown." (*emphasis supplied*)

Further, the Supreme Court has also observed in *G.S.R.T. Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690,* while dealing with this no fault liability under Sec.92-A of the Act, as follows:

"Where a pedestrian *without negligence on his part is injured or killed by a motorist' whether negligent or not he* or his legal representatives as the case may be should be entitled to recover the damages if the principle of *social justice* should have any meaning at all." (*Emphasis supplied)*

So, the Supreme Court has also made it clear that Sec.92-A of the Act will apply only when there is no negligence on the part of the deceased or injured person, as the case may be. Further, it cannot be "social justice" if a person is asked to pay compensation for another, when there is no fault on his part at all, but there is fault only on the part of the other person. That apart, the expression used even in Clause (4) of Sec.92-A of the Act is "claim for compensation." A person can make a claim for compensation against another only when the other person is at fault and not when he alone is at fault. May be, in view of certain circumstances, he is unable to prove the fault on the part of another person from whom he claims compensation. Only in such a case, Sec.92-A of the Act steps in and says that despite the abovesaid fact of inability to prove the negligence of the other party, he will be entitled to a particular minimum compensation. Social justice is thereby sought to be rendered to him since in view of certain justifiable circumstances, he is only unable to prove the negligence on the part of the other person.

7. The Supreme Court in *Minu B.Mehta v. Balakrishna, A.I.R. 1977 S.C. 1248,* also observed as follows:

"The right to receive compensation can only be against a person who is bound to compensate due to the failure to perform a legal obligation. If a person is not liable legally he is under no duty to compensate anyone else. The claims tribunal is a tribunal constituted by the State Government for expeditious disposal of the motor claims. The general law applicable is only common law and the law of torts.....

It may be that a person bent upon committing suicide may jump before a car in motion and thus get himself killed. We cannot perceive by what reasoning the owner of the car could be made liable."

Therefore, the only interpretation that could be put on clause (4) of Sec.92-A of the Act is that even where there is some negligence or default on the part of the person in respect of whose death or permanent disablement, the claim has been made his claim for compensation from the other party, whose negligence, he is unable to prove, shall not be defeated. In other words, the said clause (4) only negates totally the concept of contributory negligence. We also find from Seth's Law relating to Traffic Offences and Accidents Claim, 2nd edition at page 761 that a Division Bench of the Gauhati High Court in *Saman Deb Barma v. State of Tripura, (1985) G.L.R. 420,* has also observed likewise.

8. The Supreme Court in the above referred to *G.S.R.T. Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690,* further observed in relation to Sec.92-A of the Act as follows:

"That part of the Act is clearly a departure from the usual common law principle that a claimant should establish negligence on the part of the owner or driver of the motor vehicle before claiming any compensation for the death or permanent disablement caused on account of a motor vehicle accident. *To that extent the substantive law* of the country stands modified." (*emphasis supplied*)

It must be noted here that only to the above extent, the substantive law has been modified in this regard and not to the extent that even where the deceased or injured, as the case may be, is negligent and not the other party, the former can claim compensation. Where the former is negligent, there is no scope at all for himself claiming any compensation from any other party for his own fault. That is the substantive law. That part of the substantive law has not at all been modified by Sec.92-A of the Act. Such a modification cannot be the intention of the Legislature since it is totally contrary to the general law of torts and basic principle of law. An interpretation leading to absurdity has also to be avoided. *Express Mills v. Municipal Committee, A.I.R. 1958 S.C. 341.*

9. No doubt, in the above referred to *G.S.R.T.Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690,* the Supreme Court has observed that the above referred to statement of law made in *Minu B.Mehta v. Balakrishna, A.I.R. 1977 S.C. 1248,* that procedural law alone has been prescribed under the Motor Vehicles Act for claiming compensation arising out of Motor accidents and that the substantive law applicable is only common law and the law of torts, is only *obiter dicta.* In other words, according to the above referred to *G.S.R.T.Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690,* in some respects the substantive law also has been modified by the Motor Vehicles Act in claiming compensation arising out of motor accidents. (*Vide* paragraphs 6 to 8 of the said judgment). But, the Supreme Court also pointed out in the above referred to *G.S.R.T.Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690,* that only to the extent the modification has been made, it can be given effect to. That is why in the passage already quoted from the said decision, it is stated that "to that extent the substantive law of the country stands modified."

10. However, the learned counsel for the appellant sought to cite several decisions of different High Courts, wherein, according to him, even where there is negligence on the part of the deceased victim in the case of fatal accidents or on the part of the injured claimant in other accidents compensation has been awarded under Sec.92-A of the Act. The decisions cited by him are *Inja Venkatrao v. Sundara Barik, A.I.R. 1991 Orissa 104, Vatchala Uttam Mors v. Shivaji Dnyanu Patil, A.I.R. 1991 Bom. 234, Krishna Pillai v. Jalal Ahamed and others, (1990) A.C.C. 111, Manne Bala Saraswathi v. P.Subbarao, (1990)1 A.C.C. 202 (D.B.)* and *K.P.Ali and others v. Manilatha Madhavan and others.* Of these cases, we find that only in *Manne Bala Saraswathi v. P.Subbarao, (1990)1 A.C.C. 202 (D.B.) Kerala,* compensation has been awarded under Sec.92-A even though the deceased victim was himself *solely negligent* and there was no negligence on the part of the other party. We think, in the view we have taken and in the light of what the Supreme Court has observed in *G.S.R.T.Corporation, Ahmedabad v. Ramanbhai, A.I.R. 1987 S.C. 1690,* referred to above, this Kerala decision, with due respect to the learned Judges who decided the said case, is not correct. In the other four decisions, when we went into the facts, we found that it could be said that the deceased or the injured, as the case may be was only contributorily negligent and not solely negligent. In other words, those are cases where it could be said that both the parties were negligent. In such cases, Sec.92-A of the Act could no doubt be invoked, as we have stated already.

11. In the result, the appeal is dismissed with costs.

B.S. ------ *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.1716 of 1991 *12th November, 1991.*

Nachayee Ammal and others ...*Petitioners*
v.
Pichaimuthu ...*Respondent.*

(A) Civil Procedure Code (V of 1908), O.21, Rule 22 - Execution proceedings - Executing Court if should always issue notice to person against whom execution is applied - High Court Circular dated 22.11.1977 - Subordinate Court not obeying circular - Effect - Granting execution without notice, if invalid.

Under O.21, Rule 22 of the Code of Civil Procedure, the Executing Court shall issue a notice to the person against whom execution is applied only if the execution petition is made more than two years after the date of the decree or it is made against the legal representative of a party to the decree or it is made against the assignee or receiver in insolvency. If the execution petition is filed within two years after the date of the decree there is no necessity for the executing court to issue notice to the judgment-debtor. However, this Court has, if appears as a matter of practice, issued a circular to the Subordinate Courts that execution shall not be granted without notice to the judgment-debtors. But the relevant portion of the Circular reads as follows: "...Of course, the said provisions enable the executing court to pass an *ex parte* order if the application has been made within the period specified therein. But it is prudent that in respect of application filed under O.21, Rule 22 of the Civil Procedure Code in the case of *ex parte* decree (though the rule does not make a distinction between execution of a decree passed on contest or *ex parte* decree), the court should not ordinarily pass an order without issuing notice to the other side." The language used in the circular is rather significant. The subordinate courts are not prevented altogether from ordering execution without notice. As a rule of prudence, the subordinate courts are directed that they should not ordinarily pass an order without issuing notice to the other side. If in a particular case, the subordinate court has not obeyed the circular issued by this Court, that will not invalidate the order of the court as it is a judicial order if it is in accordance with the provisions of the Code of Civil Procedure. The disobedience of the circular issued by the court may lead to appropriate proceedings against the concerned official. But that will not, in any event, nullify or vitiate the judicial order passed by the court when it is in conformity with the provisions of the Code of Civil Procedure and other provision of law. So long as there is no rule made by this Court under the First Schedule of the Civil Procedure Code and so long as there is no amendment to the provisions of O.21, Rule 22 of the Code of Civil Procedure, an administrative circular will not have precedence over the existing rule. Consequently, the order dated 7.1.1991, recording delivery is directly in accordance with law as the order granting execution without notice to the judgment-debtor was in accordance with the provisions of O.21, Rule 22 of the Civil Procedure Code. Hence, the order cannot be set aside on the ground that the circular issued by this Court had not been followed or complied with.

[Paras 4 and 5]

(B) Civil Procedure Code (V of 1908), O.21, Rule 22 - Executing decree recording delivery of possession - No application filed to review that order - Order cannot be set aside.

For setting aside judicial order, there should be an application known to law. The procedure prescribed by the law should be followed. There is no application before the court to review the order dated 7.1.1991. The application filed on 6.2.1991 is to set aside the order dated 7.1.1991. Unless there is an application as prescribed by the Civil Procedure Code, the order passed on 7.1.1991 could not have been set aside by the court below. Hence, the order which is under revision is unsustainable. *[Para 8]*

Petition under Sec.115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Principal District Munsif, Karur, dated 3.5.1991 and made in I.A.No.165 of 1991 in E.P.No.660 of 1990 in O.S.No.419 of 1988.

T.R.Rajagopalan, for Petitioners.

K.Ravichandrababu, for Respondent.

The Court made the following

ORDER: The petitioners obtained in decree for delivery of possession in O.S.No.419 of 1988. The decree was passed *ex parte* on 6.7.1990. The respondent applied for setting aside the *ex parte* decree on 31.7.1990. When that application was

pending, the respondent had not obtained any order of stay. The decree-holders/plaintiffs applied for delivery of possession in executing court and an order was passed on 3.12.1990 that delivery should be effected on or before 3.1.1991. The matter was posted on 7.1.1991 for final orders. On that date, the delivery effected by the Amin was recorded by the court and the execution petition was closed.

2. The application filed by the respondent for setting aside the *ex parte* decree was dismissed on 7.2.1991. It is stated that an appeal has been filed against that order and it is pending as C.M.A.No.9 of 1991 on the file of the Sub Court, Karur. It is stated to be posted on 26.11.1991.

3. After the delivery was recorded, the respondent filed an application for stay of execution proceedings. But, that application was dismissed as delivery had been effected already. The respondent filed E.A.No.165 of 1991 for setting aside the order dated 7.1.1991 passed by the executing court. Several grounds are urged by the respondent. But the executing court accepted one of the grounds, *viz.* the delivery of possession was ordered by the executing court without notice to the respondent and, therefore, it was not proper and it was not in accordance with a circular issued by this Court in R.O.C.No.195/76 Con.B.R.2, dated 22.11.1977.

4. Under O.21, Rule 22 of the Code of Civil Procedure, the executing court shall issue a notice to the person against whom execution is applied only if the execution petition is made more than two years after the date of the decree or it is made against the legal representative of a party to the decree or it is made against the assignee or receiver in insolvency. If the execution petition is filed within two years after the date of the decree, there is no necessity for the executing court to issue notice to the judgment-debtor. However, this Court has, it appears as a matter of practice, issued a Circular to the Subordinate Courts that execution shall not be granted without notice to the judgment-debtors. But, the relevant portion of the circular reads as follows:

> "...Of course, the said provisions enable the executing court to pass an *ex parte* order if the application has been made within the period specified therein. But, it is prudent that in respect of application filed under O.21, Rule 22 of the Civil Procedure Code in the case of *ex parte* decree (though the rule does not make a distinction between execution of decree passed on contest or *ex parte* decree), the court should not ordinarily pass an order without issuing notice to the other side."

The language used in the Circular is rather significant. The subordinate courts are not prevented altogether from ordering execution without notice. As a rule of prudence, the subordinate courts are directed that they should not ordinarily pass an order without issuing notice to the other side.

5. If in a particular case, the subordinate court has not obeyed the Circular issued by this Court, that will not invalidate the order of the court as it is a judicial order if it is in accordance with the provisions of the Code of Civil Procedure. The disobedience of the Circular issued by this Court may lead to appropriate proceedings against the concerned official. But, that will not in any event nullify or vitiate the judicial order passed by the court when it is in conformity with the provisions of the Code of Civil Procedure and other provisions of law. So long as there is no rule made by this Court under the First Schedule of the Civil Procedure Code and so long as there is no amendment to the provisions of O.21, Rule 22 of the Code of Civil Procedure, an administrative circular will not have precedence over the existing Rule.

6. Consequently, the order dated 7.1.1991 recording delivery is directly in accordance with law as the order granting execution without notice to the judgment-debtor was in accordance with the provisions of O.21, Rule 22 of the Civil Procedure Code. Hence, that order cannot be set aside on the ground that the Circular issued by this Court had not been followed or complied with.

7. On the facts of this case, it is seen that the respondent was very much aware of the *ex parte* decree and he had filed an application on 31.7.1990 itself to set aside the same. He ought to have applied for stay of execution of the decree if he was interested in getting an order of stay. Not having done so, the respondent cannot blame the executing court for directing delivery of possession without notice to him. On the facts of this case, failure of the executing court to issue notice to the judgment debtor is not really a violation of the circular of this Court.

8. Even otherwise, for setting aside a judicial order, there should be an application known to law. The procedure prescribed by the law should be

followed. There is no application before the court to review the order dated 7.1.1991. The application filed on 6.2.1991 is to set aside the order dated 7.1.1991. Unless there is an application as prescribed by the Civil Procedure Code the order passed on 7.1.1991 could not have been set aside by the court below. Hence, the order which is under revision is unsustainable. Hence, the civil revision petition is allowed and the order in E.A.No.165 of 1991 dated 3.5.1991 is set aside. The order dated 7.1.1991 recording delivery of possession is restored. There will be no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Mishra* and *Swamidurai, JJ.*

O.S.A.No.193 of 1988 *6th April, 1992.*

State Bank of India Officers' Association Educational Trust represented by its Secretary, E.A.G.Moses. *...Appellant*

v.

V.Parthasarathy and others *...Respondents.*

(A) Civil Procedure Code (V of 1908), Sec.92 - Ingredients of - Life member of State Bank of India Officers' Association Educational Trust and member of Executive Committee of the Parents-Teachers' Association filing application for leave to sue for framing a scheme to appoint new brushes - Maintainability.

(B) Civil Procedure Code (V of 1908), Sec.92 - Life member of State Bank of India Officers' Association Educational Trust and member of Executive Committee of Parents-Teachers' Association of the school filing application for leave to sue - Applications rejected - One of the respondents filing an appeal against that order - Maintainability.

The State Bank of India Officers' Association started a trust for the advancement of the education for the benefit of the public. The subscribers of the trust became the members of the trust by virtue of the bye-laws. The officers of the association also became ex-officio office-bearers of the trust. In W.P.No.9933 of 1985, the Supreme Court held that officers of the Bank should not actively work for a trust involving connection of funds consequently issued a directive to the Association Officers to desist from associating themselves with the Trust or holding office in the Trust. Alleging that the directive had paralysed the functioning of the trust and that it became necessary to move the court for framing a scheme to appoint new trustees in the place of the existing trustees the two applicants, one a life member in the trust and the second an Executive Committee Member of the Parents-Teachers' Association of the school run by the trust filed an application for leave to file a suit under Sec.92, C.P.C. A learned single Judge passed an order appointing a retired Judge of the High Court receiver to administer the trust pending disposal of the application for leave. The application for leave was however rejected. The trust represented by its Secretary filed an appeal. It was opposed on the ground that the appeal was filed not by the applicants but by one of the respondents.

Held: The Supreme Court in *Pragdasji v. Ishwarlabhai, (1952)2 M.L.J. 94: A.I.R. 1952 S.C. 143: 1952 S.C.J. 224,* has pointed out that a suit under Sec.92 is a suit of a special nature which presupposed the existence of a public trust of a religious or charitable character. The plaint allegation is that there is a charitable trust and that there are circumstances requiring settlement of the scheme for the proper administration of the trust. On the allegations in the plaint, it is clear that the ingredients of Sec.92 of the Code of Civil Procedure are attracted. Refusal of leave to sue on such facts does not appear to be legal. *[Paras 5, 8 and 10]*

Grounds of appeal show that his grievance is primarily on the basis that in the impugned order, a direction has been given to the receiver to handover possession of the properties of the trust to the newly elected office-bearer. According to him since possession of the trust properties had been taken from him in the event of refusal of relief, the property could have been delivered to him. He has, on this basis, tried to contend that the appeal is not maintainable as it is not in fact against the refusal of relief. It is however, not possible to view such a limited character of the appeal. All that was necessary for the appellant to satisfy is he is a

person aggrieved and that he is in a position that in the event of the appeal being allowed, he either gets the benefits for himself or for the causes for which the applicants applied to the Court for the grant of relief. It is not possible on the facts of this case to say that the appellant is not one such person. He, it is not in dispute, has been associated with the trust. Today, he may not be one of the elected office-bearers. Nonetheless, his interest *pro bono publico* is not in doubt. *[Para 9]*

Cases referred to:

Pragdasji v. Ishwarlalbhai, (1952)2 M.L.J. 94: A.I.R. 1952 S.C. 143: 1952 S.C.J. 224; Harendra Nath v. Kali Ram Das, A.I.R. 1972 S.C. 246; Devalur Pitchayya v. Divi Venkatakrishnamacharlu, 58 M.L.J. 39; Chikka Venkatappa v. Hanumanthappa, (1970)1 Mys.L.J. 296.

Appeal under clause 15 of the Letters Patent against the order of Sethuraman, J. dated 29.11.1988 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No.2063 of 1986 in unnumbered civil suit of 1986 on the file of this Court.

The Judgment of the Court was delivered by

Mishra, J.: A learned single Judge of this Court has declined to grant leave to the plaintiffs-respondents to institute the suit under Sec.92 of the Code of Civil Procedure. One of the respondents in the application, named as the defendant in the plaint, has preferred the appeal.

2. Claiming *inter alia* that the first applicant-first respondent was a life member in the defendant trust and that he was closely associated with the management of the schools belonging to the trust as an executive member of the Parents-Teachers' Association and the second applicant-second respondent too was in the Executive Committee of the Parents-Teachers' Association of the School, the applicants filed the application praying for leave to sue. According to them, this trust was started by the State Bank of India Officers' Association for the advancement of the education for the benefit of the public. When the trust was started, the subscribers to the Trust became the members of the trust by virtue of the bye-laws. The officers of the Association also became the ex-officio, office-bearers of the trust. They were, however, serving officers in the State Bank of India.

3. It so happened in Writ Petition No.9933 of 1985, the Supreme Court held that officers of the Bank should not actively work for a trust involving collection of funds from the public, and observed as follows:

> "We are of the firm opinion that no employee of the nationalised bank or any other public sector corporation should engage himself in collecting donation for any trust or other organisation from persons with whom because into contact in the course of his employment. It is not desirable. It is likely to lead to unhealthy practices and harmful results, intended or unintended. It the world of commerce, *quid pro quo* and not charity is the rule. Those in a position of advantage by reason of their office have to be very wary. Otherwise they may unsuspectingly walk into traps."

4. It is further stated that the Management of the State Bank of India has consequently issued a directive to the Association Officers to desist from associating themselves with the trust or holding office in the trust and it also directed that no employee shall promote or constitute or associate himself with the trust which directly or indirectly contains the Bank's name or provides for collection of funds from the public including the Bank's clients. Alleging that the directive has in such a situation paralysed the functioning of the defendant's trust and it became necessary to move the court for framing a scheme to appoint new trustees in the place of the existing trustees, the applicants filed the application seeking leave to institute the suit. It appears that besides the application for leave to institute the suit, another application was filed praying for appointment of a receiver to administer the alleged trust pending disposal of the application for leave. A learned single Judge of this Court passed an order stating that by consent of both parties, a retired Judge of this Court was appointed receiver to administer the State Bank of India Officers' Association Educational Trust pending disposal of the application for leave. Several other applications were filed in relation to the administration of the trust. But no specific orders were passed in these applications, and by a common order, P.K.Sethuraman, J., disposed of the main application for grant of leave to sue under Sec.92 of the Code of Civil Procedure, holding *inter alia* that leave to sue to file the suit under Sec.92 of the Code of Civil Procedure cannot be granted in this case. The learned single Judge has noted the facts as follows:

"In the plaint also after mentioning other details about the formation of the trust and also the manner how the funds were collected, how the schools were started in different places, how they had been managing, the circular issued by the management dated 18.2.1986 regarding the disciplinary action to be taken for collection of funds by the Officers' Association and also referring to the bye-laws of the trust and issue of notice by the Management of the State Bank of India to the office-bearers of the trust it has been prayed for framing a scheme for the management of the trust and as earlier shown the amendment also has been suggested in paragraph 4 to the various clauses of the bye-laws in the cause of action paragraph it has been mentioned about the statement of the management of State Bank of India objecting to the use of the name and directing deletion of the name and also directing the office-bearers of the trust to desist themselves from the trust. Therefore, it is clear that while suit is sought to be filed because of the objection taken by the Management of the State Bank of India for naming school as State Bank of India Officers' Association Educational Trust and also for the Officers Associating with the Trust and collecting funds and donations from the Bank.

22. It may be pointed out that the trust itself was established by the State Bank of India Officers Association for the various objects enumerated in the Memorandum of Association and the Officers who subscribed to the Memorandum of Association became founder members of the Trust and they are office-bearers and members of the Secretariat of the State Bank of India Officers' Association, Madras Circle. As per bye-law they shall remain members so long as they held respective offices in the Association. In the event of cessation of membership the respective successors to the office shall *ipso facto* become members of the Society. The president, Secretary, Associate Secretary, Treasurer among themselves shall constitute themselves into a management committee and as to the officers, the President of the State Bank of India Officers' Association, Madras Circle, shall be the President of the Trust. The Treasurer of the Association shall be the Treasurer of the Trust. The General Secretary/Deputy Secretary and/or vice President of the Association as may be determined by the Committee shall be the Secretary and Associate Secretary of the Trust (Bye-law XIX (a). Therefore, it is clear that the President, Treasurer, General Secretary and Vice President became officers of the trust also. The other office-bearers have not been made as parties either in the suit or in the application."

5. The question before the learned single Judge, was whether on the aforementioned facts, a suit under Sec.92 of the Code of Civil Procedure could be filed and leave should be granted. He has, however, stated at one place:

"It will be worthwhile to mention that the two applicants are not in any way concerned with the State Bank of India Officers' Association. While that is so, it is not known as to how they had come to know the directive issued by the Management of the State Bank of India to the Officers' Association as well as members of the Trust. It may also be pertinent to point out that the application and the plaint are dated 10.4.1986 and they had been filed into Court on 11.4.1986. According to the affidavit filed by Mr.M.Balakrishnan, the applicant in A.Nos.2979, 2981 and 2982 of 1986, it has been stated that he has been declared elected General Secretary of the State Bank Officers Association on 6.4.1986 and the only respondent/defendant shown in the application and in the plaint State Bank of India Officers' Association Educational Trust by its Secretary Mr.E.A.G.Moses was not the Secretary on the date of the institution of the suit, as according to the affidavit filed by Mr.Balakrishnan, Mr.Moses contested for the office of the President of the Association and he was defeated in the election and further according to the affidavit, the said Moses with ulterior motive and object of somehow continued to be in charge of the institution, has colluded with the plaintiffs and he had engineered the suit and the application filed and also without any authority whatsoever consented to the appointment of a Receiver even before permission to sue was granted by this Court. In this connection it was also submitted on behalf of the said applicant that Moses had even resigned from the primary membership of the State Bank Officers' Association and as such he has no *locus standi* whatsoever to be the respondent/defendant in the proceedings.

It was also submitted that even in the year 1979 the formation of the trust and the proposed activities of the trust had been informed to the Chairman, State Bank of India and he had been sent the Memorandum of Association of Trust along with the Special brochure brought out in that regard.

23. It was also submitted that on 6.6.1979 the school at Madras was inaugurated by the Chairman of the State Bank of India in the presence of dignitaries in the City of Madras. It was also further submitted that there had been a collection of more than Rs.8,00,000 and a souvenir had also been released and the members of the State Bank of India in Tamil Nadu, Karnataka and Pondicherry had made collections and there had been some benefit musical programme also through which funds were raised. It was further submitted that even in the year 1980 there was issue of a circular letter dated 24.10.1980 regarding collection of funds by the Officers Association and it was pointed out that such activity was in contravention of conditions of service as laid down in the Rule for the Supervising Staff Service. It was also submitted that under Rule 42(3) of the State Bank of India Supervising Staff Service Rules, it has stated that "no employee shall, except with the previous sanction of the appropriate authority ask for or accept contributions or otherwise associate himself with the raising of any funds or other collection in cash or in kind." Under the abovesaid circular the officers were advised to stop such activities mentioned above. Again there was a similar circular in the month of November, 1980."

Besides the above, the learned Judge has taken notice of the dispute between the parties and the various rules and the bye-laws and stated as follows:

"Therefore if the Management of the State Bank of India accedes to the request of the *SBIOA* and if the association also makes the necessary amendments in the byelaws with the approval of the Registrar under the Societies Registration Act, there could be no hindrance in the continued and effective functioning of the Trust established by the *SBIOA*. Having regard to the steps alleged to have been taken by the new office-bearers of the Association with the Management of State Bank of India, I feel there is absolutely no need for a suit of this nature to be entertained by this Court and the alleged cause of action cannot at all be said to be a real one."

6. With respect, we have to say that the learned Judge was not adjudicating any dispute between the parties in the suit, but was examining, whether on the allegations in the plaint, a case had been made out for leave under Sec.92 of the Act. The law on the subject is not in dispute. The Supreme Court in *Pragdasji v. Ishwarlalbhai, (1952) 2 M.L.J. 94: A.I.R. 1952 S.C. 143: 1952 S.C.J. 224*, has pointed out that a suit under Sec.92 is a suit of a special nature which presupposes the existence of a public trust of a religious or charitable character. The Supreme Court has said:

"Such a suit can proceed only on the allegation that there is a breach of such trust or that directions from the court are necessary for the administration thereof, and it must pray for one or other of the reliefs that are specifically mentioned in the Section. It is only when these conditions are fulfilled that the suit has got to be brought in conformity with the provision of Sec.92, C.P.C. As was observed by the Privy Council in *Abdur Rahim v. Md. Barkat Ali, 55 Ind. App. 96 (P.C.)*, a suit for a declaration that certain property appertains to a religious trust may lie under the general law but is outside the scope of Sec.92, C.P.C. In the case before us, the prayers made in the plaint are undoubtedly appropriate to the terms of Sec.92 and the suit proceeded on footing tat the defendant, who was alleged to be the trustee in respect of a public trust was guilty of breach of trust. The defendant denied the existence of the trust and denied further that he was guilty of misconduct of breach of trust. The denial could not certainly oust the jurisdiction of the court, but when the courts found concurrently on the evidence adduced by the parties, that the allegations of breach of trust were not made out, and as it was not the case of the plaintiffs, that any direction of the court was necessary for proper administration of the trust, the very foundation of a suit under Sec.92, C.P.C. became wanting and the plaintiffs had absolutely no cause of action for the suit they instituted. In these circumstances, the finding of the High Court about the existence of a public trust was wholly inconsequential and as it was

unconnected with the grounds upon which the case was actually disposed of, it could not be made a part of the decree or the final order in the shape of a declaratory relief in favour of the plaintiffs."

Stating further, on the objection that even if the plaintiffs failed to prove the other allegations made in the plaint, they did succeed in proving that the properties were public and charitable trust properties, the Supreme Court observed:

"The reply to this is, that in a suit framed under Sec.92, C.P.C., the only reliefs which the plaintiff can claim and the court can grant are those enumerated specifically in the different clauses of the section. A relief praying for a declaration that the properties in suit are trust properties does not come under any of these clauses. When the defendant denies the existence of a trust, a declaration that the trust does exist might be made as ancillary to the main relief claimed under the section if the plaintiff is held entitled to it; but when the case of the plaintiff fails for want of a cause of action, there is no warrant for giving him a declaratory relief under the provision of Sec.92, C.P.C. The finding as to the existence of a public trust in such circumstances would be no more than an *obiter dictum* and the same cannot constitute the final decision in the suit."

7. This view has been reiterated, and no departure has been shown in any of the judgments of the Supreme Court in this behalf. Reiterating the same view in *Harendra Nath v. Kali Ram Das, A.I.R. 1972 S.C. 246,* it has been pointed out,

"It is well settled by the decisions of this Court that a suit under Sec.92 is of a special nature which pre-supposes the existence of a public trust of a religious or charitable character. Such suit can proceed only on the allegation that there is a breach of such trust or that directions from the court are necessary for the administration of the trust. In the suit, however, there must be a prayer for one or other of the reliefs that are specifically mentioned in the section. Only then the suit has to be filed in conformity with the provisions of Sec.92 of the Code of Civil Procedure."

8. It appears that the attention of the learned Judge was drawn to a judgment of this Court in *Devalur Pitchayya v. Divi Venkatakrishnamacharlu, 58 M.L.J. 39.* In that judgment also, it has been observed:

"....the object of requiring sanction of permission before such suits are instituted under Sec.92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit it is necessary to see that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. Even though the whole public are technically parties, still the plaintiffs who file the suit have the conduct of the suit and very large powers in the shaping and the conduct of the suit. As a matter of general experience the public leave to the plaintiffs to conduct all the proceedings and to take the various steps necessary for its successful prosecution. It is also for the benefit of the institution and of the trustees because it affords a safeguard against impecunious and improper persons coming as plaintiffs and involving the trust in litigation and expenses and it is also a safeguard that the persons are substantial person from whom if the suit fails, the costs can be recovered, and not merely men of straw....

The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community....

It would be more desirable before giving the sanction that notice should be given to the institution or the trustees although it is not obligatory."

9. Sub-sec.(1) of Sec.92, Code of Civil Procedure, states:

"92.(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Advocate General or two or more persons having an interest in the trust and having obtained the leave of the Court may institute a suit, whether contentious or not, in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the

subject-matter of the trust is situate, to obtain a decree--

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust-property or of the interest therein shall be allotted to any particular object of the trust;

(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require."

Sub-sec.(3) of Sec.92 gives power to the Court to alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied *cypres* in one or more circumstances enumerated therein. We can see, however, the plaint allegation is that there is a charitable trust and that there are circumstances requiring settlement of the scheme for the proper administration of the trust.

10. Learned counsel for the respondent-trust, however, contended that the instant appeal is not filed by the applicants, but one of the respondents has chosen to move the appeal. Grounds of appeal show that his grievance is primarily on the basis that in the impugned order, a direction has been given to the receiver to handover possession of the properties of the trust to the newly elected office-bearers. According to him since possession of the trust properties had been taken from him in the event of refusal of relief, the property could have been delivered to him. He has, on this basis, tried to contend that the appeal is not maintainable as it is not in fact against the refusal of relief. It is, however, not possible to view such a limited character of the appeal. All that was necessary for the appellant to satisfy he is a person aggrieved and that he is in a position that in the event of the appeal being allowed, he either gets the benefits for himself or for the causes for which the applicants applied to the Court for the grant of relief. It is not possible on the facts of this case to say that the appellant is not one such person. He, it is not in dispute, has been associated with the trust. Today, he may not be one of the elected office-bearers. Nonetheless, his interest *pro bona publico* is not in doubt. Learned counsel for the appellant, however, has contended that it has been found that the properties of the trust are in the hands of a society registered under the Societies Registration Act. He has drawn our attention to the specific finding in this behalf recorded by the learned single Judge on the basis of a judgment in *C.Chikka Venkatappa v. D.Hanumanthappa, (1970)1 Mys.L.J. 296,* that Sec.92 of the Code of Civil Procedure is not attracted in a case of a society registered under the Societies Registration Act. We, however, do not propose to say anything finally in this behalf, for what is found in the plaint is that members of the Society have constituted a trust and that the officer-bearers of the society have become office-bearers of the trust. Whether the two are separate legal entities and whether the trust exists independently are questions that have to be answered only on such issues of fact that may be pertinent on the pleadings of the parties. Since this will be an issue beyond the application for leave to sue in our opinion, it is not the appropriate stage to examine it.

11. It is a fit case, in our opinion, in which this Court should leave any contest open, as to whether there is a charitable trust attracting Sec.92 of the Code of Civil Procedure, and whether on the facts of this case a scheme should be ordered, or any alternative relief should be granted to the appellant in the event of the leave granted and the suit contested. We, however, see, that on the allegations in the plaint, it is clear that the ingredients of Sec.92 of the Code of Civil Procedure are attracted. Refusal of leave to sue on such facts does not appear to be legal.

12. The appeal is allowed. The impugned order is set aside. Leave prayed for is granted. The suit shall accordingly be registered and proceeded in accordance with law. There shall, however, be no order as to costs.

/B.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan, J.*

C.R.P.Nos.2305 and 2306 of 1991 *23rd April, 1992.*

M/s.Jupitor Traders and others ...*Petitioners*
v.
A.T.Sankar and another ...*Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.25 - Petitioner filing petition for fixation of fair rent against partnership firm - Fair rent fixed - Both parties aggrieved - Filing appeals - Petitioners filing application to implead partners of firm as parties to appeal - Application ordered - Appellate authority remitting the matter to the Rent Controller - Directions given - Order, if an order of remand - Revision whether lies against the order.

The order cannot be treated as an order of remand as the appellate authority has not chosen to set aside the order of the Rent Controller made earlier fixing the fair rent at Rs.2,333. That fact that he has directed the Rent Controller to pass a fresh order and send the same to him within a period of two months indicates definitely that he is only calling for a finding from the Rent Controller. Obviously the appellate authority expected the partners to file fresh pleadings and adduce fresh evidence on the basis of which he directed the Rent Controller to give a fresh finding. But the first sentence of the order reads as if the appeals were allowed. Reading the entire order, the only possible interpretation that can be given is that the order is one calling for a finding from the Rent Controller and that it does not dispose of the appeals on the file of the appellate authority once and for all. The order did not deal with the merits of the appeals. It only directed the impleading of the partners of the tenant firm before the Rent Controller and called upon the Rent Controller to give a fresh finding on the basis of additional pleadings and evidence which may be adduced by the parties; There was no discussion of the merits of the appeals. Nor was there any finding setting aside the finding given by the Rent Controller on the amount of fair rent to be fixed to the building. Hence the appeal R.C.A.Nos.300 and 371 of 1986 continue to be pending in the eye of law on the file of the appellate authority and they require to be disposed of in accordance with law.

[Paras 3 and 13]

Cases referred to:

M/s.Chhotelal Pyarelal v. Shikharchand, (1984)4 S.C.C. 343: A.I.R. 1984 S.C. 1570; Ramachandra v. Beero Pollai, A.I.R. 1936 Mad. 531; Fernandes v. Ranganayakulu Chetty, (1952)2 M.L.J. 445; P.N.Thakershi v. Pradyumansinghji, A.I.R. 1970 S.C. 1273; P.Satyanarayana v. Land Reforms Tribunal, A.I.R. 1980 A.P. 149; Doskey Machado v. Francis Games, (1984)2 M.L.J. 42; Collector of Madras v. G.Logeswara Rao, 99 L.W. 432; Re.S.N.Komaraswami Gounden, (1951)1 M.L.J. 422; T.S.Pichaiyaa v. Rent Controller, Tuticorin, (1983)1 M.L.J. 18; Natarajan v. State of Madras, I.L.R. 1960 Mad. 449.

Petitions under Sec.25 of the Tamil Nadu Buildings Lease and Rent Control Act XVIII of 1960 as amended by Act 23 of 1973, praying the High Court to revise the Order of the Court of Small Causes (VII Judge), Madras, dated 3.5.1991 and made in M.P.Nos.301 and 302 of 1991 in R.C.A.Nos.300 and 371 of 1986, respectively.

N.Maninarayanan, for Petitioners.

K.P.Unni Krishnan, for Respondents.

The Court made the following

ORDER:- The respondents herein filed R.C.O.P.No.3336 of 1984 for fixation of fair rent. In the original petition, M/s.Jupitor Traders, a partnership firm, was the only respondent. The Rent Controller by order dated 27.2.1986 fixed the fair rent at Rs.2,333 per mensem. Both parties were aggrieved by that order. The tenant filed R.C.A.No.300 of 1986 and the landlords filed R.C.A.No.371 of 1986 and when the appeals were pending, the landlords filed an application in M.P.No.1255 of 1986 for impleading the partners of M/s.Jupitor Traders as parties to the appeal. That application was made because of the ruling of the Supreme Court in *M/s.Chhotelal Pyarelal v. Shikharchand, (1984)4 S.C.C. 343: A.I.R. 1984 S.C. 1570*, in which the Apex Court held that an application for eviction would not be maintainable against a firm in the firm's name, as the Code of Civil Procedure was not applicable to proceedings under the Rent Control order of the Central Provinces. The Supreme Court however had pointed out in that judgment that the non-joinder of the partners by itself would not result in the dismissal of the application filed by the landlord, as it would

be merely a case of misdescription and it could be corrected at any stage of the proceedings. The court observed that there can be no doubt that the partners of the firm were before the court, though in a wrong name.

2. The application was ordered by the appellate authority on 31.3.1987 and the partners of the firm who are petitioners 2 to 5 herein, were impleaded in the appeals. The appeals were heard in 1989. The appellate authority passed a common order on 31.10.1989. It is a curious order which cannot be fitted with any description known to law. The first sentence of the order reads that the appeals were allowed. Then, a direction to the landlords is given to implead the partners of the tenant firm as parties to the original petition in the court of the Rent Controller and amend the cause title accordingly. Then, it is stated that the Rent Controller shall take into account the pleadings and evidence of such partners and pass a fresh order and forward the same within a period of two months to the appellate authority. A time limit was fixed for the amendment of the original petition by the landlords. Both the parties were directed to appear before the Rent Controller on 16.11.1989. They were directed to co-operate with the Rent Controller to complete the matter at an early date.

3. The order cannot be treated as an order of remand, as the appellate authority has not chosen to set aside the order of the Rent Controller made earlier fixing the fair rent at Rs.2,333. The fact that he has directed the Rent Controller to pass a fresh order and send the same to him within a period of two months, indicates definitely that he is only calling for a finding from the Rent Controller. Obviously, the appellate authority expected the partners to file fresh pleadings and adduce fresh evidence on the basis of which he directed the Rent Controller to give a fresh finding. But the first sentence of the order reads as if the appeals were allowed. Reading the entire order, the only possible interpretation that can be given is that the order is one calling for a finding from the Rent Controller and that it does not dispose of the appeals on the file of the Appellate Authority once and for all.

4. Before the Rent Controller, a fresh additional counter-statement was filed by the partners of the tenant firm on 28.8.1990, but, no further evidence was adduced by either party. Inspite of that, the Rent Controller proceeded to consider the evidence and passed an order on 17.9.1990 fixing the fair rent at Rs.1,462 per mensem. He purported to pass a judgment and decree as if the matter was before him on remand.

5. The petitioners herein filed R.C.A.No.129 of 1991 challenging the order of the Rent Contoller dated 17.9.1990. The respondents did not prefer an appeal at that time, but, they claim to have filed an appeal with an application for condonation of delay in filing the same long afterwards, *i.e.*, on 22.3.1991. But even before that, the respondents filed M.P.No.302 of 1991 under the Code of Civil Procedure and Sec.23(3) of the Tamil Nadu Buildings (Lease and Rent Control) Act and Rule 28(7) of the Rules framed under the Act. The prayer in the petition is to review the common order passed by the appellate authority on 31.10.1989 and give a date for hearing of R.C.A.Nos.300 and 371 of 1986 for considering the propriety, regularity and correctness of order passed by the Trial Judge on 17.9.1990 in R.C.O.P.No.3336 of 1984. In the affidavit filed in support of the petition, it is stated that the appellate authority had no jurisdiction to remand the rent control petition to the trial court for fresh disposal and it had jurisdiction only to call for a finding by retaining the appeals on its file. It is stated that there is a error apparent on the record committed by the appellate authority and it should be set right by the court.

6. That application was opposed by the petitioners herein. The appellate authority passed an order on 3.5.1991 allowing the application. He has expressly viewed that the appeals ought to have been retained on its file as there was a direction to the Rent Controller to send the order to the appellate authority within two months from 31.10.1989, on which date the appellate authority made the order in question. He has referred to the pendency of R.C.A.No.129 of 1991 and directed that all the three appeals, *viz.*, R.C.A.Nos.300 and 371 of 1986 and 129 of 1991 should be heard together and disposed of together. Aggrieved by the said order, the petitioners have preferred these revision petitions.

7. The contention urged by learned counsel for the petitioners is that the appellate authority has no power of review, as there is no specific provision in Tamil Nadu Buildings (Lease and Rent Control) Act empowering the appellate authority to grant a review. It is also contended that the appellate authority being a statutory tribunal has no

inherent power of review and the order which is sought to be revised, it sustainable in law, inasmuch as it has chosen to review the earlier order dated 31.10.1989 allowing the appeals and remanding the matter to the Rent Controller for fresh disposal. It is the contention of learned counsel for the petitioners that the order of the appellate authority dated 31.10.1989 was undoubtedly an order of remand and if the landlords were aggrieved thereby, they ought to have challenged the same by a revision in this Court and they have no right to file a petition for review before the appellate authority itself.

8. In support of his contentions, learned counsel refers to the following rulings:

(i) *Ramachandra v. Beero Pollai, A.I.R. 1936 Mad. 531,* (ii) *Fernandes v. Ranganayakulu Chetty, (1952)2 M.L.J. 445,* (iii) *P.N.Thakershi v. Pradyumansinghji, A.I.R. 1970 S.C. 1273,* (iv) *P.Satyanarayana v. Land Reforms Tribunal, A.I.R. 1980 A.P. 149,* (v) *Doskey Machado v. Francis Games, (1984)2 M.L.J. 42.*

In those cases, it has been held that a court has no inherent power of review and it has to be conferred by a statue expressly or by necessary implication.

9. On the other hand, learned counsel for the respondents places reliance on the judgment of Justice Kader in *Collector of Madras v. G.Logeswara Rao, 99 L.W. 432,* in which the learned Judge has considered the power of review of the Rent Controller and the appellate authority under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act. He rejected the contention of the petitioner before him and held that the Authorities under the Act had an inherent power to review their own orders with a view to correcting patent or obvious mistakes in order to advance the ends of justice and redress a wrong.

10. Reliance is also placed by learned counsel for the respondents on a judgment of a Division Bench of this Court *In Re.S.N.Komaraswami Gounden, (1951)1 M.L.J. 422.* The Division Bench in that case held that though Sec.151, C.P.C. by itself would not apply to proceedings under the Act, a quasi-judicial tribunal like the Rent Controller or the appellate tribunal had an inherent power to set right mistakes made by inadvertence so long as the amendment did not amount to a review of the adjudication already made.

11. My attention is also drawn to a judgment of Justice Padmanabhan in *T.S.Pichaiya v. Rent Controller, Tuticorin, (1983)1 M.L.J. 18.* The learned Judge held in that case that an application for restitution was an application for execution and the Rent Controller had the power to order restitution. He relied on the principle that an act of court shall prejudice no man, as found in the *latin maxim, actus curiae neminem gravabit.*

12. It is held by a Division Bench of this Court in *Natarajan v. State of Madras, I.L.R. 1960 Mad. 449,* that in order to render justice, all statutory tribunals, so long as they exercise judicial functions should be held to possess inherent powers to review their judgments, where due cause is shown.

13. I do not think it necessary to refer to the other judgments cited by the counsel on both sides, as in my view they are not relevant for the present case. I do not also propose to consider the question whether the Rent Controller or the appellate authority has an inherent power of review in a matter arising under the Act. In this case, it is not necessary to decide that question. I have stated already that the order dated 31.10.1989 passed by the appellate authority is not one which disposed of the appeals once and for all. The order did not deal with the merits of the appeals. It only directed the impleading of the partners of the tenant firm before the Rent Controller and called upon the Rent Controller to give a fresh finding on the basis of additional pleadings and evidence which may be adduced by the parties. There was no discussion of the merits of the appeals. Nor was there any finding setting aside the finding given by the Rent Controller on the amount of fair rent to be fixed for the building. Hence the appeals R.C.A.Nos.300 and 371 of 1986 continue to be pending in the eye of law on the file of the appellate authority and they require to be disposed of in accordance with law. The petitioner filed by the respondents for review was only a reminder to the court that appeals R.C.A.Nos.300 and 371 of 1986 were pending. Really, a petition was unnecessary and a memo would have served the purpose.

14. There is no doubt whatever that the two appeals R.C.A.Nos.300 and 371 of 1986 are pending before the appellate authority and the Rent Controller was directed to submit his finding to the appellate authority within a period of two months. Hence, the fresh order passed by the Rent Controller on 17.9.1990 could only be considered as a finding given by the Rent Controller, though

on the basis of evidence already on record. It was open to both parties to challenge the finding by filing memorandum of objections. Instead of filing memorandum of objections, the petitioners have chosen to file a regular appeal treating the finding of the Rent Controller fixing the fair rent. Thus, R.C.A.No.129 of 1991 has come to be pending. Though it is in the form of a regular appeal, it can be treated as memoranda of objections filed by the tenants to the finding of the Rent Controller and the appellate authority can consider the same as such.

15. Similarly, the appeal filed by the respondents can also treated as a memorandum of objections filed by the respondents to the finding of the Rent Controller. As it is only a memorandum of objections, there is no question of limitation or condonation of delay in filing the same. The memorandum of appeal filed by the respondents before the appellate authority shall be treated as memorandum of objections filed by the respondents and considered by the appellate authority along with the appeals, R.C.A.Nos.300 and 371 of 1986.

16. The direction given by the appellate authority is to hear all the three appeals together and dispose of the same together. I do not find any error in the said direction and it has to be upheld.

17. I must also point out that if ultimately the appellate authority passes an order in the appeals, it is not necessary for the parties to file different revision petition against each of the appeals. If the tenants are aggrieved, they can file one revision petition against the said common order and similarly, if the landlords are aggrieved, they can file one revision petition against the said common order.

18. In the result, the civil revision petitions are dismissed. There will be no order as to costs.

19. As the matter has been pending for 8 years by now from the institution of the proceedings for fixation of fair rent, the appellate authority is directed to dispose of the appeals on its file on or before 31.7.1992.

B.S. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *S.Ramalingam, J.*

W.P.No.5558 of 1989 *6th March, 1990.*

A.Logammal ...*Petitioner*

v.

Secretary to Government of India and others ...*Respondents.*

(A) Land Acquisition Act (I of 1894), Secs.4(1) and 6 - Notification under Sec.4(1) gazetted on 12.2.1986 - Substance of notification published in Newspapers on 3.3.1986 and 12.3.1986 - Published in locality on 4.4.1986 - Period of one year from date of notification for making declaration under Sec.6 - Reckoning of.

From the records, it is seen that though the notification under Sec.4(1) was gazetted on 12.2.1986, the substance of the notification was published in the Tamil Newspaper on 3.3.1986 and in The Hindu on 12.3.1986 and the substance of the notification was published in the locality on 4.4.1986. Reckoning 4.4.1986 as the date of publication of notification under Sec.4(1) the declaration made on 28.3.1987 is well within a period of one year. *[Para 4]*

(B) Land Acquisition Act (I of 1894), Secs.6 and 11-A - Declaration under Sec.6 published in Gazette on 28.3.1987, published in newspapers on 30.3.1987 and published in locality on 1.4.1987 - Award made on 31.3.1989, if within two years prescribed under Sec.11-A.

The declaration under Sec.6 though Gazetted on 28.3.1987 was published in Tamil Newspaper on 30.3.1987 and News Today, an English Newspaper on the same day and it was published in the locality on 1.4.1987. Reckoning the date of declaration under Sec.6 as 1.4.1987, the award made on 31.3.1989 is well within two years prescribed under Sec.11-A of the Land Acquisition Act. Therefore, there is no delay which is fatal to the acquisition proceedings. *[Para 5]*

(C) Land Acquisition Act (I of 1894), Sec.5-A - Enquiry under - No proof that objections to proposed acquisition were made within 15 days from date of service of notice - Legality of enquiry under Sec.5-A - Whether can be questioned.

It is admitted by the petitioner that he was served

with a notice under Rule 3 of the Rules framed under Sec.55 of the Land Acquisition Act indicating that he should submit his objections to the proposed acquisition within 15 days from the date of service of the notice. It was indicated that any objection statement received after the due date would be summarily rejected. It was also indicated that the objections received within the due date would be inquired into on 9.5.1986. Therefore, it follows that if the objection statement had been filed within the prescribed period of 15 days from the date of service of notice under Rule 3, the inquiry was warranted into those objections. The petitioner has not averred in his affidavit, the date on which he was served with the notice under Rule 3 nor has he stated affirmatively that he has filed his objections within 15 days from the date of service of the notice. Therefore, there is no proof to show that the petitioner has filed his objection within the due date warranting a full-fledged inquiry under Sec.5-A. Merely, because the petitioner participated in the inquiry that was held on 9.5.1986 along with several other persons, if would not confer on the petitioner, a special right to question the legality of the inquiry held under Sec.5-A in the absence of any valid objection statement filed by the petitioner within the date. *[Para 6]*

Case referred to:

Sinnaiyan v. Union Territory of Pondicherry, (1977)1 M.L.J. 342.

David Tyagaraj, for Petitioner.

Jamal Naseem, for Respondent No.1.

G.Devadoss, for Respondent Nos.2 and 3.

The Court made the following

ORDER: The petitioner's lands of about 700 sq.ft. situate in R.S.No.1004/11 part were notified under Central Act I of 1894 for acquisition for a project called Mass Rapid Transit System connecting Madras Beach and Luz. The notification under Sec.4(1) was published in the gazette on 12.2.1986 and the declaration under Sec.6 was published on 28.3.1987 in the gazette. Thereafter, an inquiry under Secs.9(3) and 10 of the Act was held, in which the petitioner participated. The award was made on 31.3.1989.

2. The prayer in the writ petition is to call for the records relating to the notification under Sec.4(1) and also declaration under Sec.6 in respect of the petitioner's land and building and to quash the same.

3. Learned counsel for the petitioner urges three contentions. The first is that there was a delay in the publication of the declaration under Sec.6 and the delay is fatal. He would submit that as per the amended provisions of the Land Acquisition Act, a period of one year is available from the date of 4(1) notification to publish the declaration under Sec.6 and insofar as in the instant case, the notification was on 12.2.1986, the declaration made beyond the period of one year on 28.3.1987 is vitiated. In the same lines, he would contend that the declaration under Sec.6 having been made on 28.3.1987, the award should have been made within two years thereof and since the award was made only on 31.3.1989, the award is belated and that delay would nullify the entire acquisition proceedings. Thirdly, it is submitted that at the inquiry under Sec.5-A of the Act, the objections filed by the petitioner were merely forwarded to the requisitioning department and they had disposed of the objections in a routine manner and after the remarks from the requisitioning body were received by the Land Acquisition Officer, no further inquiry was conducted and therefore, Sec.5-A inquiry was not in compliance with the Act. In this connection, learned counsel placed reliance on the decision reported in *Sinnaiyan v. Union Territory of Pondicherry, (1977)1 M.L.J. 342.*

4. In answer, the learned Additional Government Pleader would contend that none of the above objections of the petitioner is sustainable. From the records, he is able to show that though the notification under Sec.4(1) was gazetted on 12.2.1986, the substance of the notification was published in the Tamil Newspaper on 3.3.1986 and in The Hindu on 12.3.1986 and the substance of the notification was published in the locality on 4.4.1986. Reckoning 4.4.1986 as the date of publication of notification under Sec.4(1), the declaration made on 28.3.1987 is well within a period of one year.

5. So far as the award dated 31.3.1989 is concerned, from the records, the Additional Government Pleader is able to establish that the declaration under Sec.6 though Gazetted on 28.3.1987 was published in Tamil Newspaper on 30.3.1987 and News Today, an English Newspaper on the same day and it was published in the locality on 1.4.1987. Reckoning the date of declaration under Sec.6 as 1.4.1987, the award made on 31.3.1989 is well within two years prescribed under Sec.11-A of the

Land Acquisition Act. Therefore, there is no delay which is fatal to the acquisition proceedings.

6. So far as the inquiry under Sec.5-A of the Act is concerned, it is admitted by the petitioner that he was served with a notice under Rule 3 of the Rules framed under Sec.55 of the Land Acquisition Act indicating that he should submit his objections to the proposed acquisition within 15 days from the date of service of the notice. It was indicated that any objection statement received after the due date would be summarily rejected. It was also indicated that the objections received within the due date would be inquired into on 9.5.1986. Therefore, it follows that if the objection statement had been filed within the prescribed period of 15 days from the date of service of notice under Rule 3, the inquiry was warranted into those objections. The petitioner has not averred in his affidavit, the date on which he was served with the notice under Rule 3 nor has he stated affirmatively that he has filed his objections within 15 days from the date of service of the notice. Therefore, there is no proof to show that the petitioner has filed his objections within the due date warranting a full-fledged inquiry under Sec.5-A. Merely, because the petitioner participated in the inquiry that was held on 9.5.1986 along with several other persons, it would not confer on the petitioner, a special right to question the legality of the inquiry held under Sec.5-A in the absence of any valid objection statement filed by the petitioner within the due date.

7. For the foregoing reasons, there are no merits in the writ petition and the same is dismissed. Learned counsel for the petitioner submits that in view of the pendency of this writ petition, his client has not sought for a reference under Sec.18 of the Land Acquisition Act. Having regard to the facts and circumstances of the case, the petitioner is granted four weeks' time from this date to make an application to the Land Acquisition Officer for a reference under Sec.18 of the Act and when such an application is filed, it will be forwarded to the Sub Court to be decided on merits. No order as to costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *K.S.Bakthavatsalam, J.*

W.P.No.380 of 1991 *19th June, 1992.*

Bharat Pulverising Mills Ltd. ...*Petitioner*

v.

The Joint Director of Agriculture (Inputs), Directorate of Agriculture, Chepauk, and another ...*Respondents.*

Insecticides Act (XLVI of 1968), Sec.3(K)(i) and Rules 23 and 24(2) of the Rules framed under the Act - Powers of Insecticide Analyst - If empowered to test the volume of the sample - Whether can go into question whether the nettt volume as noted in the label is contained in the container less volume than stated to label - It can be called 'misbranded' - 'Ingredient' if includes volume.

A reading of the provisions of the Act and the Rules framed thereunder clearly show that the Insecticide Analyst has no jurisdiction to go into the question whether the nettt volume as noted in the label is contained in the container. The Insecticide Analyst cannot go into the question whether the contents in the container contains 250 ml. as noted in the label. Just because the container in this case is found to have contained only the contents of 238 ml., it cannot be said that the material was substandard due to the volume. The court is not able to see anywhere in the Act that the material can be said to be substandard due to the volume. The term 'ingredient' which occurs in Rule 24(2) cannot and will not include volume content. *[Para 7]*

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from the second respondent relating to his order bearing No.PPS 7/212993/89, dated 13.12.1990 quash the order of the second respondent bearing No.PPS 7/212993/89, dated 13.12.1990 confirming the order of the first respondent bearing No.PPS 7/212993/89, dated 8.11.1990.

S.K.L.Ratan, Senior Counsel, for *P.S.Venkatasubramani*, for Petitioner.

V.Raghupathy, Additional Government Pleader, for Respondents.

The Court made the following

ORDER: The petitioner is a manufacturer of insecticides. The Agricultural Officer (Quality Control) of the office of the Assistant Director of Agriculture, Papanasam, took a sample of Plant Protection Chemical Monocrotophos 35% from the shop of the petitioner's dealer located at No.37, Gandhi Road, Kumbakonam. Only one sample of the insecticides was taken and sent to the Assistant Agricultural Chemist, Pesticides Testing Laboratory, Aduthurai, for analysis and the Assistant Agricultural Chemist, Aduthurai, submitted his report stating that the contents showed 238 ml. as against 250 ml. declared on the label and his report disclosed that it was "misbranded". Based on this report, the first respondent herein, passed the order appealed against, directing the suspension of the manufacturing licence No.9/1972 of the petitioner for a period of 10 days from 16.12.1990 to 25.12.1990. Against this order, the petitioner preferred an appeal to the appellate authority who is the Director of Agriculture, under the Insecticides Act, 1968 and the appellate authority upheld the order of the original authority. Hence the petitioner is before the court challenging the order of suspension passed by the appellate authority.

2. The petitioner alleges in the affidavit filed in support of the writ petition that the Insecticides Act, 1968 (Central Act No.46 of 1968) is intended to prevent risk to human beings in the use of insecticides and if the contents of the container is defective in quality, it will come under Sec.3(k)(i) of the Insecticides Act, 1968 stating that the article must be deemed to be "misbranded". It is also alleged in the affidavit that under Sec.3(K)(i) of the Insecticides Act, 1968 (hereinafter referred to as 'the Act') will not apply to a case where the actual quantity found in the container is less than the quantity declared on the label. It is further alleged in the affidavit that Sec.19 of the Act provides for the appointment of Insecticides Analysts and the qualification of an Insecticide Analyst is prescribed in Rule 21 of the Rules framed thereunder. According to the affidavit filed by the petitioner it is stated that the Act and the rules framed thereunder do not contemplate the Analyst measuring the volume of the insecticide and the report of the analyst is to be sent in Form XI. It is further alleged that "weights" and "measures" are matters governed by the Standards of Weights and Measures Act, 1976 (hereinafter referred to as "The Standards Act") and the Central Government, in exercise of the rule-making power contained in Sec.83 of the Standards Act, framed "The Standards of Weights and Measures (Packaged Commodities) Rules, 1977. It is pointed out in the affidavit that it is only the "Director" under the Standards Act and any person authorised under Sec.29 of the Standards Act who can draw samples and determine the weight of volume (measure) and nobody else can determine the weight or measure. It is also pointed out that the Insecticide Analyst is least qualified to determine the measure and the Insecticide Analyst not being one authorised to determine the weight or measure, the report of the analyst relating to volume is illegal and cannot form basis for any action. It is further alleged in the affidavit that the duties of the insecticide analyst under Rule 23 are to analyse or test and furnish reports or results of such test or analysis the result could only relate to effectiveness and report could only relate to ingredients as also presence of adulterants if any and it is no part of the duty or power of an insecticide analyst to declare the produce "misbranded" and the report of the Analyst declaring the product "misbranded" is illegal. It is also pointed out that the appellate authority having found that the material is sub-standard due to volume and not having found the product "misbranded", ought to have allowed the appeal and set aside the order of the first respondent.

3. Notice of motion has been ordered by me on 9.1.1991.

4. A counter affidavit has been filed by the respondents. It is stated in the counter affidavit that the orders of the first and second respondent are in according with the provisions of the Act and the rules framed thereunder and they are legally correct. A reference is made to Sec.3(K)(i) and Rule 19(v) of the Act. It is further stated in the counter affidavit that Rule 24(2) authorises the Insecticide Analyst to state whether the ingredients as stated on the label are present and in view of the said provision in the Act and Rules, there is clear provision for testing the volumes and weights. It is further stated in the counter affidavit that Sec.3(i) of the Act speaks about "misbranded" and Rule 24(2) does not debar the authorities from

checking the volumes and the Insecticide Analyst will analyse the volume content as exhibited on the label and when it is not in consonance with the label, the report has been given as "misbranded." It is also submitted in the counter affidavit that during the course of analysis, either weight or measure has to be ascertained to fix quality and lesser weight or measure will necessarily be in lack of quality, disproving the printed information either on the packet or on the container and in such cases, no authenticity to check the weight or measure is needed and when deficiency in volume is found out, it is construed that there will be deficiency in quality also.

5. Mr.S.K.L.Ratan, learned Senior Counsel appearing for the petitioner took me to the relevant provisions of the Act especially Sec.19 and Sec.24 of the Act apart from Rules 21 to 23 of the Rules framed under the said Act which speak about the qualifications of the Insecticide Analysts and the powers and duties of the Insecticide Inspectors. According to Mr.S.K.L.Ratan, learned Senior Counsel, the Insecticide Analyst has no business to go into the volume of the container and it is not one of his duties enjoined as per the Act and the rules framed thereunder and points out that the Insecticide Analysts are appointed under Sec.19 of the Act and the Insecticide Inspectors are appointed under Sec.20 of the Act. Under Sec.24 of the Act, the Insecticide Analyst to whom a sample of any insecticide has been submitted for test or analysis under sub-sec.(6) of Sec.22, should within a period of sixty days, deliver to the Insecticide Inspector submitting it a signed report in duplicate in the prescribed form. According to the learned Senior Counsel, the reasoning given for suspension of the licence in this case is wholly untenable and the authorities are not empowered to do so under the provisions of the Act and the rules framed thereunder.

6. *Per contra*, Mr.V.Raghupathy, Additional Government Pleader (Writs) appearing for the respondents, states that under Sec.3(k)(i) of the Act if the label contains any statement design or graphic representation relating thereto which is false or misleading in any material particulars or if its package is otherwise deceptive in respect of its content, it can be called as "misbranded" and submits that the insecticide shall be deemed to be misbranded if it comes under various sub-clauses in Sec.3(k) of the Act. Learned Additional Government Pleader also states that since the volume is one of the ingredients and when it is noted that the volume is not correct, the action taken in this case is perfectly valid in law.

7. I have considered the arguments of Mr.S.K.L.Ratan, learned Senior Counsel appearing for the petitioner, and also that of the learned Additional Government Pleader (Writs) appearing for the respondents. On a consideration of the entire facts and circumstances of the case, I am fully satisfied that the impugned order cannot stand for scrutiny even for a minute by this Court. The Insecticides Act, 1968 is enacted to regulate the import, manufacture, sale, transport, distribution and use of insecticide with a view to prevent risk to human beings or animals, and for matters connected therewith. In order to appreciate the contentions of both parties, it is necessary to extract the relevant provisions of the Act. Sec.3(e) of the Act reads as follows:

> "(c) "*insecticide" means*: (i) any substance specified in the schedule; or
> (ii) such other substances (including fungicides and weedicides) as the Central Government may, after consultation with the Board, by notification in the Official Gazette, include in the Schedule from time to time; or
> (iii) any preparation containing any one or more of such substances;"

"Misbranded" is defined in Sec.3(k) of the Act and so far as the case before me is concerned, it is enough to refer to sub-clause (k)(i) which is to the following effect:

> "(i) if its label contains any statement, design or graphic representation relating thereto which is false or misleading in any material particular, or if its package is otherwise deceptive in respect of its contents; or"

Sec.14 of the Act provides for revocation, suspension and amendment of licences. Sec.19 of the Act speaks above the appointment of persons as Insecticide Analysts by the Central or a State Government. Sec.20 speaks about the appointment of Insecticide Inspectors. The power of the Insecticide Inspectors are enumerated under Sec.21 of the Act. Sub-clause (c) of Sec.21(1) empowers the Insecticide Inspectors to take samples of any Insecticide and send such samples for analysis to the Insecticide Analyst for test in the prescribed manner. Sec.24 speaks about the report of the Insecticide Analyst. Sec.24(1) of the Act is in the

following terms;

"(1) The Insecticide Analyst to whom a sample of any insecticide has been submitted for test or analysis under sub-sec.(8) of Sec.22, shall, within a period of sixty days, deliver to the Insecticide Inspector submitting it a signed report in duplicate in the prescribed form."

Then if we turn to the rules framed under the Act, it is necessary to mention Rules 21 to 23 of the Act which are in Chapter VI of the Rules. The qualifications of Insecticide Analyst are prescribed under Rule 21 and the powers of the Insecticide Analyst are given under Rule 23 and the duties of Insecticide Analyst are given under Rule 23. Rule 23 is as follows:

"*Duties of Insecticide Analyst*:- (1) The Insecticide Analyst shall analyse or cause to be analysed or test or cause to be tested such samples of Insecticides as may be sent to him by the Insecticide Inspector under the provisions of the Act and shall furnish reports or results of such tests or analysis.

(2) An Insecticide Analyst shall, from time to time, forward to the State Government reports giving the result of analytical work and investigation with a view to their publication at the discretion of the Government."

The procedure to be adopted by the Insecticide Inspector after the receipt of sample is stated in Rule 24. Rule 24(2) speaks as to how the test or analysis has to be carried out by the Insecticide Analyst. After the test of analysis has been carried out under sub-rule (2) the Insecticide Analyst shall forthwith supply to the Insecticide Inspector a report in triplicate in Form IX of the result of test or analysis. A reading of the provisions of the Act and the Rules framed thereunder clearly show that the Insecticide Analyst has no jurisdiction to go into the question whether the nett volume as noted in the label is contained in the container. In my view the argument of Mr.S.K.L.Ratan, learned Senior Counsel appearing for the petitioner that the Insecticide Analyst is not empowered to test the volume, as well founded. I do not think the Insecticide Analyst can go into the question whether the contents in the container contains 250 ml. as noted in the label. Just because the container in this case is found to have contained only the contents of 238 ml., it cannot be said that the material was substandard due to the Volume. I am not able to see anywhere in the act that the material can be said to be sub-standard due to the volume. More so, I am not able to accept the contention of the learned counsel appearing for the respondents that in testing the chemical, the Analyst also tested the volume content in the container which formed one of the parameters of test. The term 'ingredient' which occurs in Rule 24(2) cannot and will not include volume content. I am not able to appreciate the argument of the learned counsel appearing for the State/respondents that the nett volume has to be taken as ingredient as stated on the label and such an argument does not stand to reason that the ingredient on the label can mean only the ingredient of the insecticide and not what is contained on the label. The statement made in the counter affidavit that under the Rules, the Insecticide Analyst is empowered to check all the ingredients as stated on the label does not at all appeal to me. In the view I had taken that the Insecticide Analyst has no business to go into the volume and took the view that only because of the volume, the materials is stated to be sub-standard, the impugned order is set aside and the writ petition will stand allowed. No costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *Nainar Sundaram* and *Maruthamuthu, JJ.*

W.P.Nos.570, 4584, 4585, 4586 etc. of 1983

12th August, 1991.

The Society of the Brothers of the Sacred Heart of Jesus, Palayamkottai and others ...*Petitioners*

v.

The State of Tamil Nadu represented by the Commissioner and Secretary to Government, Education Department and another ...*Respondents.*

(A) Tamil Nadu Recognised Private Schools (Regulation) Act (XXIX of 1974), Secs.18-A and 18-B - Tamil Nadu Private Colleges (Regulation) Act (XIX of 1976), Secs.14-A and 14-B - Constitutional validity. (Constitution of India, (1950) Arts.14 and 30.

The right of the minorities to establish and administer educational institutions of their choice is set forth in Art.30(1) of the Constitution. The set of expressions 'the right to establish and administer' requires an interpretation in tune and harmony with the substances of the right conferred by the Article. The 'right to administer' certainly takes in the right to choose its own management and manager. There is no doubt as to what sub-secs.(2) and (3) of Sec.18-A of the Private Schools Act and of Sec.14-A of the Private Colleges Act would do if they are to be invoked in respect of minority institutions. The right to administer educational institutions of their choice preserved for minorities under Art.30(1) of the Constitution will certainly be set at naught.
[Para 2]

The writ petitions covered in this batch are allowed and Secs.18-A and 18-B of the Private Schools Act and Secs.14-A and 14-B of the Private Colleges Act are held to be not applicable to the Educational Institutions of the petitioners.
[Para 5]

(B) Constitution of India (1950), Art.30(1) - Provision offending Art.30 - If can be sustained on the theory that it is only a temporary phase.

If a particular provision of enacted law offends Art.30(1) of the Constitution of India, it is not possible to sustain it on a theory that it is only a temporary phase. *[Para 5]*

Cases referred to:

St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389; Kerala Education Bill, (1957) In the matter of, (1959)2 S.C.J. 321; State of Kerala v. Very Rev. Mother Provincial, (1971)1 S.C.J. 641.

Petitions under Art.226 of the Constitution of India praying that in the circumstances stated therein and in the respective affidavits filed therewith, the High Court will be pleased to issue writs of *mandamus* directing the respondents Nos.1 and 2 in all the petitions herein and their agents and subordinates from giving effect to the Secs.18-A and 18-B of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (Act 29 of 1974) in so far as the Petitioner's educational institutions in Tamil Nadu are concerned as they are *ultra vires* Arts.30 and 14 of the Constitution of India.

T.Martin, for Petitioner.

P.Sathasivam, Special Government Pleader, for Respondents.

The Order of the Court was made by

Nainarsundaram, J.: In this batch of writ petitions, the challenge is of the constitutional vires of Secs.18-A and 18-B of the Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 hereinafter referred to as the Private Schools Act; and Secs.14-A and 14-B of the Tamil Nadu Private Colleges (Regulation) Act, 1976, hereinafter referred to as the Private Colleges Act, in so far as they are to be made applicable to the Educational Institutions established and Administered by the petitioners, who are minorities. These provisions are similar. Sec.18-A of the Private Schools Act is *in pari materia* with Sec.14-A of the Private Colleges Act. Sec.18-A of the Private Schools Act corresponding to the Sec.14-A of the Private Colleges Act speaks about appointment of Special Officer in certain cases. Sec.18-B of the Private Schools Act, corresponding to Sec.14-B of the Private Colleges Act, speaks about appeals to special tribunal as against orders under the preceding provision. Secs.18-A and 18-B, set forth in Chapter IV-A were introduced into the Private Schools Act by the Tamil Nadu Recognised Private Schools (Regulation) Act and Private Colleges (Regulation) Amendment Act, 1982, hereinafter referred to as the Amendment Act, effective from 1.6.1981. So also, Secs.14-A and 14-B, set forth in Chapter III-A, were introduced into the Private Colleges Act by the Amendment Act, effective from 1.6.1981. By the enforcement of sub-secs.(1) and (2) of Sec.18-A of the Private Schools Act, corresponding to sub-secs.(1) and (2) of Sec.14-A of the Private Colleges Act, there is an obvious inroad into the rights of private schools and private colleges to have management or manager of their own choice, to administer the educational institutions under their control and if these provisions are to be enforced to private schools or private colleges, established and administered by minorities, that will do away with the preservation of the rights of minorities to establish and administer educational institutions of their choice, solemnly protected by Art.30(1) of the Constitution of India. This is the sum and substance of the submissions made by Mr.T.Martin, learned counsel appearing for the petitioners. It must be noted that sub-sec.(3) of Sec.18-A of the Private Schools Act, and the similar provision sub-sec.(3) of Sec.14-A of the Private Colleges Act are explanatory provisions and clause (C) of sub-sec.(3) in each of the

above sections includes a minority institution. Sub-sec.(4) of Sec.18-A of the Private Schools Act corresponding to sub-sec.(4) of Sec.14-A of the Private Colleges Act says that sub-secs.(1) and (2) of the respective sections shall apply to a minority institution in so far as they are not repugnant to clause (1) of Art.30 of the Constitution of India. Chapter IV-A containing Secs.18-A and 18-B of the Private Schools Act stand extracted as 'Appendix A' to this judgment of ours. Correspondingly, Chapter III-A containing Secs.14-A and 14-B of the Private Colleges Act stand extracted as 'Appendix B' to this judgment of ours.

2. The petitioners are indisputably minorities and they have established; and they man and administer educational institutions. Apprehending enforcement of the aforesaid provisions of the Private Schools and Private Colleges Act, they have come to this Court for directions not to apply to their educational institutions the said provisions. The right of the minorities to establish and administer educational institutions of their choice is set forth in Art.30(1) of the Constitution. The set of expressions 'the right to establish and administer' requires an interpretation in tune and harmony with the substances of the right conferred by the Article. The 'right to administer' certainly takes in the right to choose its own management and manager. To our mind, there is no doubt as to what sub-secs.(2) and (3) of Sec.18-A of the Private Schools Act and of Sec.14-A of the Private Colleges Act would do if they are to be invoked in respect of minority institutions. The right to administer educational institutions of their choice preserved for minorities under Art.30(1) of the Constitution will certainly be set at naught.

3. As to how the rights of the minorities got to be guarded without the width and scope of Art.30(1) of the Constitution of India circumscribed has found expression in *St.Xavier's College v. State of Gujarat, A.I.R. 1974 S.C. 1389*, in the following terms:

> "A liberal, generous and sympathetic approach is reflected in the Constitution in the matter of the preservation of the right of minorities so far as their educational institutions are concerned. Although attempts have been made in the past to whittle down the rights of the minorities in this respect, the vigilant sections of the minorities have resisted such attempts. Disputes have consequently arisen and come up before this Court for determining whether the impugned measures violate the provisions of the Constitution embodied in Arts.29 and 30. This Court has consistently upheld the rights of the minorities embodied in those Articles and has ensured that the ambit and scope of the minority rights is not narrowed down. The broad approach has been to see that nothing is done to impair the rights of the minorities in the matter of their educational institutions and that the width and scope of the provisions of the Constitution dealing with those rights are not circumscribed. The principle which can be discerned in the various decisions of this Court is that the catholic approach which led to the drafting of the provisions relating to minority rights should not be set at nought by narrow judicial interpretation. The minorities are as such children of the soil as the majority and the approach has been to ensure that nothing should be done as might deprive the minorities, of a sense of belonging of a feeling of security, of a consciousness of equality and of the awareness that the conservation of their religion, culture, language and script as also the protection of their educational institutions is a fundamental right enshrined in the Constitution. The same generous, liberal and sympathetic approach should weigh with the courts in construing Arts.29 and 30 as marked the deliberations of the Constitution-makers in drafting those articles and making them part of the fundamental rights. The safeguarding of the interests of the minorities amongst sections of population is as important as the protection of the interests amongst individuals of persons who are below the age of majority or are otherwise suffering from some kind of infirmity. The Constitution and the laws made by civilised nations, therefore, generally contain provision for the protection of those interests. It can, indeed be said to be an index of the level of civilisation and catholicity of a nation as to how far their minorities feel secure and are not subject to any discrimination or suppression."

A Bench of this Court, to which one of us (Nainar Sundaram, J.) had been a party in *Maryna Memorial High School Bethelpuram v. Government of Tamil Nadu, W.P.No.1628 of 1985, etc. order dated 10.9.1990*, had occasion to advert to the above

passage. The invoking of the aforesaid provisions of the Private Schools Act and the Private Colleges Act would undoubtedly do violence to the above principles. Sub-sec.(4) of Sec.18-A of the Private Schools Act and of Sec.14-A of the Private Colleges Act, of course, sounds a word of caution that the concerned provisions shall apply to a minority institution in so far they are not repugnant to Art.30(1) of the Constitution of India. This will only tend to keep the controversy alive and the position of the minority institutions in a nebulous stage and legitimately the petitioners have come to this Court to have a declaration that the provisions could not apply to their educational institutions, as they are patently violative of Art.30(1) of the Constitution of India. There is no need to strain further over this point, because the answer to this point has been given by pronouncements of the highest Court in the land construing similar provisions. In *Kerala Education Bill, (1957) In the matter of, (1959)2 S.C.J. 321*, clause 14 of the Kerala Education Bill, (1957), came up for consideration as to whether it could be construed as regulatory or totally destructive of the rights under Art.30(1) of the Constitution of India. It must be noted here that the right conferred on minorities to establish and administer educational institutions of their own is not absolute right, and is subject to regulatory measures. The scope of clause 14 of the Kerala Education Bill, 1957 was discussed in the above pronouncement in the following terms:

> "Clause 14 is of considerable importance in that it provides, by sub-clause (1) that the Government, whenever it appears to it that the manager of any aided school has neglected to perform any of the duties imposed by or under the Bill or the Rules made thereunder, and that in the public interest it is necessary so to do, may, after giving a reasonable opportunity to the manager of the Educational agency for showing cause against the proposed action, take over the management for a period of not exceeding five years. In cases of emergency the Government may, under sub-clause (2), take over the management after the publication of notification to that effect in the Gazette without giving any notice to the Educational agency or the manager. Where any school is thus taken over without any notice the Educational agency or the manager may, within three months of the publication of the notification, apply to the Government for the restoration of the school showing the cause therefor. The Government is authorised to make orders which may be necessary or expedient in connection with the taking over of the management of an aided school. Under sub-clause (5) the Government is to pay such rent as may be fixed by the Collector in respect of the properties taken possession of. On taking over any school the Government is authorised to run it affording any special educational facilities which the school was doing immediately before such taking over. Right of appeal to the District Court is provided against the order of the Collector fixing the rent. Sub-clause (8) makes it lawful for the Government to acquire the school taken over under this clause if the Government is satisfied that it is necessary so to do in the public interest, in which case compensation shall be payable in accordance with the principles laid down in clause 15 for payment of compensation."

The comment on the provision has been expressed as follows:

> "We, however find it impossible to support clauses 14 and 15 of the said Bill as mere regulations. The provisions of those clauses may be totally destructive of the rights under Art.30(1)."

4. In *State of Kerala v. Very Rev. Mother Provincial, (1971)1 S.C.J. 641*, provisions similar to Sec.18-A of the Private Schools Act and Sec.14-A of the Private Colleges Act came up for scrutiny as to whether they offend Art.30(1) of the Constitution of India. The relevant portion of Sec.63 of the Kerala University Act 60 of 1969, which was the subject matter of scrutiny by the Supreme Court ran as follows:

> "63. *Power to regulate management of private colleges:-* (1) Whenever Government are satisfied on receipt of a report from the University or upon other information that a grave situation has arisen in which the working of a private college cannot be carried on for all or any of the following reasons namely:
> (a) default in the payment of the salary of the members of the staff of the college for a period of not less than three months;
> (b) wilful closing down of the College for a period of not less than one month except in the

case of the closure of the College during a vacation;

(c) persistent default or refusal to carry out all or any of the duties imposed on any of the authorities of the College by this Act or the Statutes or Ordinances or Regulations or Rules or Bye-laws or lawful orders passed thereunder; and that in the interest of private college it is necessary so to do, the Government may, after giving the governing body or managing council, as the case may be, the manager appointed under sub-sec.(1) of Sec.50 and the education agency, if any, of the college a reasonable opportunity of showing cause against the proposed action and after considering the cause, if any, shown, by order, appoint the University to manage the affairs of such private College temporarily for a period not exceeding two years; Provided that in cases where action is taken under this sub-section otherwise than on a report from the University, it shall be consulted before taking such action."

This is what the Supreme Court observed over that provision:

"We have no doubt that the provisions of the Act were made *bona fide* and in the interest of education but unfortunately they do affect the administration of these institutions and rob the founders of that right which the Constitution desires should be theirs. The provisions, even if salutary cannot stand in the face of the Constitutional guarantee. We do not, therefore, find it necessary to refer to the two reports."

Ultimately, it was held that Sec.63 of the Kerala University Act 60 of 1969 is *ultra vires* Art.30(1) of the Constitution of India.

5. However, Mr.P.Sadasivam, learned Special Government Pleader, would submit that the provisions, dealt with by the pronouncements, referred to above, are much more rigorous in that they severed the connection of the minorities from the educational institutions established and administered by them, once and for all and the present provisions of the Private Schools Act and the Private Colleges Act do provide sufficient safeguard for the minorities to get back what they may lose only for a temporary phase. First of all, we are not able to indulge in such a distinction. If a particular provision of enacted law offends Art.30(1) of the Constitution of India, it is not possible to sustain it on a theory that it is only a temporary phase. Even otherwise, the provisions dealt with in the pronouncement of the Supreme Court, which we have adverted to, have only covered situations for temporary phases only. Hence, this distinction has got to be rejected as a puerile one. For the reasons expressed above, the writ petitions, covered in this batch, are allowed and Secs.18-A and 18-B of the Private Schools Act and Secs.14-A and 14-B of the Private Colleges Act are held to be not applicable to the Educational Institutions of the petitioners. We make no order as to costs.

[*Appendix A & B to judgment omitted. - Ed.*]

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *K.M.Natarajan, J.*

C.R.P.No.2033 of 1989 *25th September, 1989.*

R.Ramaiya ...*Petitioner*

v.

S.Swaminathan ...*Respondent.*

Civil Procedure Code (V of 1908), O.1, Rule 10(2) - Petitioner encroaching on public canal Road belonging to Panchayat - Filing a suit for declaration that he is absolute owner of property - Panchayat whether a necessary party to the suit.

The revision petitioner filed a suit for a declaration that he is the absolute owner of the suit 'B' Schedule property, for recovery of possession by evicting the respondent from the encroached B schedule property and for permanent injunction. The plaint averred that there was a Government irrigation canal separating the property of the revision petitioner and the respondent and that the respondent had encroached the whole length of the canal. In the written statement, the respondent stated that the Planning Authority, Pondicherry and the Commissioner of Oulgarate Commune Panchayat were necessary parties to the suit and that the suit was bad for non-joinder. He also filed a petition for impleading them. It was

allowed. The petitioner filed a revision contending that the suit was between the plaintiff and the defendant and that the burden was on the plaintiff to prove title and that he could not be compelled to implead a third party against his wishes.

Held:- The trial court on the facts and circumstances of the case came to the conclusion that the proposed parties are necessary parties, in order to enable the said Court to effectively and completely adjudicate the issue involved in the said suit. It is seen from the counter filed by one of the proposed party that the revision petitioner herein has encroached upon the public canal and the road which belong to the Oulgarat Commune Panchayat and that he has made deviations by constructing the building and a deviation notice was issued to him directing him to stop all the works. It is to be noted that the petitioner has not challenged the said order. For all these reasons, the impugned order does not suffer from any infirmity or illegality whatsoever for this Court to interfere in revision. *[Para 7]*

Cases referred to:

Vaithilinga v. Sadasiva, 49 M.L.J. 414: 91 I.C. 612: A.I.R. 1926 Mad. 35; Banarsi Dass v. Panna Lal, A.I.R. 1969 P. & H. 57; Razia Begum v. Anwar Begum, A.I.R. 1958 A.P. 195; Razia Begum v. Sahebzadi Anwar Begum, A.I.R. 1958 S.C. 886; Kshitish Chandra v. Dewan Sheikh, A.I.R. 1976 Gauhati 41; Durgabala Nazra and others v. Acharaya Prosbodhananda Adahut and others, A.I.R. 1985 Cal. 204 (N.O.C.); Kisan Uchattar M.V.Samiti v. IIIrd Addl. Dist. Judge, Deoria, A.I.R. 1989 All. 168; Bal Nicketan Nursery School v. Kesari Prasad, A.I.R. 1987 S.C. 290; Munshi Ram v. Narsi Ram, A.I.R. 1983 S.C. 271.

Petition under Sec.115, C.P.C., praying the High Court to revise the order of the court of the II Additional District Munsif at Pondicherry, dated 5.7.1989 and made in I.A.No.1046 of 1989 in O.S.No.353 of 1988.

G.Masilamani, for *T.P.Manoharan,* for Petitioner.
R.Francis Royan, for Respondent.

The Court made the following

ORDER: This revision is directed by the respondent-plaintiff against the order in I.A.No.1046 of 1989 allowing the petition for impleading the Planning Authority, Pondicherry and the Commissioner, Oulgaret Commune Panchayat as party-defendants.

2. The facts which are necessary for the disposal of this revision can be briefly stated as follows:

"The revision petitioner filed the suit for a declaration that he is the absolute owner of the suit B Schedule property, for recovery of possession by evicting the respondent from the encroached B Schedule property and for permanent injunction restraining the respondent from interfering with the peaceful enjoyment/ and possession of the revision petitioner. The said suit was contested by the respondent herein and in his written statement, it is stated that the Planning Authority, Pondicherry, and the Commissioner Oulgaret Commune Panchayat are necessary parties, as even in the plaint it is stated that there is a Government Irrigation Canal separating the property of the revision petitioner and the respondent and that the respondent has encroached the whole length of the canal and that therefore the suit is bad for non-joinder of necessary and proper parties. It is further stated in the written statement that the revision petitioner by his illegal construction has blocked the entire government canal and the extension of the road used by the public, and only when it was brought to the notice of the proposed parties by the respondent, the present suit with a view to cover up his manipulations and misdeeds and to stall the action by the Government authorities. In substance, it was complained to the authorities that the revision petitioner has grossly violated all the norms fixed by the Planning Authority, Pondicherry and the Commissioner Oulgaret Commune Panchayat in putting up a residential building."

3. Thereupon the respondent herein/defendant filed the application I.A.No.1046 of 1989 under O.1, Rule 10(2) read with Sec.151, C.P.C. for impleading the Planning Authority, Pondicherry and the Commissioner, Oulgaret Commune Panchayat as party-defendants. It is alleged in the affidavit filed in support of the application that the revision petitioner has put up his house construction on a piece of land over which he has absolutely no right or title disregarding the provisions of the Pondicherry Town Planning Act and the commune Panchayat Act and also the rules and regulations made therein. Further the revision petitioner has constructed his house encroaching upon the Government irrigation canal and the portion allotted for public road. The Oulgaret

Commune Panchayat has already surveyed the entire site and issued to the revision petitioner a notice of encroachment. It is further stated by the respondent that he had constructed his residential house on a lay-out duly approved by the Planning Authority, Pondicherry. The property described is the schedule to the plaint does not correlate with the property described in the sale deed filed by the revision petitioner or with the property available at the site. The Advocate Commissioner's report also reveals that the revision-petitioner has encroached upon the Government property and has put up the construction. By such illegal construction the revision-petitioner has caused great loss to the respondent to the Government and to the other residents of the locality. It is lastly submitted that to bring to light the actual and real facts involved and for just decision of the case, those two parties are very necessary and essential. Hence the petition.

4. The said application was resisted by the revision-petitioner and in his counter it is stated that the respondent/defendant can only plead non-joinder of necessary or proper parties under O.1, Rule 10(2), C.P.C. but he cannot compel the plaintiff to implead them as parties. Further there is no averment or allegation made in the plaint against the proposed parties and no relief is sought against them. They are neither necessary nor proper parties to the suit. Further to implead them as parties, there should be a notice under Sec.30, C.P.C. and under the Municipality Act and Commune Panchayat Act. The revision-petitioner also denied having encroached upon the Government property and also denied having done several manipulations to overcome the regulation and restriction of the Pondicherry Planning Authority. According to the revision-petitioner, the respondent is the Deputy Director in the statistics department and that he had raised a compound wall at his south west side beyond the area purchased by him. Lastly he has stated that he is a poor teacher and that he has been harassed by the respondent. Hence, as prayed for dismissal of the petition.

5. Though both the proposed parties were served with notice, the Pondicherry Planning Authority alone filed a counter, wherein it is stated that they have issued a building permit to the revision-petitioner in respect of the plot No.45, in R.S.No.169/4. But, he had made deviations by constructing the building and the same was noted by the staff of the Authority. A deviation notice dated 14.4.1988 was issued to the revision petitioner directing him to stop all the work immediately. The revision-petitioner continued the work inspite of the receipt of the deviation notice and thereafter, a reminder dated 29.7.1989 was sent to him. It is a fact that the revision-petitioner encroached upon the public canal and the road which belong to the Oulgaret Commune Panchayat and in this regard a communication has also been sent to them to take suitable action against the revision petitioners. The Pondicherry Planning Authority is taking necessary action against the revision-petitioner as far as the deviations committed by him are concerned. Lastly, it was stated that Oulgaret Commune Panchayat is only the rightful person in respect of the encroached portion but not the Planning Authority, Pondicherry. Since in this case no question or issue is involved which is to be adjudicated in the presence of the proposed party, the proposed party is not a necessary party.

6. The court below for the reasons stated in the order allowed the petition. Hence the aggrieved plaintiff (revision-petitioner), has preferred this revision. The learned counsel for the revision-petitioner, Mr.G.Masilamani, mainly contended that since the revision-petitioner (plaintiff), is not willing to implead the proposed parties and since one of the two proposed parties has filed a counter contending that he is not a necessary party, the court below should not have allowed the application and the reasons given by the lower court are not sustainable. It is further submitted by the learned counsel that the suit is between the plaintiff and the defendant and the burden is on the plaintiff to prove title and his right to recover possession from the defendant who is in possession and if he fails to do so, the suit will be dismissed. The plaintiff is a *dominus litas* and he cannot be compelled to implead a third party against his wishes. In this connection, the learned counsel drew the attention of this Court to the decision in *Vaithilinga v. Sadasiva, 49 M.L.J. 414: 91 I.C. 612: A.I.R. 1926 Mad: 35,* wherein it was held:

> "Where a third person who applies to be added as a party is only a permissible party, then on principle, his addition as party cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. The very basic principle of judgments

inter partes is that the judgments are not judgments *in rem*, but declaratory and operative only as between them. The plaintiff being generally *dominus litus* there is no principle of justice upon which he can be compelled to fight against some other litigant not for his own choice unless such a process is required by the positive rule of law."

That was a case where the Secretary of State for India in Council was sought to be impleaded as a party to obtain declaration that the Madras Hindu Religious Endowments Act 1 of 1925 was invalid and *ultra vires* and on the basis of such declaration the plaintiff has asked for a relief by way of an injunction which is merely a relief consequent on the declaration. It was observed in the above judgment:

> "The only suggestion on which such a joinder can be supported is that it is necessary that the declaration that the Act is *ultra vires* should be obtained in the presence of the Secretary of State. But the Secretary of State so far as the Civil P.C., is concerned represents merely the Government or the Sovereign and can under the present system be regarded if at all only as part of the legislative machinery."

It was observed by the learned single Judge:

> "Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc. I feel that questions of *ultra vires* are certain to be raised in the courts in increasingly large number of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for Indian being required by every defendant to be made a party in every one of them."

Consequently, in that case the application was dismissed. Even in the said decision, the learned Judge observed at page 838:

> "The phrase to enable the Court effectively and completely to adjudicate upon and settle would seem really to indicate that the addition of the party should be ordered only if in the opinion of the court in the absence of the party it cannot effectually and completely adjudicate and settle all the questions."

In the instant case, the learned District Munsif came to the conclusion that the proposed parties are the necessary parties in order to enable the court effectively and completely adjudicate and settle the questions involved in the suit. Hence, that decision is not helpful to the case of the revision petitioner. Next, the learned counsel relied on the decision reported in *Banarsi Dass v. Panna Lal, A.I.R. 1969 P. & H. 57.* In the above quoted case, a single Judge of the said High Court has observed:

> "As a rule the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. The reason is that the plaintiff is the *dominus litis*. He is the master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief."

It was also observed:

> "The word 'may' in sub-rule (2) imports a discretion. In exercising that discretion, the courts will invariably take into account the wishes of the plaintiff before adding a third person as a defendant in his suit. Only in exceptional cases, where the court finds that the addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff. *Razia Begum v. Anwar Begum, A.I.R. 1958 A.P. 195,* ref."

The said decision also is not helpful to the case of the revision-petitioner as even in that case it was observed that where the court finds that the addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, the impleading of defendant can be done without the consent of the plaintiff.

7. On the other hand, it is seen that the lower Court has relied on the decision of the Supreme Court reported in *Razia Begum v. Sahebzadi Anwar Begum, A.I.R. 1958 S.C. 886,* wherein the guidelines for impleading parties under O.1 Rule 10 C.P.C. were laid down. The guidelines were also extracted in the lower Court's order. It is seen from the above judgment that where the subject matter of a litigation is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy. In a suit relating to property in order that a

person may be added as a party he should have direct interest as distinguished from a commercial interest in the subject matter of litigation. It was further observed that the result of a declaratory decree on the question of status, such as in controversy in the instant case affects not only the parties actually before the Court but generations to come and in view of that consideration, the rule of present interest as evolved by case law relating to disputes about property does not apply with full force. The lower court also relied on the decision reported in *Kshitish Chandra v. Dewan Sheikh, A.I.R. 1976 Gauhati 41,* where the learned Judge, applying the principles laid down by the Supreme Court in the above quoted case, allowed the application on the ground that in order to enable the court to effectually and completely adjudicate the points at issue, the proposed party is necessary party. The lower court also relied on the decision *Durgabala Nazra and others v. Acharya Prosbodhananda Adahut and others, A.I.R. 1985 Cal. 204 (N.O.C.).* In addition to those decisions, the learned counsel for the respondent drew the attention of this court to the decision in *Kisan Uchattar M.V.Samiti v. IIIrd Additional District Judge, Deoria, A.I.R. 1989 All. 168,* wherein it was held:

> "The provisions of O.1 Rule 10(2) of the Code clearly empower the court to implead any person as party *suo motu,* who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. In case the plaintiff is permitted as a rule to choose his own opponents and the court does not interfere on the point in that event it may be that a collusive decree is obtained against the real owner or interested person without impleading him as a party and when the decree will become final, then at a very late stage the person vitally affected or the real owner may come to know about it. This would lead to defeat the interest of justice which should not be permitted in a court of law and to avoid these ugly situations, the Parliament with considerable ingenuity enacted O.1, Rule 10(2) of the Code which has been couched in a language having very wide sweep."

Reliance was placed on the earlier decision of the Supreme Court reported in *Bal Niketan Nursery School v. Kesari Prasad, A.I.R. 1987 S.C. 290,* it was observed by the Supreme Court:

> "The scope and effect of O.1 Rule 10 has been considered in number of cases and there is a plethora of decisions laying down the ratio that if the court is satisfied that a *bona fide* mistake has occurred in the filing of the suit in the name of the wrong person then the court should set right matters in exercise of its powers under O.1 Rule 10 and promote the cause of justice."

In *Munshi Ram v. Narsi Ram, A.I.R. 1983 S.C. 271,* it was held:

> "The omission to implead a defendant was due to a mistake Sec.21(1) of the Act would be attracted and the defendant has to be impleaded under O.1, Rule 10, C.P.C. to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit."

In the instant case, the trial court on the facts and circumstances of the case came to the conclusion that the proposed parties are necessary parties in order to enable the said court to effectually and completely adjudicate the issue involved in the said suit. It is seen from the counter filed by one of the proposed party that the revision petitioner herein has encroached upon the public canal and the road which belong to Oulgaret Commune Panchayat and that he has made deviations by constructing the building and a deviation notice was issued to him directing him to stop all the works. It is to be noted that the petitioner has not challenged the said order. For all these reasons, I am of the view that the impugned order does not suffer from any infirmity or illegality whatsoever for this court to interfere in revision. Consequently the revision fails and stands dismissed. No costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan, J.*

C.R.P.No.2491 of 1991 *30th October, 1991.*

M.Palanichamy ...*Petitioner*
v.
Muthiah Pillai ...*Respondent.*

Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act (1990), Secs.4 and 5 - Scope of - Expression arrears of rent payable to the landlord - Interpretation of.

The petitioner, a cultivating tenant, was in arrears of rent for faslis 1391 to 1398. The total rent payable for these years was Rs.1,26,000 and odd. In an appeal pending in the High Court, he was directed to deposit Rs.21,000 which he did. He had already paid Rs.24,500 towards rent for the said years. Thus a total sum of Rs.45,500 had been paid. The Revenue Court ordered that the tenant was liable to pay under Sec.5 of the Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, 1990, the current rent plus 1/4th of the arrears namely Rs.1,26,000 and odd mines Rs.45,500 already paid by the tenant. In a revision petition against that order, it was contended that under Sec.5 of the Act, the tenant was liable to pay only the current rent plus 1/4th of the total amount of rent namely Rs.1,26,000 and odd which comes to about Rs.31,500, and odd, that the tenant had already paid Rs.45,500 and that he was not liable to pay any further amount.

Held:- In Sec.4 of the Act, the significant expression is "arrears of rent payable to the landlord for the fasli year ending with 30th day of June, 1989 and for any previous fasli year and outstanding on the date of the publication of this Act." That expression itself shows that the section refers only to the amount due to the landlord on the date of the publication of the Act after giving credit to the amounts already paid to him. Further, clause (2) of Sub-sec.(1) expressly refers to said amount as "said arrears of rent". Hence the section contemplates only the amount due and payable on the date of publication of the Act. Sec.5 of the Act no doubt uses the expression "total amount of arrears of rent". That expression itself shows that it refers to the amount remaining due affter giving credit to the payments already made. The contention that the expression 'total amount of arrears of rent' would mean total amount of rent fixed between the parties cannot be accepted. When the Section uses the term 'arrears', it would automatically mean that the amount payable is only rent due after taking into account the amounts already paid. The word 'arrears' is defined in the Concise Oxford Dictionary as 'outstanding debts; what remains not done. Hence there is no difficulty in holding that under Sec.5 of the Act, the tenant is bound to pay the current rent plus 1/4th of the amount due and payable on the date of the publication of the Act with regard to the rent payable for fasli year ending with 30th June, 1989 and previous fasli years. It can never mean that the tenant is bound to pay 1/4th of the total amount of rent fixed between the parties inclusive of amounts already paid. If the contention of the learned counsel for the petitioner is accepted, it would tantamount to refixing the rent at one fourth of the agreed rent in all cases when the tenant is in arrears. There is no warrant for such a construction. If the legislature intended to wipe out all arrears in cases where the tenants had paid earlier one fourth of the total rent or more, it would have said so expressly. Such provisions are found in some of the Debt Relief Acts. No such provision is found in the Act. The legislature has intended to give only a concession and reduce the burden of arrears as on the date of the said Act: Learned counsel submits that the Preamble of the Act indicates that the tenant should not be made to pay again if he had already paid some amount towards the rent due. The Legislature has made it clear that the relief that is granted in the Act is only with reference to the arrears of rent. The name of the Act itself shows that it pertains to arrears of rent due on the date of the Act. The Preamble also refers only to arrears of rent. Hence the Act does not refer to the amounts already paid. The Act is concerned only with the arrears of rent due as on the date of publication of the Act. Consequently, the contention of learned counsel cannot be accepted. *[Paras 4, 5, 6, 7 and 9]*

Petition under Sec.11 of Act 38 of 1990 read with 115 of Act V of 1908 praying the High Court to revise the order of the Special Deputy Collector (Revenue Court) Madurai dated 12.8.1991 and made in T.C.T.P.No.21 of 1991.

K.Suguna, for Petitioner.

P.Seshadri, for Respondent.

The Court made the following

ORDER: The contention put forward by the tenant, who is the petitioner, is that under the provisions of Sec.5 of Tamil Nadu Cultivating Tenants Arrears of Rent (Relief) Act, 1990 the tenant is bound to pay or deposit only 1/4th of the total amount of rent due for the years referred to in the section including what he had paid earlier. In order to appreciate the contention, it is necessary to state a few facts. The tenant is in arrears for faslis 1391 to 1398. The total rent payable for those years is Rs.1,26,000 and odd. In an appeal pending in this Court, namely, A.S.No.562 of 1987, the tenant was directed to deposit Rs.21,000 and he has complied with the order. Apart from that, the tenant has also paid a sum of Rs.24,500 towards rent for the said years. Thus, a total sum of Rs.45,500 has already been paid. According to the order of the Revenue Court, which is now challenged in this revision petition, the tenant is liable to pay under Sec.5 of the said Act, the current rent plus 1/4th of the arrears, namely, Rs.1,26,000 and odd minus Rs.45,500 already paid by the tenant.

2. But learned counsel for the petitioner contends that under Sec.5 of the Act, the tenant is liable to pay only the current rent plus 1/4th of the total amount of rent, namely Rs.1,26,000 and odd which comes to about Rs.31,500, and odd, and as the tenant had already paid Rs.45,500 towards the rent he is not liable to pay any amount at all under Sec.5 of the Act. This contention cannot be accepted in view of the express language of the section.

3. Secs.4 and 5 of the Act should be read together. Sec.4 reads as follows:

"4. *Option for payment of arrears of rent:* (1) Any cultivating tenant who is in arrears of rent payable to the landlord for the fasli year ending with the 30th day of June, 1989 and for any previous fasli year (hereinafter referred to as the said years) and outstanding on the date of the publication of this Act shall, within two months from the date of such publication, intimate his option in writing to the competent authority---

(1) to pay the current rent and the one-fourth of the said arrears of rent in the manner specified in Part II or

(ii) to pay the current rent and the one third of the said arrears of rent in the manner specified in Part III, of this Act for availing relief under this Act from the payment of the said arrears of rent.

(2) The option given under Sub-sec.(1) shall be final."

Sec.5(i) reads as follows:-

"Sec.5. *Relief for payment of arrears of rent:* (i) All arrears of rent payable by a cultivating tenant to the landlord for the said years and outstanding on the date of the publication of this Act, shall be deemed to be discharged, whether or not a decree or order has been obtained therefor if such cultivating tenant pays to the landlord or deposits in the court or before the competent authority, to the account of the landlord in the manner specified in Sub-secs.(2) and (3)."

4. In Sec.4 of the Act, the significant expression is "arrears of rent payable to the landlord for the fasli year ending with 30th day of June 1989 and for any previous fasli year (hereinafter referred to as the said years) and outstanding on the date of the publication of this Act."

5. That expression itself shows that the section refers only to the amount due to the landlord on the date of the publication of the Act after giving credit to the amounts already paid to him. Further, Clause (2) of Sub-sec.(1) expressly refers to said amount as "said arrears of rent". Hence, the section contemplates only the amount due and payable on the date of publication of the Act. Sec.5 of the Act no doubt uses the expression "total amount of arrears of rent". That expression itself shows that it refers to the amount remaining due after giving credit to the payments already made. Learned counsel contends that the expression 'total amount of arrears of rent' would mean total amount of rent fixed between the parties. That contention cannot be accepted. When the Section uses the term 'arrears', it would automatically mean that the amount payable is only rent due after taking into account the amounts already paid.

6. The word 'arrears' is defined in the Concise Oxford Dictionary as 'outsanding debts': what remains not done". Hence, there is no difficulty in holding that under Sec.5 of the Act, the tenant is bound to pay the current rent plus 1/4th of the amount due and payable on the date of the publication of the Act, with regard to the rent payable for fasli year ending with 30th June, 1989 and

previous fasli years. It can never mean that the tenant is bound to pay 1/4th of the total amount of rent fixed between the parties inclusive of amounts already paid.

7. If the contention of the learned counsel for the petitioner is accepted, it would tantamount to refixing the rent at one fourth of the agreed rent in all cases where the tenant is in arrears. There is no warrant for such a construction. If the Legislature intended to wipe out all arrears in cases where the tenants had paid earlier one fourth of the total rent or more, it would have said so expressly. Such provisions are found in some of the Debt Relief Acts. No such provision is found in this Act. The Legislature has intended to give only a concession and reduce the burden of arrears as on the date of the Act.

8. Learned counsel invites my attention to the Preamble of the Act which reads in so far as it is relevant, as follows:-

> "And whereas, in the interests of the general public, cultivating tenants should, at the present time, be spared the distractions and expenditure involved in such action in order that the maximum possible advantage may result to the State in the matter of production of food groups: And Whereas it is considered necessary, as a part of agrarian reform, to give relief to cultivating tenants from the heavy burden of discharging arrears of rent, on certain conditions specified."

9. Learned counsel submits that the Preamble of the Act indicates that the tenant should not be made to pay again if he had already paid some amount towards the rent due. The Legislature has made it clear that the relief that is granted in the Act is only with reference to the arrears of rent. The name of the Act itself shows that it pertains to arrears of rent due on the date of the Act. The Preamble also refers only to arrears of rent. Hence, the Act does not refer to the amounts already paid. The Act is concerned only with the arrears of rent due as on the date of publication of the Act. Consequently, the contention of learned counsel cannot be accepted.

10. In the result, the civil revision petition fails and is dismissed. There will be no order as to costs.

B.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present: *K.S.Bakthavatsalam, J.*

W.P.Nos.16200 of 1990 and 6298 of 1991

12th March, 1992.

A.Jothi and others ...*Petitioners*

v.

The State of Tamil Nadu and another ...*Respondents.*

(A) Constitution of India (1950), Art.226 - Petition under - If can be entertained on basis of bald allegations of mala fide.

It is well settled that mere bald allegations of *mala fide* cannot be a ground for setting aside any proceedings. The apex court of the land has held that on the basis of mere bald allegations of *mala fides*, a petition under Art.226 of the Constitution cannot be entertained. *[Para 13]*

(B) Land Acquisition Act (I of 1894), Secs.5-A and 6 - Authority holding enquiry under Sec.5-A and sending a report - Report if binding as Government - Enquiry Officer overruling objections - Government issuing notification under Sec.6, if can be said not to have applied its mind.

It is well settled that the decision of the Government is final and what all the authority who holds the enquiry under Sec.5-A of the Act is to do is to send a report to the Government and the report is not binding on the Government and the Government can differ from that. So the finality of the proceedings is reached only at the stage of the declaration under Sec.6 of the Act, when the Government decides to proceed with the acquisition. As such, there is no substance in the contention that just because the enquiry officer overruled the objections and but the report to the Government, the Government has not applied its mind. The declaration under Sec.6 of the Act itself will show that the Government has come to the conclusion to acquire the land. *[Para 13]*

(C) Constitution of India (1950), Art.226 - Writ of certiorari - Petition for - No counter-affidavit filed - Records, if can be perused to prove that Rules have been complied with.

It is well-settled that in a petition praying for the issue of a writ of *certiorari*, if no counter-affidavit

is filed then records can be produced to prove that there is compliance of Rules. *[Para 14]*

(D) Land Acquisition Act (I of 1894), Sec.48 - Earlier acquisition proceedings dropped - Initiation of acquisition proceedings after some lapse of time - If invalid.

The court does not think the power of eminent domain ceases once the acquisition proceedings were dropped in the year 1976. Nearly after 15 years, the land acquisition proceedings are taken up and it is not for this Court to say whether the lands should be acquired or not; sitting under Art.226 of the Constitution of India. *[Para 15]*

(E) Constitution of India (1950), Art.226 - Locus standi - *Person entering into an unregistered agreement of land with another whose land is sought to be acquired - If has* locus standi *to maintain petition under article.*

On the facts of the case, it is clear that an unregistered agreement, of sale had been entered into between the petitioner in W.P.No.6298 of 1991 and the petitioners in W.P.No.16200 of 1990. If the principles laid down by the Full Bench of this Court in *Seethalakshmi Ammal v. The State of Tamil Nadu and others, 1992 W.L.R. 7,* are applied to the facts of the cases on hand, the petitioner in that writ petition has no *locus standi* and no legal right of the petitioner is infringed. *[Para 16]*

Cases referred to:

Shanmugha Sundara Nadar v. Special Tahsildar I, Tamil Nadu Housing Board Schemes, Madras, (1987)2 M.L.J. 170; Tamil Nadu State Housing Board v. Shanmugha Sundara Nadar, 1988 W.L.R. 55; Vembuli Naicker v. State of Tamil Nadu, (1992)1 M.L.J. 26; Wavoo Magudoom Mohammed v. Government of Tamil Nadu, (1991)2 M.L.J. 281; Seethalakshmi Ammal v. The State of Tamil Nadu, 1992 W.L.R. 7; Somawanti v. State of Punjab, (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.R. 774: (1963)2 S.C.J. 35: A.I.R. 1963 S.C. 151.

Petitions under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari*, calling for the records in G.O.Ms.No.1586, Adi Dravidar and Tribal Welfare, dated 14.8.1989, a notification under Sec.4(1) of the Land Acquisition Act and published in Part II Sec.2 (Supplement) of the Tamil Nadu Government Gazette on 13.9.1989 and in G.O.Ms.No.526, Adi Dravidar and Tribal Welfare, dated 23.3.1990 a declaration made under Sec.6 of the Land Acquisition Act and published in Part II, Sec.2 (Supplement) of the Tamil Nadu Government Gazette, dated 2.5.1990 on the file of the first respondent and quash the same respectively.

K.Raghunathan and *V.Srinivasan,* for Petitioners.

Veerabadran, Government Advocate, for Respondents.

The Court made the following

ORDER: Both the writ petitions are filed challenging the land acquisition proceedings made under the Land Acquisition Act.

2. W.P.No.16200 of 1990 is filed by the owners of the land and W.P.No.6298 of 1991 is filed by the agreement holder who entered into an agreement with the petitioners in W.P.No.16200 of 1990.

3. An extent of 3.94.5 hectare of land at Kondur Village were proposed for acquisition to provide house-sites for Adi Dravidars. A notification under Sec.4(1) of the Land Acquisition Act (hereinafter referred to as the "Act") was published in the Gazette on 13.9.1989 and it was published in Tamil Dailies on 15.9.1989 and 17.9.1989 and the substance of the notification issued under Sec.4(1) of the Act was published in the village on 30.9.1989. Notices for enquiry under Sec.5(A) of the Act were sent and served on the petitioner and the said enquiry was conducted on 17.11.1989. After overruling the objections raised by the landowners, a declaration under Sec.6 of the Act was published in the Gazette on 2.5.1990 and in local dailies on 4.5.1990. At this stage, the owners of the land, the petitioners in W.P.No.16200 of 1990, have come up to this Court challenging the notification issued under Sec.4(1) of the Act. The agreement holder with the petitioners in W.P.No.16200 of 1990 has filed W.P.No.6298 of 1991 challenging the same notification issued under Sec.4(1) of the Act in respect of the small land in question.

4. Though no counter affidavit has been filed in W.P.No.16200 of 1990, a counter-affidavit has been filed in W.P.No.6298 of 1991.

5. As the subject matter relates to one and the same acquisition proceedings of the land in question, I am of the view that the counter affidavit filed in W.P.No.6298 of 1991 can be taken as the counter affidavit in W.P.No.16200 of 1990 also.

6. The main contention raised by Mr.K.Raghunathan, the learned counsel appearing for the petitioners in W.P.No.16200 of 1990 is that the substance of notification has not been published

as required under Rule 1 of the Tamil Nadu Land Acquisition Rules framed under Sec.55(1) of the Act. According to the learned counsel, as required under Rule 1 of the Land Acquisition 'Tamil Nadu' Rules (hereinafter referred to as the "Rules"), the notice should be published at convenient places in the locality, and copies thereof fixed up in the office of the Collector, the Tahsildar, and in the nearest police station and it has not been complied with in this case. The learned counsel relies upon the decision rendered by Nainar Sundaram, J. (as he then was) in *Shannugha Sundara Nadar v. Special Tahsildar I, Tamil Nadu State Housing Board Schemes, Madras, (1987)2 M.L.J. 170,* which has been reversed in by a Division Bench of this Court in *Tamil Nadu State Housing Board v. Shannugha Sundara Nadar, 1988 W.L.R. 55.* The learned Counsel points out that the judgment of the learned Single Judge was reversed on some other ground, Govindasamy, J. has held that the publication is mandatory in *Vembuli Naicker v. State of Tamil Nadu, (1992)1 M.L.J. 26.*

7. The other contention raised by the learned counsel appearing for the petitioners in W.P.No.-16200 of 1990 is that certain acquisition proceedings were taken up earlier, in the year 1976, that it had been dropped and as such the acquisition made in this case is tainted with *mala fides* and has got to be set aside. The learned counsel contends that this Court should presume that the earlier acquisition proceedings were dropped only because the lands were not suitable and as such when once the lands are left out in the earlier proceedings it cannot be said that they are suitable for the purpose of providing house sites for Adi Dravidars. One other contention raised by the learned counsel appearing for the petitioner is that the second respondent, the enquiry officer, has given a finding, based on the enquiry under Sec.5-A of the Act, that the lands are to be acquired for the purpose for which it is acquired, that it is bad in law and that the first respondent has not applied its mind. The learned counsel further contends that the acquisition proceedings has to be struck down on the ground of delay of one year between the date of notification under Sec.4(1) of the Act and the declaration under Sec.6 of the Act.

8. *Per contra* Mr.Veerabadran, the learned Government Advocate contends that all the provisions of Land Acquisition Act have been complied with. He also produced before me the records to show that copies of notices were affixed in the offices as required under Rule 1 of the Rules framed under Sec.55(1) of the Act. The learned Government Advocate further contends that this Court cannot presume that once the acquisition proceedings are dropped, it does not mean that the power under the Act is exhausted and the lands cannot be acquired due to change in circumstances. The learned Government Advocate further argues that there is no delay in the publication of the declaration under Sec.6 of the Act and relies upon a decision of a Division Bench of this Court in *Wavoo Magudoom Mohammed v. Government of Tamil Nadu, (1991)2 M.L.J. 281.* That apart, he contends that just because the Enquiry Officer under Sec.5-A of the Act had given a finding, overruling the objections of the land owners, that does not mean that the Government has not applied its mind. According to the learned Government Advocate, the authority to decide about the land acquisition is Government and mere allegations of *mala fide* cannot be a ground to set aside the acquisition proceedings. According to the learned Government Advocate, the allegations regarding *mala fide* have no basis and this Court should not entertain such allegations as *mala fide.*

9. Mr.V.Srinivasan, the learned Counsel appearing for the petitioner in W.P.No.6298 of 1991 contends that the petitioner is an agreement holder, that he is a person interested and that he can challenge the acquisition proceedings. He has raised all other grounds raised in the W.P.No.16200 of 1990.

10. Mr.Veerabadran the learned Government Advocate states that the petitioner in W.P.No.6298 of 1991 is only a lessee and that the agreement alleged to have been executed between the petitioners in W.P.No.16200 of 1990 and the petitioner in W.P.No.6298 of 1991 is an unregistered one and that it is created only for the purpose of defeating the purpose of the Government. to acquire the lands. He further submits that the argument was not in existence at the time of initiation of the acquisition proceedings or at the time of publication of notification under Sec.4(1) of the Act, that it came to light at the time of enquiry under Sec.5-A of the Act that the agreement entered into between the petitioners in W.P.No.-16200 of 1990 and the petitioner in W.P.No.6298 of 1991 is an unregistered document and that it is created only to defeat the land acquisition

proceedings and as such it cannot be said that the petitioner in W.P.No.6298 of 1991 is an interested person and the W.P.No.6298 of 1991 has to be dismissed *in limine*. It is also stated that the petitioner in W.P.No.6298 of 1991 is a person who deals with real estate business and that the land owners thinking that they will get only lesser compensation have connived with the petitioner herein and have created an unregistered document and registered a power of attorney on the petitioner on 30.10.1989 long after the publication of the notification under Sec.4(1) of the Act. It is claimed in the counter affidavit that as such, no notice was given to the petitioner in W.P.No.6298 of 1991.

11. I have considered the arguments of Mr.K.Raghunathan, the learned counsel for the petitioner in W.P.No.16200 of 1990, Mr.V.Srinivasan, the learned counsel for the petitioner in W.P.No.6298 of 1991 and of Mr.Veerabadran, the learned Government Advocate appearing for the State.

12. The learned counsel for the petitioners in both cases contend that there is a delay of one year between the date of the publication of notification under Sec.4(1) of the Act and the declaration made under Sec.6 of the Act. I do not think the said contention can be entertained, in view of the decision of a Division Bench of this Court in *Wavoo Magudoom Mohammed v. Government of Tamil Nadu, (1991)2 M.L.J. 281,* (W.P.No.1772 of 1987 dated 19.9.1990) where it has been held that the last date of the publication has to be taken into account.

13. I do not that think the other contention raised by the learned counsel for the petitioners in both cases, with regard to *mala fide* can be accepted. It is well settled that mere bald allegations of *mala fide* cannot be a ground for setting aside any proceedings. The apex court of the land has held that on the basis of mere bald allegations of *mala fides*, a petition under Art.226 of the Constitution cannot be entertained. That apart, it is well settled that the decision of the Government is final and what all the authority who holds the enquiry under Sec.5-A of the Act, to do is to send a report to the Government and the report is not binding on the Government and the Government can differ from that. So the finality of the proceedings is reached only at the stage of the declaration under Sec.6 of the Act, when the Government decides to proceed with the acquisition. As such, I do not see any substances in the contention that just because the enquiry officer overruled the objections and sent the report to the Government, the Government has not applied its mind. The declaration under Sec.6 of the Act itself will show that the Government has come to the conclusion to acquire the land. See *Somawanti v. State of Punjab, (1963)2 M.L.J. (S.C.) 18: (1963)2 An.W.R. (S.C.) 18: (1963)2 S.C.J. 35: (1963)2 S.C.R. 774: A.I.R. 1963 S.C. 151.*

14. The other question raised by the learned counsel for both the petitioners is with regard to the compliance of Rule 1 of the Rules framed under Sec.55(1) of the Act. When the said contention was raised, records were called for and produced before me. The records produced before me will show that the notification under Sec.4(1) of the Act has been published in the office of the Joint Sub Registrar, Cuddalore, at Nellikuppam Police Station, in the Office of Deputy Tahsildar (Headquarters), Cuddalore, Chairman, Kondur Panchayat and also in Kondur Village. It is pointed out by the learned counsel appearing for the petitioners that no date is shown in the said publications. It is true that the publication is mandatory under Rule 1 of the Rules. But the records produced before me clearly show that Rule 1 of the Rules has been duly complied with. However, the learned counsel for the petitioner relies upon the decision of Nainar Sundaram, J. (as he then was) which is reported in *Shanmugha Sundara Nadar v. Special Tahsildar I, Tamil Nadu Housing Board Schemes, Madras, (1987)2 M.L.J. 170.* The notification under Sec.4(1) of the Act has been published in the Gazette on 13.9.1989 and has been published in the notice board in the abovementioned places, *i.e.*, in the offices of the Joint Registrar, Panchayat Office, Tahsildar Office and in the Nellikuppam Police Station on 30.9.1989. As such, I am satisfied, on the facts of the case and on perusal of the records produced before me, that there is the compliance of Rule 1 of the Rules which contemplates that the notice must be placed at convenient places in the locality and copies thereof fixed up in the office of the Collector, Tahsildar and in the nearest police station. The judgment of Nainar Sundaram, J. (as he then was) in *Shanmugha Sundara Nadar v. Special Tahsildar I, Tamil Nadu Housing Board Schemes, Madras, (1987)2 M.L.J. 170,* was taken on appeal and the Division Bench of this Court in *Tamil Nadu State Housing Board v. Shanmugha Sundara Nadar, 1988*

W.L.R. 55, has observed as follows: (at P.60)

> "...There is on record an endorsement made by the village officer which says that matter in the "copy" (நகல்) has been published. The learned Judge undoubtedly is right when he says that there is no indication as to what was the copy which was published. While it may not be possible to find fault with those observations that would not necessarily lead to the conclusion that what was published was not the notification under Sec.4(1) of the substance of the notification, but something else. If the publication was in connection with the land acquisition proceedings, the only publication possible in the cause would be the substance of the notification under Sec.4(1) of the Act. The State Housing Board was entitled to show by evidence *aliunde* as to what was the material published and if this would have been put in issue at the earlier opportunity it would have been possible for the State Government or the Collector to produce the necessary material in the writ petition. To permit such a challenge which cannot be determined without reference to the facts which have transpired in June, 1975 to be raised in 1984 or 1985 would be really placing a premium on the latches and want of diligence on the part of the petitioner. In our view, the learned Judge was in error in entertaining the challenge to the proceedings under Sec.4 of the Act after a lapse of several years. There may have arisen a doubt in the mind of the learned Judge about the non-compliance with the requirement of Sec.4(1) of the Act but at the same time it should have been appreciated that this doubt could have been cleared more effectively if it was raised much earlier. The benefit of this delay cannot certainly go to the petitioner who allowed the proceedings to go on and stood by these proceedings..."

The abovementioned observations of the Division Bench of this Court culminated in setting aside the order of the learned single Judge which is reported in *Shanmugha Sundara Nadar v. Special Tahsildar I, Tamil Nadu Housing Board Schemes, Madras, (1987)2 M.L.J. 170.* It is well-settled that in a petition praying for the issue of a writ of *certiorari*, if no counter-affidavit is filed then records can be produced to prove that these is compliance of Rules. In this case, a counter affidavit has been filed in W.P.No.6298 of 1991 stating that the substance of notice under Sec.4(1) of the Act has been published in the village on 30.9.1989 and all other formalities have been followed. It is also stated in para 6 of the counter affidavit that all the formalities contemplated under the rules have been followed and notices were served on the land owners. So apart from producing the records before me, the respondents have also filed counter-affidavit with regard to the compliance of Rule 1 of the Rules, which is held to be mandatory. In such circumstances, I am not able to accept the contention of the learned counsel for the petitioners that Rule 1 of the Rules has not been complied with on the facts of the case. Govindasamy, J. in *Vembuli Naicker v. State of Tamil Nadu, (1992)1 M.L.J. 26,* has held that giving public notice under Sec.4(1) Notification is mandatory and failure to follow the procedure will vitiate the entire proceedings. There cannot be any doubt about the proposition decided by Govindasamy, J. in the abovementioned case. As I have already stated, on the facts of this case, Rule 1 of the Rules framed under Sec.55 of the Act has been duly complied with.

15. The other contention raised by the learned counsel appearing for the petitioners that since the earlier land acquisition proceedings were dropped in the year 1976, the initiation of the acquisition proceedings now in invalid in law, is a contention to be mentioned only to be rejected. That is all. I do not think the power of eminent domain ceases once the acquisition proceedings were dropped in the year 1976. Nearly after 15 years, the land acquisition proceedings are taken up and it is not for this Court to say, whether the lands should be acquired or not, sitting under Art.226 of the Constitution of India.

16. The only point left for consideration is whether a notice should be given to the petitioner in W.P.No.6298 of 1991, who is an agreement holder with regard to the question whether subsequent purchaser of the property can question the acquisition proceedings and whether he has got *locus standi*, a Full Bench of this Court (to which I am a party) in *Seethalakshmi Ammal v. The State of Tamil Nadu, 1992 W.L.R. 7,* has held as follows:

> "....One, who is deprived of his legal rights and or who has sustained injury to any legally protected interest can do so.
>
> Circumstances of each case will have to show

how far the Court can go to accommodate the purchaser......

If the purchaser is able to show that something is being done contrary to law in the name of the land acquisition, he can maintain a writ petition, otherwise not......"

On the facts of this case, it is clear that an unregistered agreement, of sale had been entered into between the petitioner in W.P.No.6298 of 1991 and the petitioners in W.P.No.16200 of 1990. In my view, if the principles laid down by the Full Bench of this Court, cited supra, are applied to the facts of the cases on hand, the petitioner in that writ petition has no *locus standi* and no legal right of the petitioner is infringed. There are no merits in both the writ petitions. Accordingly, the writ petitions will stand dismissed. However, there will be no order as to costs.

B.S. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Abdul Hadi, J.*

S.A.No.1858 of 1984 *29th April, 1992.*

Seeni Thevar and others ...*Appellants*

v.

M.S.Velayutha Raja and another ...*Respondents.*

(A) Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.6(20) - 'Temple' - Denominational temples whether public temples.

In view of the decisions in *Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255,* and *Venkatachalapathy and another v. Deputy Commissioner, Hindu Religious and Charitable Endowments (Administrative Department), Thanjavur and another, W.P.Nos.804 and 805 of 1987,* it is no doubt clear that the denominational temples are also public temples which fall within the definition of the term 'temple' under Sec.6(20) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959. *[Para 5]*

(B) Tamil Nadu Hindu Religious and Charitable Endowments Act (XXII of 1959), Sec.63(a) - Jurisdiction - Question whether a temple is public temple or private temple - It can be decided by civil court.

The question whether a temple is a public one (coming under the Act) or a private one (not coming under the Act) can be decided only by the Deputy Commissioner, H.R. and C.E. Department under Sec.63(a) of the Act and not by the civil court. *[Para 5]*

(C) Civil Procedure Code (V of 1908), Sec.11 - Res judicata - *Defendants filing suit against the Authorities under Tamil Nadu Hindu Religious and Charitable Endowments Act - Members of the public other than Rajus not parties to it - Publication of the order not made - Suit decreed granting right of management of a temple to the denomination of Rajus - Petition special leave against judgment in second appeal against decree pending in Supreme Court - Hindu general public in City of Rajapalayam - Filing suit for declaration that suit institution was public religious institution belonging to the Hindu public in general - Suit whether barred by* res judicata.

The present plaintiffs were not parties in the prior original suit O.S.No.100 of 1975 or to the subsequent appeals therefrom. In fact, they filed I.A.No.548 of 1976 in O.S.No.100 of 1975 for impleading themselves as defendants therein. But the said application was dismissed holding that the remedy of the present plaintiffs (propose parties therein) was only to file a separate suit. Further the present plaintiffs tired for consolidation of the present second appeal with S.A.No.1946 of 1979 which arose out of the abovesaid O.S.No.100 of 1975. That petition for consolidation also was dismissed. Further S.A.No.1946 of 1979 cannot be considered as having become final since the appellants themselves have filed C.M.P.No.6580 of 1988 in the Supreme Court for grant of leave to file S.L.P. against the judgment in S.A.No.1946 of 1979 and the same is pending. Further on account of the pending of the said C.M.P., the Supreme Court has requested this Court to dispose of this appeal early. Further, was Explanation VI to Sec.11, C.P.C. will have no application to the present case. The rights of the Hindu community are not the same as that of the Commissioner, H.R. and C.E. Department who was the defendant in O.S.No.100 of 1975. Therefore, there is no bar of *res judicata.* *[Para 21]*

Cases referred to:

State of Bihar v. Biseshwar Das, A.I.R. 1971 S.C.

2057; Bhagwan Din v. Har Saroop, A.I.R. 1940 P.C. 7: (1940)1 M.L.J. 1: 185 I.C. 305: 67 I.A. 1; Chakkarai Chetti v. Board of Commissioner, 67 L.W. 830; Commissioner H.R. & C.E. v. L.T.Swamier, (1954)1 M.L.J. 596: A.I.R. 1954 S.C. 282: 1954 S.C.J. 335: 1954 S.C.R. 1005: 1954 M.W.N. 363; Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255; Durgah Committee v. Hussain Ali, A.I.R. 1961 S.C. 1402; Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662; Ambika Prasad v. Ram Ekbal Rai, A.I.R. 1966 S.C. 605; Assistant Commissioner H.R. & C.E., Salem v. Nattamai K.S. Ellappa, 100 L.W. 240; State of Rajasthan v. Sajjan Lal, A.I.R. 1975 S.C. 706; T.V.Mahalinga Iyer v. The State of Madras, (1981)1 M.L.J. (S.C.) 1; Ananda Baliga v. Ananteswar Temple, (1952)1 M.L.J. 678; Asarimar Samudayam v. Natarajan Asari, (1973)2 M.L.J. 306; Santhana Gopala Chettiar v. Seetharama Chettiar, (1968)2 M.L.J. 401; Ugam Singh v. Kesrimal, A.I.R. 1971 S.C. 2540.

Alagar, for Appellants.

G.Subramaniam, for Respondents.

The Court delivered the following

JUDGMENT:- Having failed in both the courts below plaintiffs 1, 2 and 4 to 7, representing "the Hindu general public in the City of Rajapalayam" have filed this second appeal. Their suit O.S.No.93 of 1978 on the file of the Additional District Munsif, Srivilliputtur is for declaration that the suit institution is a "public religious institution belonging to the Hindu public in general as against the exclusive claim by the defendants on behalf of Rajus of Singaraja Kottai, Rajapalayam with a right of entry for all the Hindu citizens into it for worship in pujas according to the usage by Pandarams of the "temple" (a temple called Arulmigu Mariamman Koil, Pudupalayam) and for consequential injunction.

2. The pleas of the plaintiffs are briefly as follows: The origin of the said institution is unknown. However, the deity was granted by Karnatic Rajas in T.D.No.182 of Sambandapuram village (now called as Pudupalayam). The grant was devadayam grant. In the year 1865, the T.D. was confirmed. After such confirmation, the institution has been under the management of Poojaries, otherwise called as Pandarams, the descendants of the registered holders of the grant. All communities participated in the conduct of the festivals in the suit institution. However, the citizens have got the right of entry into the temple for worship and it is a place of public religious worship for devotees of all castes and sections of Hindu Public. The defendants filed a suit in O.S.No.100 of 1975 on the file of Sub Court Ramnad at Madurai for a declaration that the suit institution was a denominational one with a right of management for them. The authorities under the Tamil Nadu Hindu Religious and Charitable Endowments Act alone were defendants in the said suit. But, the members of the public other than the Rajus were not parties to the suit, nor was there a publication under O.1, Rule 8, C.P.C., binding the Hindu citizens of Rajapalayam. In the suit, declaration of title to the denomination of Rajus over the suit temple was not granted, but the right of management in the temple was granted to them, while decreeing the suit. The decree is not binding on other communities. The 2nd defendant got himself appointed as trustee by the Assistant Commissioner, Ramanathapuram at Madurai since 1969 or so. Formerly, the 2nd defendant's father was trustee of the temple on appointment by area committee.

3. The defence of the defendants, who represent Rajus, residing at Singarajakottai, Rajapalayam is as follows: The temple had been constructed by the said Rajus and consecrated for exclusive worship by and for the spiritual benefit of the said Rajus, who formed a religious denomination and it has been in their exclusive administration and management beyond living memory for over a century. Members of the other communities were allowed to worship with their permission. The said denomination had been electing among themselves trustees for the administration of the temple. Such representatives were "invariably" recognised by the Endowment Department. The present suit is barred by the principles of *res judicata* in view of the decision in O.S.No.100 of 1975. The defendants in O.S.No.100 of 1975 claimed the public right which alone is claimed in the present suit. The civil court has no jurisdiction to try the suit in view of Sec.108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act.

4. Mainly there were two issues decided by the trial court. One is, "Whether the suit temple is a public or denominational temple?" The other is, "whether the suit is barred by *res judicata* by reason of the judgment in O.S.No.100 of 1975 on the file of Sub Court, Ramanathapuram?" The trial court, after a lengthy discussion in paragraphs 7 to 39 of its judgment, gave the finding that the suit temple

was not a public temple, but it was a denominational temple belonging to Singarajakottai Rajus. On the other main issue, the trial court held that the suit was barred by *res judicata*, by reason of the judgment in O.S.No.100 of 1975. The lower appellate court in A.S.No.14 of 1982 did not go into the abovesaid question of *res judicata*, but went into the other question whether the suit temple is a public temple or a denominational temple at length in paragraphs 16 to 25 of its judgment and concurred with the finding of the trial court and, therefore, it dismissed the appeal filed by the plaintiffs.

5. The learned counsel for the plaintiffs 1, 2 and 4 to 7-appellants initially submitted that both the courts below made a wrong approach to the case on the wrong view that a denominational temple was a private temple and not a public temple. That is why, according to the learned counsel, the courts below have wrongly applied decisions which have only pointed out the distinction between the private temple and public temple. According to the learned counsel all that the plaintiffs pray is that the suit temple is a public temple, open to all Hindu communities as of right, for worship as well as management, and not a denominational temple, exclusively for the benefit of the abovesaid Rajus, a section of the public. The learned counsel also in this connection drew my attention to the decision in *Venkataramana Devaru v. State of Mysore, A.I.R. 1958 S.C. 255.* There, the Supreme Court, after holding that the suit temple therein was a public temple, went into the question whether it was yet a denominational institution for the benefit of Gowda Saraswath Brahmins and came to the conclusion that it was so. Further, a Division Bench of this Court has also held in the judgment dated 11.8.1960 in *M.R. Venkatachalapathy and another v. The Deputy Commissioner, Hindu Religious and Charitable Endowments (Administrative Department), Thanjavur and another, W.P.Nos.804 and 805 of 1957,* in relation to the temple in question in the said case thus:

> "That it is a public temple as defined by the Act in no way affects the determination of the question, is it a denominational temple.....To constitute a denominational temple the use of the temple and the worship therein need not be confined to the members of that denomination. But, if the temple belonged to the religious denomination of Sourastras and if that community was entitled to manage the temple, it would be a denominational religious institution."

In view of the abovesaid two decisions, it is no doubt clear that the denominational temples are also public temples which fall within the definition of the term "temple" under Sec.6(20) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as 'the Act'), which runs as follows:

> "(20) 'Temple' means a place by whatever designation known, used as a place of public religious worship, and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of public religious worship."

Further, the question wheter a temple is a public one (coming under the Act) or a private one (not coming under the Act), can be decided only by the Deputy Commissioner, H.R. and C.E. Department under Sec.63(a) of the Act, and not by the Civil Court. The decisions like *State of Bihar v. Biseshwar Das, A.I.R. 1971 S.C. 2057, Bhagwan Din v. Har Saroop, A.I.R. 1940 P.C. 7: (1940)1 M.L.J. 1: 185 I.C. 305: 67 I.A. 1* and *Chakkarai Chetti v. Board of Commissioners, H.R. & C.E., 67 L.W. 830,* relied on by the court below only dealt with the question whether the temple in question was a private one or a public one. So, in this regard, I am also of the view that the approach of the courts below is not correct.

6. The term "denominational temple" no doubt is not defined under the Act, though Sec.107 of the Act says, "nothing contained in this Act shall, save as otherwise provided in Sec.106 and in clause (2) of Art.25 of the Constitution, be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by Art.26 of the Constitution". Sec.51 of the Act also no doubt refers to a religious denomination. Anyway, though there is no definition of the term "religious denomination" either in the Act or in the Constitution of India, (which gives certain furndamental rights to such religious denominations under Art.26 thereof), it has been judicially interpreted by the Supreme Court in several decisions like *Commissioner H.R. & C.E. v. L.T.Swamier, (1954)1 M.L.J. 596: A.I.R. 1954 S.C. 282: 1954 S.C.J. 335: 1954 S.C.R. 1005: 1954 M.W.N. 363* and the above referred to *Venkataramana Devaru v. State of Mysore, A.I.R.*

1958 S.C. 255.

7. Anyway, in the present case, the learned counsel for the appellants did not seriously contend that the abovesaid Rajus did not belong to any such "religious denomination", but only contended that the said denomination of Rajus had no exclusive right to manage the suit temple or had right to exclude other communities of Hindus from worship in the temple as of right. In other words, he contends that the suit temple is not a denomination-temple at all, belonging to any religious denomination, but belonging to the Hindu public in general and would come under the terms "temple" as defined under Sec.6(2) of the Act.

8. Art.26 of the Constitution of India says as follows:

> "26. *Freedom to manage religious affairs:* Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-
> (a) to establish and maintain institutions for religious and charitable purposes;
> (b) to manage its own affairs in matters of religion:
> (c) to own and acquire movable and immovable property; and
> (d) to administer such property in accordance with law."

It is well-known that this Article guarantees the abovesaid fundamental rights to every religious denomination. But, as the Supreme Court itself has pointed out in *Durgah Committee v. Hussain Ali, A.I.R. 1961 S.C. 1402,* Art.26 does not *create* rights in any denomination or its section, which it never had. It merely safeguards and guarantees the continuance of the rights, which such denomination or its section had. The relevant observation of the Supreme Court in the said decision is as follows:

> "In other words, if the denomination never had the right to manage the properties endowed in favour of a denominational institution as for instance by reason of the terms on which the endowment was created, it cannot be heard to say that it has acquired the said rights as a result of Art.26(c) and (d), and that the practice and custom prevailing in that behalf which obviously is consistent with the terms of the endowment, should be ignored or treated as invalid and the administration and management should now be given to the denomination. Such a claim plainly inconsistent with the provisions of Art.26. If the right to administer the properties never vested in the denomination or had been validly surrendered by it or has otherwise been effectively and irretrievably lost to it Art.26 cannot be successfully invoked."

It should also be observed that the terms "conferred" used in Sec.107 of the Act quoted above, may not be quite appropriate since as stated above, Art.25 does not create or confer the abovesaid rights, but only "safeguards and guarantees them as fundamental rights. For example, one of the rights which is guaranteed to a religious denomination under Art.26(a) is to "establish and maintain" institutions for religious and charitable purposes. So, this Art.26(a) reiterates that if such a right to "establish and maintain" inhered in a religious denomination just prior to the constitution, it is safeguarded and guaranteed to it as a fundamental right. But, if a religious denomination only "maintained" such an institution, but did not itself "establish" it, then it cannot be said that the said denomination is conferred, the abovesaid fundamental rigt under Art.26(a). It is in these lines, the argument of the learned counsel for the appellants proceeds. That is why, he relies on the following passage in *Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662,* which no doubt deals with a case under Art.30 of the Constitution of India, which *inter alia* states "all minorities whether based on religion or language shall have the right to *establish and administer* educational institutions of their choice (*emphasis supplied*):

> "It is to our mind quite clear that Art.30(1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have

established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words "establish and administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it."

9. No doubt, on the other hand the learned counsel for the respondents sought to argue that the said decision only related to Art.30 and the abovesaid passage would not apply to the present case, which relates to Art.26. But, as pointed out by the learned Counsel for the appellants, the abovesaid decision itself makes it clear that the abovesaid ruling would apply to a case under Art.26(a) also because the Supreme Court itself has observed in the abovesaid decision as follows:

"We should also like to refer to the observations in *Durgah Committee v. Hussain Ali, (1962)1 S.C.R. 383: A.I.R. 1961 S.C. 1402.* In that case this Court observed while dealing with Art.26(a) and (d) of the Constitution that even if it be assumed that a certain religious institution was established by a minority community it may lose the right to administer it in certain circumstances. We may in this connection refer to the following observations at p.414 (of S.C.R.); (at P.1416 of A.I.R.) for they apply *equally* to Art.30(1):

"If the right to administer the properties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Art.26 cannot be successfully invoked." (*emphasis supplied*)

10. So, the contention of the learned counsel for the appellants is that the judgments of the Courts below are contrary to the decision in the above referred to *Azeez Basha v. Union of India, A.I.R. 1968 S.C. 662,* since they declare the suit temple as a denominational temple solely on the ground that the abovesaid Rajus were in management of the temple for a very long period, even though the temple had been there long before they assumed management thereof, and there is no evidence as to who established it.

11. No doubt, the trial Court observes that as per the evidence of D.W.2, the abovesaid Rajus were in management of the suit temple "for the past 47 years". It also therefore holds that the said Rajus were in management "for several decades". Likewise, the first appellate court also finds that the said Rajus are in management of the temple "for the past 50 years or more", and "atleast for the past sixty years and more." Further, as per Exs. B-5 and B-6 dated 12.3.1880, Ex.B-23 of the year 1902, Ex.B-39 of 1954 and certain other documents and the oral evidence of P.Ws.2 and 3 also, one may come to a decision that the abovesaid Rajus were in actual management of the temple, say, from 1880 onwards, that is, roughly for above 100 years.

12. But the emphasis of the learned counsel for the appellants, is, that that by itself would not be enough to hold that the suit temple is a denominational temple exclusively belonging to the abovesaid religious denomination of Rajus, since there is admittedly no evidence as to who established or founded the said temple and since admittedly the temple was in existence even much prior to 1880, or rather even prior to 1807, as shown by Exs.A-21 and A-22 documents. Ex.A-21, dated 4.5.1865 is an inam title deed granted to the manager for the time being of this temple and Ex.A-22, dated 22.4.1865 is the inam fair register extract. In column 14 of Ex.A-22 (relating to the inam entry in the register according to regulation 31 of 1802 or in the permanent settlement accounts, and relationship of persons so entered to the original guarantee, it is recited, "In F.1213 Mariamman Kovil Inam.. In F.1216 Mariamman Kovil Inam Virabhadra Pandaram". This shows that the suit temple must have been established before 1807, and the abovesaid Virabhadra Pandaram was the successor to the original grantee. Column 15 therein refers to Mariappa Pandaram and Sankaralinga Pandaram as successors in fasli 1254 (in about 1848). Then at the time of the enquiry by the Inam Commission, 1865, Sankaralinga Pandaram and Velayutha Pandaram alone are shown as owners.

12. In paragraph 17 of the written statement, the defendants also state as follows:

"It is significant that the entries in the Inam Fair Register clearly show that the inam lands had been granted in favour of the deity and not in favour of the Pandarams...."

Further, Ex.B-82 is the judgment in O.S.No.13 of 1976, the suit in which the Pandarams claimed

hereditary trusteeship as against the defendants-Rajus who claimed that they were hereditary trustees. That suit no doubt was dismissed, the trial court there holding that the defendants-Rajus were only trustees appointed by the Endowment Department. As against the said judgment, no doubt, the abovesaid Pandarams filed A.S.No.530 of 1983 and the Judgment therein is Ex.B-112 marked as one of the exhibits in this appeal. In the said A.S.No.530 of 1983, there was also cross objection by the defendants-Rajus. But the said cross-objection was withdrawn. The said appeal also was no doubt dismissed. But, that the learned counsel for the appellants' points out is that Ex.B-82 also finds that the grant was only in favour of the deity and that Ex.B-112 also shows that "persons incharge" at the time of the inam survey had been shown as one Sankaralinga Pandaram and Velayutha Pandaram, described as worshipers. Further, the learned counsel for the appellants also points out that in Ex.B-82, it is also observed that "it is admitted fact that H.R. & C.E. Department appointed defendants 3 to 5 and their ancestors as trustees to the suit temple. Under Ex.B-120 one K.Ramasami Raja was appointed as trustee for a period of 5 years in 1930 to the suit temple by the Commissioner, H.R. & C.E. Department. Further, he also draws my attention to the following admission of D.W.1, the 2nd defendant:

''*1939-ல் இருந்து இந்த கோவிலுக்கு தர்ம கர்த்தாக்கள் நியமனத்தில் இருக்கிறார் என்றால் சரிதான். 1939-51 வரை போர்டில் இருந்துதான் தர்ம கர்த்தாக்கள் நியமனம் செய்தார்கள் என்றால் தெரியாது. 1951 முதல் நாளது வரையில் எச்.ஆர். அண்டு சி.இ. போர்டு தர்மகர்த்தாக்களை நியமித்தார்கள். ராஜுக்கள் சிபாரிசின் பேரில் தான் நியமித்து இருக்கிறார்கள் என்று உத்தரவில் வெளிப்படையாக இல்லை. போர்டு, என்டோன்மெண்ட் போட்ட உத்தரவுகளில் சில எங்களிடம் இருந்தன. அவைகளை கோர்ட்டில் தாக்கல் செய்துள்ளோம். இந்த கேசில் தாக்கல் செய்துள்ளோமா என்று ஞாபகம் இல்லை.*''

13. From all these, the learned counsel for the appellants contends that the courts below erred in not considering the abovesaid evidences and has wrongly drawn inference, from the mere management of the suit temple for the abovesaid several decades, that the temple was not only managed by the said Rajus even earlier, but was also brought into existence or established by them and owned by them, applying "the presumption of lost grant." The said counsel further submits that the courts below did so, despite the fact that they specifically held that there was no evidence as to who founded the temple and when it was founded and despite the fact that respondents also admit that the origin of the temple was not known. On the other hand, the learned Counsel for the respondents relied on the decision in *Ambika Prasad v. Ram Ekbal Rai, A.I.R. 1966 S.C. 605* and the decision rendered by two different Division benches of this Court one in *Rajagopaller v. Commissioner H.R. & C.E., 84 L.W. 86* and another to the abovesaid W.P.Nos.804 and 805 of 1957, referred to above.

14. In the above referred to *Ambika Prasad v. Ram Ekbal Rai, A.I.R. 1966 S.C. 605*, no doubt it has been held as follows:

> "Now, if a thing or a state of things is shown to exist, an inference of the continuity within a reasonably proximate time both forwards and backwards may sometimes be drawn. The presumption of future continuance is noticed in illustration (d) to Sec.114 of the Indian Evidence Act, 1872. In appropriate cases, an inference of the continuity of a thing or state of things backwards may be drawn under this section, though on this point the section does not give a separate illustration. The rule that the presumption of continuance may operate retrospectively has been recognised both in India....and England..... that there is no rule of evidence by which one can presume the continuity of things backwards cannot be supported. The presumption of continuity weakens with the passage of time. How far the presumption may be drawn both backwards and forwards depends upon the nature of the thing and the surrounding circumstances."

But, it should be noted that even assuming that in the present case such inference of continuity of state of things backwards may be drawn that can relate only to, if at all, the management of temple by the Rajus. But, that cannot allow the Court to infer the *establishment* of temple by them. In *Assistant Commissioner H.R. & C.E., Salem etc. v. Nattamai K.S. Ellappa, etc., 100 L.W. 240 at 257*, Srinivasan, J., has also observed as follows:

> "The case of the plaintiffs that they have been

continuously in management of the temple from 1933 onwards has been proved beyond doubt. But, there is no acceptable evidence to prove that the temple was founded by the members of the community. Learned counsel for the respondents invites this Court to draw an inference that the temple was established by the members of the community from the fact that the management and administration have been continuously with the members of the community for over 50 years. The temple is claimed to be 200 years old by the plaintiffs. The first plaintiff is only 56 years old and no other elderly person has been examined to speak about any fact relating to a prior period. It is not possible to draw an inference of the establishment of the temple by the community from the fact the members of the community have been managing the temple for about 50 years."

So, an inference of the establishment of the suit temple by the respondents-Rajus cannot be drawn in the present case also. If that is so, they cannot claim that the suit temple is a denominational temple exclusively belonging to them. Even from the abovesaid passage extracted from *Ambika Prasad v. Ram Erkbal Rai, A.I.R. 1966 S.C. 605*, an inference is possible backwards only with reference to the management of the temple, if at all.

15. Even regarding the management, the learned counsel submits that it cannot be said that the management vested with the respondents-Rajus continuously without interruption for several decades. In the light of the abovesaid evidences, the learned counsel for the appellants points out that in later periods, particularly from 1939 as spoken to by D.W.1 himself, the Rajus were in management only by virtue of appointment orders passed by the endowment department and that hence, they cannot claim the said right of management as of right. I also find that as against the following plea in paragraph 18 of the plaint, there is no *specific* denial in the written statement:

> "The second defendant got himself *appointed* as trustee *by the Assistant Commissioner*, Ramanathapuram at Madurai *since 1969 or so. Formerly*, the second defendant's father was trustee of the temple on *appointment* by area committee". (*emphasis supplied*)

Paragraph 21 of the written statement, which deals with paragraph 18 of the plaint, after denying certain other allegations in the said paragraph 18, only as generally "the several averments in para XIII of the plaint are highly exaggerated and they are all denied. "Further, it is the same 2nd defendant (as D.W.1) who deposed as extracted above

> "''*1951 முதல் நாளது வரையில் எச்.ஆர். அண்டு சி.இ.போர்டு தர்மகர்த்தாக்களை நியமித்தார்கள்*''
>
> (*emphasis supplied*)

Even earlier to 1951, from 1939, when suggestion was put to him that the Endowment Board appointed the trustees, he only said that he did not know. He was the trustee in 1969 or so and his father was trustee earlier, as per the abovesaid allegation in the plaint which has not been denied specifically. So, he would have known, at least by having seen the relevant records, how the trustees for the suit temple came into office then. Yet, he did not assert that there was no such appointment prior to 1951. He only evasively deposed that he did not know.

16. According to the said Counsel, even before the commencement of the Constitution, the said Rajus lost their right to manage the temple and that hence, the said right cannot revive after the constitution pursuant to Art.26. In this connection, he relies on the abovesaid passage quoted in *Durgah Committee v. Hussain Ali, A.I.R. 1961 S.C. 1402*; particularly, the last sentence therein. He also relies on the following passage in *State of Rajasthan v. Sajjan Lal, A.I.R. 1975 S.C. 706 @ 715:*

> "There can, therefore, be no doubt that any right which the Jains or any one of the two Jain denominations, namely, the Swetambars or Digambers or both, may have had in the temple or in its management was lost in the pre-constitution period and is now vested in the State of Rajasthan."

In view of these decisions of the Supreme Court, I hold that the contention of the said counsel is correct.

18. Even in paragraph 3 of the written statement, it is only stated that the representatives elected by the Rajus as trustees "were *invariably* recognised by the Endowments Department (*emphasis supplied*). This shows that the alleged elected trustees were not recognised by the said Department at least some times.

19. Even with reference to the above referred to *Rajagopaller v. Commissioner H.R. & C.E., 84 L.W. 86* and the judgment in W.P.Nos.804 and 805 of

1957, I must state that there the finding was that the temple was managed *throughout* by the community in question therein. But, even such a factual finding is not there in the present case. Further, I find that in *T.V.Mahalinga Iyer v. The State of Madras, (1981)1 M.L.J. (S.C.) 1*, it has been held by the Supreme Court thus:

> "It is undisputed law that so far as Tamil Nadu is concerned, there is an initial presumption that a temple is a public one, it being upto the party who claims that it is a private temple to establish that fact affirmatively.

No doubt, this observation relates to a case where the dispute is whether the temple is a public temple or private temple and not as in the present case. However, I think the said priciple could be applied even where the dispute is whether the temple is denominational temple or non-denominational temple though both come under the same category public temple, or "temple" as defined under Sec.6(20) of the Act.

20. One other argument of the learned counsel for the respondents can also be adverted to now. The said argument is that there is neither plea nor proof of dedication to the general public and hence, the temple is not a public temple. But, this argument also has no merit. After going through the plaint, it cannot be said that there is no such plea. Further, even according to the case of the defendants, dedication to a religious denomination, that is, dedication to a section of the public is there. When such is the case, it does not lie in the mouth of the defendants to say that there was no dedication to public. That apart, the plaintiffs in the present case never pleaded that the suit temple was either a private one or denominational one to start with, but that it became generally public temple because of dedication. Only in such cases, the abovesaid plea or proof may be necessary. On the other hand, the plaintiffs' case is that the suit temple was never a denominational temple. All these apart, I have already held, relying on the abovesaid Supreme Court decision, that there is an initial presumption that a temple is a public one.

21. The next question to be decided is no doubt the abovesaid question of *res judicata*. Here also, I agree with the learned counsel for the appellants contending that the decision in O.S.No.100 of 1975 could not be a bar of *res judicata* to the present suit. First of all, the present plaintiffs were not parties to O.S.No.100 of 1975 or to the subsequent appeals therefrom. In fact, they filed I.A.No.548 of 1976 in O.S.No.100 of 1975 for impleading themselves as defendants therein. But, the said application was dismissed, holding that the remedy of the present plaintiffs (proposed parties therein) was only to file a separate suit. Further, the present plaintiffs also tried for consolidation of the present second appeal with S.A.No.1946 of 1979, which arose out of the abovesaid O.S.No.100 of 1975. That petition for consolidation also was dismissed. Further, S.A.No.1946 of 1979 cannot be considered as having become final since the appellants themselves have filed C.M.P.No.6580 of 1988 in the Supreme Court for grant of leave to file S.L.P. against the judgment in S.A.No.1946 of 1979 and the same is pending. Further, on account of the pendency of the said C.M.P., the Supreme Court has requested this Court to dispose of this appeal early. Further, even Explanation VI to Sec.11, C.P.C. will have no application to the present case. The rights of the Hindu Community are not the same as that of the Commissioner, H.R. and C.E. Department, who was the defendant in O.S.No.100 of 1975. Therefore, there is no bar of *res judicata*.

22. On the other argument advanced before me, based on Sec.108 of the Act also, I hold that the respondents' contention has no merit since the present suit cannot be considered as not maintainable in a civil court pursuant to Sec.108 of the Act, in view of the decisions of this Court in *Ananda Baliga v. Ananteswar Temple, (1952)1 M.L.J. 678* and *Asarimar Samudayam v. Natarajan Asari, (1973)2 M.L.J. 306, Santhana Gopala Chettiar v. Seetharama Chettiar, (1968)2 M.L.J. 401* and the decision of the Supreme Court in *Ugam Singh v. Kesrimal, A.I.R. 1971 S.C. 2540.* In fact, the defendants themselves only went to a civil court in the earlier suit O.S.No.100 of 1975 for a declaration that the suit temple was a denominational temple, belonging to Rajus.

23. There is also an argument by the learned counsel for the respondents that there is no substantial question of law involved in the case and this Court should not interfere under Sec.100, C.P.C. This submission also has no merit. No doubt if there was a finding by the courts below that the suit temple was established by the respondents-Rajus, there may be some substance in this argument. But, the factual finding by both the

courts below is that the case of the defendants that they established the temple, cannot be accepted. If that is so, whether the temple would become a denominational temple, is clearly a substantial question of law. Further, all the abovesaid questions dealt with by me are also only substantial questions of law.

24. In the result, the second appeal is allowed, the judgments and decrees of both the courts below are set aside and the suit is decreed as prayed for. However, in the circumstances of the case, there will be no order as to costs throughout.

B.S. ------ *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Venkataswami* and *Abdul Hadi, JJ.*

A.No.636 of 1983 *31st December, 1991.*

Narammal (died) and another ...*Appellants*
v.
Kanthamani and others ...*Respondents.*

(A) Tamil Nadu Co-operative Societies Act (LIII of 1961), Sec.24 - Nomination under - Object of - If intended to alter the course of succession under personal law - Nomination made by a deceased whether amounts to a testament.

A fair reading of Sec.21 of the Tamil Nadu Co-operative Societies Act definitely will not lead to a construction of that section that it altered the course of succession under personal law. Nomination, if any, under Sec.24 of the said Act was to protect the interests of the Society against payments and transfers in terms of the nomination is clear from Sub-sec.(4) of Sec.24 of the said Act. Likewise, Sub-sec.(2) of Sec.24 also indicates that Sec.24 was not intended to alter the course of succession under personal law. In the aforesaid circumstances and also bearing in mind the principles of various courts, if the question is approached, there is no difficulty in coming to the conclusion that the nomination, if any, by the deceased in respect of the second schedule house property in favour of the first defendant will not amount to a testament excluding the mother from claiming a share in the property. *[Paras 24 and 25]*

(B) Employees' Provident Funds and Miscellaneous Provisions Act (XIX of 1952), Sec.5, Schedule II, Item 10 and Employees Provident Fund Scheme, Paragraphs 61 and 70 - Nominee under Item 10 of Schedule II - Rights of - Nomination if prescribes a different line of succession.

Sec.5 of the Employees' Provident Fund Act enables the Central Government to frame a Scheme. Sec.5(1-B) of the said Act specifically states that a scheme framed under Sub-sec.(1) of Sec.5 may provide for all or any of the matters specified in Schedule II. It is to be noted that Schedule II is part of the main Act. Therefore when the substantive legislation enables the Central Government to frame a Scheme in respect of matters of nomination, it must conform to Item 10 to Schedule II of the Act which provides for the nomination of a person to receive the amount standing to the credit of a member after his death and the cancellation of varying of such nomination. If there is any conflict between the Scheme and the Act, the Scheme must be read subject to the main provisions. Thus, on a reading of paragraphs 61 and 70 of the Scheme, the Court feels that though it is possible to read paragraph 61 and 70 and also Form -2 on which reliance was placed by the learned counsel for the first defendant, to mean that they provide a different line of succession, such meaning cannot be given if due regard is given to the main provision namely item 10 of Schedule II under which alone the Central Government framed the Scheme regarding nomination of person to receive the amount. Unless the main section clearly and unequivocally prescribes a different line of succession, it cannot be presumed that a different line of succession is prescribed by reading paragraphs 61 and 70 of the Scheme alone. No doubt the Division Bench of the Calcutta High Court in *Usha v. Smriti, A.I.R. 1988 Cal. 115,* has referred to Sec.10(2) of the Act to support its view. This Court is unable to subscribe to the view expressed by the Calcutta High Court on the scope of Sec.10(2) of the Act. There is nothing to suggest that a different mode of succession is prescribed even under Sec.10(2) of the Act. On the other hand, this Court is inclined to think that Sec.10(2) of the Act was intended to save the provident fund money from the clutches of debtors of the

nominee so as to enable him to distribute it to the heirs of the deceased who are entitled to the money under the personal law. In other words, the court reads down paragraphs 61 and 70 of the Scheme to be in conformity with item 10 of Schedule II read with Sec.5 of the Act and by so reading, the nominee gets only a right to receive the amount to distribute the same to the heirs of the deceased in accordance with the law of succession governing them. *[Paras 31 and 32]*

Cases referred to:

Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346; Shaik Basheed v. Mohamooda Begum, A.I.R. 1985 A.P. 321; Meenambal v. Sornathammal, (1990)1 L.W. 302; Usha v. Smriti, A.I.R. 1988 Cal. 115; Krishnamoorthy v. Tmt.Anandalakshmi, (1980)2 M.L.J. 321; Saroj v. Murti Devi, A.I.R. 1991 P. and H. 183; Malathi v. Dharma Rao, A.I.R. 1968 Orissa 8.

Appeal against the decree of the court of the Principal Subordinate Judge, Coimbatore dated 39.7.1983 and passed in Original Suit No.50 of 1982.

The Judgment of the Court was delivered by *Venkataswami, J.*:- The plaintiff in O.S.No.50 of 1982, on the file of the court of Subordinate Judge, Coimbatore, has preferred this appeal.

2. Pending disposal of the appeal, the appellant/plaintiff died and the second respondent (son of the deceased appellant) in the appeal has filed C.M.P.No.10153 of 1991, claiming to be the sole legal representative of the deceased appellant, and praying for transposing him as the second appellant in the above appeal. After hearing learned counsel on both sides, we have ordered that petition. However, for the sake of convenience, the appellant will be hereafter referred to as the plaintiff and the contesting first respondent as first defendant.

3. Before going into the facts, it will be useful to narrate the relationship between the parties. One Ranganathan was the son of the plaintiff (husband of the first defendant). On the death of Ranganathan, the cause of action for the suit has arisen. The second defendant (now the second appellant in this appeal) is the brother of the deceased Ranganathan. The third defendant is the brother-in-law of the deceased Ranganathan. The 4th defendant is a tenant in respect of the second schedule property. The fifth defendant is a co-operative house benefit society. The sixth defendant is a chit fund.

4. The plaintiff, claiming to be a Class I heir along with the first defendant, claimed that she is entitled to a share in the properties, both movable and immovable, left by the deceased Ranganathan, along with the first defendant. There are eight schedules in the plaint. The first defendant has mentioned in her additional written statement that the plaintiff collected the amount due under the insurance policy, and that was to be subjected to partition and she (first defendant) must be given a half share. In addition to that, she has also pointed out that one Vicky motorcycle has been retained by the plaintiff, that it must be valued and she must be given a half share in that. Further in the additional written statement, the first defendant has pointed out that a fixed deposit amount in the name of deceased Ranganatan in the Central Bank of India was also available for division.

5. Before the court below, the plaintiff examined herself as P.W.1, and the first defendant examined herself as D.W.1. On the side of the plaintiff, Exs.A-1 to A-4 were marked, and on the side of the defendants, Exs.B-1 to B-5 were marked. Third party documents were marked as Exs.X-1 to X-15.

6. On the basis of the pleadings, evidence and the arguments, the trial court granted a decree declaring one-fourth share in plaint schedules 1 and 3 in favour of the plaintiff and half share in the 7th schedule as well as in the L.I.C. premium and in the fixed deposit pointed out in the additional written statement. In respect of other items, the suit was dismissed.

7. Aggrieved by the dismissal of the suit, the present appeal was filed by the plaintiff and the second appellant is now continuing the appeal.

8. Mr.E.Padmanabhan, learned counsel appearing for the appellant, while narrating the facts, though commented about the dismissal of the suit in respect of all items except Schedules 1, 3, 7 and two items mentioned in the additional written statement, concentrated and attacked the decree only in respect of Schedules 2 and 4. In other words, we are called upon to decide the correctness of the judgment and decree of the court below in respect of Schedules 2 and 4. In these circumstances, we do not consider it necessary to set out elaborately the pleadings and the issue framed thereunder.

9. The second schedule relates to a house bearing Door No.1-C, Lakshmipuram, Lal Bahadhur Nagar,

Uppilipalayam village, within Singanallur Municipal limits, and fully described in the Second schedule. The fourth schedule relates to a sum of Rs.27,910-24 p. representing provident fund and group insurance and gratuity taken by the first defendant from Messrs.SITRA.

10. The main ground on which the claim of the plaintiff was negatived in respect of items covered under Schedules 2 and 4 was that the deceased Ranganathan nominated the first defendant to receive the benefits and, therefore, to that extent, the plaintiff must be deemed to have been disinherited in respect of those items. The correctness of that conclusion is challenged before us.

11. In support of his contention that notwithstanding the nomination in favour of the first defendant, learned counsel submits that the plaintiff is also entitled as Class I heir to share the benefits along with the first defendant as the nomination or the statutes under which such nominations were made do not alter the general law of succession.

12. So far as the house property covered by the second Schedule is concerned, Mr.E.Padmanabhan, learned counsel invited our attention to paragraph 11 of the written statement of the first defendant, to claim exclusive title in her favour, and submitted that such a claim cannot be sustained in law in view of the ratio laid down by the Supreme Court in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346.* Paragraph 11 of the written statement reads as follows:

> "The deceased Ranganathan in his application dated 1.12.1973 to the 5th defendant, *viz.*, The Dhanalakshmipuram Rural Co-operative House Benefit Society Limited Reg. No.K.1584 had clearly mentioned that the property should go to this defendant after his life time. The Society only accepts membership and such membership is transferable only with the permission of the society. A member can nominate any person to succeed to his interest. On the death of a member the interest of the deceased member under the society shall be dealt with in accordance with Sec.24 of Act 53 of 1961. Every member of the society may nominate any person to succeed to his share of interest in the society in the event of his death and such nomination shall be given effect to by the committee in the event of his death. The nomination in this case has been done specifically in accordance with the law and as per the procedure described under the said Act. The nomination has also been registered under the rules of the society. The society shall transfer the interest of the deceased as per the bye-laws of the society. While so, the said nomination has to be treated as a will and rights of this defendant have to be worked out accordingly. The plaintiff is not entitled to claim any share in schedule 2 of the property. Moreover, a suit in respect of this property is barred by Act 53 of 1961. This Hon'ble Court, has, therefore, no jurisdiction to try the suit. The claim for mesne profit is neither just nor proper. The plaintiff who claims to be in occupation of a portion is certainly not entitled to claim mesne profits especially after having filed a speculative suit under Sec.37(2) of the Court-Fees Act. The suit, is therefore, liable to be dismissed.

13. As regards the moneys representing provident fund, group Insurance and gratuity, as described in schedule 4 of the plaint, the argument of the learned counsel for the appellant was that applying the same ratio of the Supreme Court in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346*, the mother is entitled to share the moneys along with the first defendant notwithstanding the nomination in favour of the first defendant. In addition to the judgment of the Supreme Court as mentioned above, Mr.E.Padmanabhan also placed reliance on a Division Bench judgment of the Andhra Pradesh High Court, in *Shaik Dawood v. Mohamooda Begum, A.I.R. 1985 A.P. 321,* and another judgment of this Court in *Meenambal v. Somathammal, (1990)1 L.W. 302.* He also submitted that the Division Bench judgment of the Calcutta High Court in *Usha v. Smriti, A.I.R. 1988 Cal. 115,* does not lay down the correct law. Learned counsel also relied on a decision of this Court in *Krishnamoorthy v. Tmt. Anandalakshmi, (1980)2 M.L.J. 321.*

14. Mr.K.Govindarajan, learned counsel appearing for the first defendant (1st respondent herein), contending contra, submitted that the ratio laid down by the Supreme Court in the case reported in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346*, will have no application either to the second schedule house property or to Schedule 4 moneys. According to learned counsel, the nomination prevails and disinherits the plaintiff from claiming

any share in the properties described in these Schedules. In any event, according to the learned counsel, in the light of specific provisions in the Employees Provident Funds Act and the Employees Provident Funds Scheme, in particular paragraphs 61 and 70 of the Scheme, there is no difficulty to come to a conclusion that there is an express provision providing a line of succession to the estate of the deceased different from the Hindu Succession Act and therefore, the ratio laid down by the Supreme Court will have no application. In support of his submission, he placed reliance on a Division Bench Judgment of the Calcutta High Court reported in *Usha v. Smriti, A.I.R. 1988 Cal. 125*, another judgment of the Punjab and Haryana High Court in *Saroj v. Murti Devi, A.I.R. 1991 P. and H. 183* and yet another judgment in *Malathi v. Dharma Rao, A.I.R. 1968 Orissa 8.*

15. Let us now consider the rival submissions.

16. Before proceeding further, it will be useful to set out the relevant provisions, for appreciating the contentions as well as the ratios laid down in the various judgments cited by the learned counsel on both sides.

17. Sec.24 of the Tamil Nadu Co-operative Societies Act, 1961 reads as follows:

> "24(1). Subject to the provisions of Sec.34, on the death of a member of a registered society, the society shall transfer the share or interest of the deceased member in the capital to the person nominated in accordance with the rules, or, if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member;
>
> Provided that such nominee, heir or legal representative, as the case may be, being eligible for admission, is admitted as a member of the society;
>
> Provided further that nothing in this sub-section shall prevent a minor or a person of unsound mind from acquitting by inheritance or otherwise the share or interest of a deceased member in the capital of the society.
>
> (2) Notwithstanding anything contained in sub-sec.(1) and subject in such conditions as may be specified in the rules, a registered society may of its own motion and shall, if so required by any such nominee, heir, or legal representative, as the same may be, pay to him the value of the share or interest of the deceased member in the capital ascertained in accordance with the rules.
>
> (3) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.
>
> (4) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person."

18. As the Supreme Court considered the question under the Insurance Act, the relevant section, namely, Sec.39 of the Insurance Act is set out below:

> "39. *Nomination by policy-holder*: (1) The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:
>
> Provided that where any nominee is a minor, it shall be lawful for the policy-holder to appoint in the prescribed manner any person to receive the money secured by the policy in the event of his death during the minority of the nominee.
>
> (2) Any such nomination in order to be effectual shall unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement, or a further endorsement or a will, as the case may be, but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made *bona fide* by him to a nominee mentioned in the text of the policy or registered in records of the insurer.
>
> (3) The insurer shall furnish to the policy-holder a written acknowledgment of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding one rupee for registering such cancellation or change.
>
> (4) A transfer or assignment of a policy made in accordance with Sec.38 shall automatically

cancel a nomination;

Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its reassignment on repayment on the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy.

(5) Where the policy matures for payment during the lifetime of the person whose life is insured or where the nominee or, if there are more nominees than one, all the nominees die before the policy natures for payment, the amount secured by the policy shall be payable to the policy-holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) where the nominee or if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors.

(7) The provisions of this section shall not apply to any policy of life insurance to which Sec.6 of the Married Women's Property Act, 1874 applies or has at any time applied:

Provided that where a nomination made whether before or after the commencement of the Insurance (Amendment) Act, 1946, in favour of the person who has insured his life or of his wife and children or any of them is expressed, whether, or not on the face of the policy, as being made under this section, the said Sec.6 shall be deemed not to apply or not to have applied to the policy."

19. As we are concerned with the provisions of the Employees Provident Funds Act and the Scheme framed thereunder, the relevant provisions of the said Act and Scheme are set out below:

"5. *Employee's Provident Fund Schemes*: (1) The Central Provident may, by notification in the Official Gazette, frame a Scheme to be called the Employees' Provident Fund Scheme for the establishment of Provident Funds under this Act for employees or for any class of employees and specify the establishments or class of establishments to which the said Scheme shall apply and there shall be establishment, as soon as may be after the framing of the Scheme, a Fund in accordance with the provisions of this Act and the Scheme.

(1-A) omitted.

(1-B) subject to the provisions of this Act, a scheme framed under sub-sec.(1) may provide for all or any of the matters specified in Schedule II."

Item 10 of Schedule II, which is relevant for our purpose, reads as follows:

"The nomination of a person to receive the amount standing to the credit of a member after his death and the cancellation or variation of such nomination."

Paragraphs 33, 61 and 70 of the Employees Provident Funds Scheme read as follows:

"33. *Declaration by persons already employed at the time of the institution of the Fund:* Every person who is required or entitled to become a member of the Fund shall be asked forthwith by his employer to furnish and shall, on such demand, furnish to him, for communication to the Commissioner, particulars concerning himself, and his nominee required for the Declaration Form in Form 2. Such employer shall enter the particulars in the Declaration Form and obtain the signature or thumb-impression of the person concerned.

61. *Nomination:* (1) Each member shall make in his declaration in Form 2, a nomination conferring the right to receive the amount that may stand to his credit in the fund in the event of his death before the amount standing to his credit has become payable, or where the amount has become payable before payment has been made.

(2) A member may in his nomination distribute the amount that may stand to his credit in the Fund amongst his nominees at his own discretion.

(3) If a member has a family at the time of making a nomination, the nomination shall be in favour of one or more persons belonging to his family. Any nomination made by such member in favour of a person not belonging to his family shall be invalid.

(4) If at the time of making a nomination the member has no family, the nomination may be in favour of any person or persons but if the member subsequently acquires a family, such nomination shall forthwith be deemed to be invalid and the member shall make a fresh

nomination in favour of one or more persons belonging to his family.

(4-A) Where the nomination is wholly or partly in favour of a minor, the member may, for the purposes of this Scheme, appoint a major person of his family, as defined in clause (g) of paragraph 2, to be the guardian of the minor nominee in the event of the member predeceasing the nominee and the guardian so appointed; Provided that where there is no major person in the family, the member may, at his discretion, appoint any other person to be a guardian of the minor nominee.

(5) A nomination made under sub-paragraph (1) may at any time be modified by a member after giving a written notice of his intention of doing so in Form 8 annexed thereto. If the nominee prodeceases the member, the interest of the nominee shall revert to the member who may make a fresh nomination in respect of such interest.

(6) A nomination or its modification shall take effect to the extent that it is valid on the date on which it is received by the Commissioner.

70. *Accumulations of a deceased member to whom payable:* On the death of a member before the amount standing to his credit has become payable or where the amount has become payable before payment has been made--

(i) if a nomination made by the member in accordance with paragraph 61 subsists, the amount standing to his credit in the Fund or that part thereof to which the nomination relates, shall become payable to his nominee or nominees in accordance with such nomination; or

(ii) if nomination subsists or if the nomination relates only to a part of the amount standing to his credit in the Fund, the whole amount or the part thereof to which the nomination does not relate, as the case may be, shall become payable to the members of his family in equal shares;

Provided that no share shall be payable to--

(a) sons who have attained majority;

(b) sons of a deceased son who have attained majority;

(c) married daughters whose husbands are alive;

(d) married daughters of a deceased son whose husbands are alive;

If there is any member of the family other than those specified in clauses (a), (b), (c) and (d); Provided further that the widow or widows, and the child or children of a deceased son shall receive between them in equal parts only the share which that son would have received if he had survived the member and has not attained the age of majority at the time of the member's death.

(iii) In any case, to which the provisions of clauses (i) and (ii) do not apply the whole amount shall be payable to the person legally entitled to it.

Explanation: For the purpose of this paragraph a member's posthumous child, if born alive, shall be treated in the same way as a surviving child born before the mother's death.

20. The first defendant claimed exclusive right to the second schedule house property on the basis of the statement by the deceased in the loan application, which, according to her, is a nomination in her favour. The plaintiff disputes there is any such nomination. We have already pointed out that the trial court proceeded as if there was a valid nomination in favour of the first defendant in so far as the second schedule property is concerned. We do not think that the lower court is correct in proceeding on the basis that there was a nomination in favour of the first defendant in respect of the second schedule property. Assuming that there is a nomination, let us see that is the position in law. The question is, whether the nomination enables the first defendant to take the second schedule house property absolutely or the plaintiff, as Class 1 heir, is entitled to claim a share therein. In this context, the ratios laid down by this Court and the Supreme Court, on the scope of nomination will be useful to answer the point.

21. Sathiadev, J., as he then was, in *Krishnamoorthy v. Tmt.Anandalakshmi, (1980)2 M.L.J. 321,* while considering a case arising out of Life Insurance Corporation's Provident Fund, observed as follows:

"Most of the decisions above referred to arise under the Provident Fund Act and even then subsequent to amendments it has been held that the nominee does not acquire absolute interest in the funds. The provision for nomination is made for the benefit of discharging the liability of the custodian of the fund, which aspect I have dealt with at length in the earlier part of this judgment, and unless a specific

provision is made in the relevant Act or even in the nomination a direction of bequeathing the amount is given to the effect that except the nominee, none of the legal heirs would acquire rights and such direction is not varied later on, the right of a nominee cannot be anything more than being the sole person entitled to draw out the amount and he would be doing so in the capacity of a trustee of the funds answerable to the claims of the lawful heirs of the deceased member. The use of the word 'nomination' which means only appointments to receive the amount, cannot be construed as to confer any absolute right in the funds to the exclusion of the rights of the lawful heirs, because even a stranger may be nominated in whom the nominator may have trust. If the intendment is to make the nominee as the absolute owner there can be no difficulty in incorporating the necessary recitals to the effect that he has got, on the date of nomination, his legal heirs and inspite of it, he bequeaths the amount only to the nominee to take the funds to the exclusion of the other heirs. When such an unequivocal expression is not present in a nomination, it would not be proper to hold that such a nomination would result in absolute conferment of rights on the nominee to take the amount for himself."

22. While concurring with the above observations, Srinivasan, J. in the decision reported in *Meenambal v. Somathammal, (1990)1 L.W. 302,* further observed as follows:

"I am entirely in agreement with those observations of the learned Judge. In fact, the principle laid down by the learned Judge has been accepted by the Supreme Court in a case which arose under the Insurance Act in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346.* While dealing with a nomination made under Sec.39 of the Insurance Act, the Supreme Court held that the nomination does not have the effect of conferring on the nomine any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. It is laid down that the amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them. Incidentally, the Supreme Court approved of the distinction made by Ismail, J. in *M.B.Mundkur v. Life Insurance Corporation*, between a nomination under Sec.39 and a nomination under Sec.44 of the Insurance Act. In fact, the Supreme Court has quoted a passage from the decision of Ismail, J., with approval. In view of the decision of the Supreme Court holding that a nomination does not give any right to the nominee, to the beneficial interest in the amount paid to the nominee, it is not necessary to discuss that aspect of the matter any further. The effect of nomination has been conclusively decided by the judgment of the Supreme Court."

23. In the decision reported in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346,* the Supreme Court observed as follows:

"We are of the view that the language of Sec.39 of the Act is not capable of altering the course of succession under law... ... ...The High Court equated a nominee to the heirs and legatees of the assured and proceeded to hold that the nominee succeeded to the estate with all 'plus and minus points'. We find it difficult to treat a nominee as being equivalent to a heir or legatee having regard to the clear provisions of Sec.38 of the Act ... ...The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them."

24. Let us first take the issue relating to the second schedule house property. The only document on which heavy reliance was placed on behalf of the first defendant which found favour with the trial court is Ex.B-1. Ex.B-1 is a copy of loan application dated 1.12.1973. Under Ex.B-1., it is claimed that the deceased Ranganathan applied to the 5th respondent-society for a loan of Rs.10,000 for constructing a house. Actually, the signature of the deceased Ranganathan does not find a place anywhere in the copy marked as Ex.B-1. It is seen from Ex.B-1. that the site was purchased for a sum of Rs.2,000 under a registered document dated 29.1.1972 and the deceased was the sole owner and the loan applied was for constructing a new house.

In one of the columns in the application which requires information regarding the present ownership of the property and the future right, the deceased has stated that the property at that time belonged to him, and in future to his wife. In Tamil, the exact words are:

> "தற்போது எனக்கு பாத்யதை; எதிர் காலத்தில் என்மனைவி காந்தமணிக்கு"

Based on this alone and invoking Sec.24 of the Tamil Nadu Co-operative Societies Act, a contention was advanced before the trial court to the effect the above answer amounts to a 'will' bequeathing schedule 2 house property in favour of the first defendant. This argument was accepted by the court below and the plaintiff's suit was dismissed in respect of this item. First of all, it is not clear whether there is any nomination apart from the above statement in the loan application. The conclusion of the trial court that the above extracted statement of the deceased will amount to a 'will' is totally unsustainable as the requirements of a valid will are not only not present, but also the necessary proof for establishing that, is totally absent. Presumably, to get over this, the counsel for the first defendant must have invoked Sec.24 of the Tamil Nadu Co-operative Societies Act. We have already set out Sec.24 of the said Act and a fair reading of the same definitely will not lead to a construction of that section that it altered the course of succession under personal law. Nomination, if any, under Sec.24 of the said Act was to protect the interests of the Society against payments and transfers in terms of the nomination is clear from sub-sec.(4) of Sec.24 of the said Act. Likewise, sub-sec.(2) of Sec.24 also indicates that Sec.24 was not intended to alter the course of succession under personal law.

25. In the aforesaid circumstances and also bearing in mind the principles of various courts set out above, if we approach the question, we do not find any difficulty in coming to a conclusion that the nomination, if any, by the deceased Ranganathan in respect of the second schedule house property in favour of the first defendant will not amount to a testament excluding the mother from claiming a share in the property. Therefore, we hold that the court below was not right in dismissing the suit in respect of the second schedule-house property. Consequently, we hold that the plaintiff is entitled to a half share in the second schedule house property.

26. The only other question that remains to be considered is, with reference to the Provident Fund and Group Insurance amounts as described in the Fourth Schedule. As it is, there are two conflicting views of the Andhra Pradesh High Court and the Calcutta High Court.

27. In *Shaik Basheed v. Mahmooda Begum, A.I.R. 1986 A.P. 321*, a Division Bench of the Andhra Pradesh High Court has taken a definite stand that the ratio laid down by the Supreme Court in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346,* squarely applies to Provident Fund amounts. On the other hand, a Division Bench of the Calcutta High Court, in *Usha v. Smriti, A.I.R. 1988 Cal. 115,* has taken a view that a nominee under the Provident Fund Act is completely different from his counterpart under the Insurance Act and, therefore, a nominee alone is exclusively entitled to the amount to the exclusion of other heirs.

28. We have already extracted the relevant passage from the Supreme Court judgment in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346.* One more passage which is also relevant may now be noted. It occurs in paragraph 12 of the judgment. The relevant portion reads as follows:

> "We approve the views expressed by the other High Courts on the meaning of Sec.39 of the Act and hold that a mere nomination made under Sec.39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be assured in accordance with the law of succession governing them."

29. Inasmuch as the counsel appearing for the plaintiff (appellant) and the first defendant placed heavy reliance to substantiate their respective stand on the Division Bench judgments of Andhra Pradesh High Court and Calcutta High Court respectively, let us look into those decisions and find out the reasons which impelled the learned Judges to take their respective views which are diametrically opposite. Let us first take the Division Bench judgment of the Andhra Pradesh High Court *Shaik*

Basheed v. Mahmooda Begum, A.I.R. 1985 A.P. 321, which is earlier in point of time. The learned Judges have given the reasons in paragraph 12 of the judgment which reads as follows:

"The more important question is, whether succession to this asset, stands to be governed by the Mohammedan Law of Inheritance, whether there was a nomination or no nomination. The answer depends on the real intendment of the special provisions made in the Employees Provident Fund Act, 1952 or the Employees Provident Fund Scheme, 1952; and the meaning to be given to the word 'payable' which occurs balances, in the Provident Fund, represent in the majority of cases, the life savings of an employee. If there is a valid nomination, it becomes payable in equal shares, amongst the various members, who fall in the ambit of 'family' as defined in the Scheme. Does the nominee in the one case of the member of the family in the other case acquire an exclusive right to appropriate the amount paid to him as an asset belonging to him? In our view, the word 'payable' cannot be interpreted to mean that the payee gets an absolute right over such amounts to the exclusion of the other heirs to the estate of the deceased. To illustrate, 'A' nominated his second wife and then he died, he left a provident fund asset of Rs.1 lakh and some children by his two wives. Surely A's wife cannot claim to be entitled to the entire amount to the exclusion of A's children. The same principles ought to govern amounts paid to persons in a case of 'no nomination'. Such persons cannot be put on a higher footing than a 'nominee'. We are of the definite view that, in respect of provident fund amounts, the same principles as were laid down by the Supreme Court in *Sarbati's Devi's case, A.I.R. 1984 S.C. 346,* should be applied."

Thereafter, after pointing out the amendment made to the Provident Fund Act, 1925 in the year 1946 by deleting the word 'absolutely' occurring in Sec.5, and after noticing various conflicting decisions of other High Courts, ultimately, the learned Judges summed up their views as follows:

"To sum up, our conclusions are:

(1) The nominee of a provident fund has only the exclusive right to receive the fund. His rights are the same as that of a nominee under Sec.39 of the Insurance Act.

(2) The provident fund remains the property of the deceased subscriber and is available for distribution amongst his heirs in accordance with their personal law. The Supreme Court decision in *Sarbati's Devi's case, A.I.R. 1984 S.C. 346,* governs nominations made, in respect of provident funds as well."

30. The Division Bench of the Calcutta High Court did not agree with the Andhra Pradesh High Court. In *Usha v. Smriti, A.I.R. 1988 Cal. 115,* the learned Judges were of the view that a nomination under the Provident Fund Act differed substantially from a nomination under the Insurance Act. To sustain this view, reliance was placed on Sec.10(2) of the Employee's Provident Funds and Miscellaneous Provisions Act, 1952. Sec.10(2) of the said Act reads as follows:

"Any amount standing to the credit of a member in the fund or of an exempted employee in a provident fund at the time of his death and payable to his nominee under the scheme or the rules of the provident fund shall subject to any deduction authorised by the said scheme or rules, vest in the nominee and shall be free from any debt or other liability incurred by the deceased or the nominee before the death of the member or of the exempted employee."

We find the views of the learned Judges in paragraphs 13 to 16 of the judgment which read as follows:

"Having given our anxious consideration to the various provisions of the provident fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely different from his counterpart under the Insurance Act. The most and striking difference about the status of the nominee under the two Acts is clearly discernible from Sec.10(2) of the Provident Fund Act quoted earlier which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member. From Sec.10(2) it is abundantly clear that immediately upon the death of the member the Provident Fund money becomes part of the asset of the nominee whereas under the Insurance Act after the death of the assured the money continues to be his asset; and the money which was

standing to the credit of the member becomes free even from the debt of liability incurred by the nominee before the death of the member. Only because the money vested in and thereby became the property of the nominee after the death of the member such a provision was required to be incorporated as, otherwise to be attached for debts or liabilities incurred by him prior to the death of the member. That the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, gets a right to the money also has been made clear by the provisions of paras 61 and 70 of the Scheme quoted earlier.

It is of course true that para 70 is prefixed with the heading "accumulation of a deceased member to whom payable" (*emphasis supplied*) and relying upon the same in the Andhra Pradesh High Court *Shaik Basheed v. Mahmooda Begum, A.I.R. 1985 A.P. 321,* that the principle laid down by the Supreme Court in the case of *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346,* would be equally applicable under the Provident Fund Act but we regret our inability to agree with the views so expressed for reasons as follows: Headings or titles prefixed to a section cannot restrict the meaning of the section itself if its language is clear and as our discussion will presently show, the language of para 70 is manifest. But before however we proceed to analyse para 70 let us examine para 61 of the Scheme. Under this para if a member, who had no family of his own, makes an outsider his nominee, such nomination will automatically fail if he substantially acquires a family and he will have to make a fresh nomination in favour of one or more persons belonging to his family. It will be pertinent to point out that under Sec.39 of the Insurance Act there is no such mandate; and under Sec.38 thereof a life insurance policy cannot be assigned or transferred. Para 61(2) envisages that a member may in his nomination distribute (*emphasis supplied*), the amount that may stand to his credit in the funds amongst his nominees in his own discretion and sub-para (5) thereof says that if one of the nominees predeceases the member the interest (*emphasis supplied*) of that nominee shall revert to the member who may make a fresh nomination in respect of such interest. The word "distribute" means divide, apportion, allot, dispense and therefore when the member has been empowered "to distribute the amount amongst his nominees at his discretion" it certainly means that thereby he would be giving the amount to them. A concept of distribution as envisaged in para 61(2) of the scheme cannot by any stretch of imagination mean that the member was distributing the right to receive the money amongst his nominees. That by such distribution the nominee acquires ownership to the money has again been made explicitly clear by the word "interest" appearing in sub-para (5). The word "interest" obviously means the right to the money that accrued in favour of the nominee consequent upon its distribution by the member. It is of course true that the member may modify his nomination a nominee's interest but then ultimately the nominee, whoever he may be, acquires an interest in the money.

Coming now to para 70 of the scheme we get that sub-para (ii) thereof expressly says that the money shall become payable to the members of the family, in cases provided therein, in "equal shares" and proviso thereto expressly lays down that no share shall be payable to the sons of the deceased members who have attained majority or daughters who have their husbands living. The major sons and married daughters whose husbands are alive have been expressly excluded from receiving any share obviously because they are expected to be capable of maintaining themselves. If really para 70 only referred to right of the nominees mentioned therein to receive the money, and not to have any beneficial interest in the money, there was no necessity of expressly providing therein that it should not be paid to the persons who are capable of maintaining themselves nor it would have provided that the money would be payable in equal shares. In other words, if really the para intended to mean that the nominees were to receive the money only and not to have any beneficial interest therein the minors would not have been preferred to collect the same instead of majors who would be in a better position to receive the money and to pay the same to the beneficiaries. On the contrary, para 70 has taken care of the minor heirs of the deceased member by providing that the money would be paid to and received by them

so that being unable to maintain themselves, they can gainfully utilise the money. Lastly para 70(iii) provides that in case the provisions of the paragraph are not applicable the entire amount shall be paid to persons legally entitled (*emphasis supplied*) to it. Entitlement to a property obviously means a right to the property and consequently the fact that the money would be payable to such person means that he will be entitled to appropriate the money. For the foregoing discussions we therefore find no hesitation in concluding that the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, has not only the right to receive the money but also a beneficial interest therein.

The contention of Mr.Roy Chowdhury that under item 10 of Schedule II of the Provident Fund Act, the Central Government could not make any provision for bestowal of any right to the money under the Scheme cannot be entertained having regard to the fact that the said item speaks of nomination of a person to receive the amount; and the word "receive" does not militate against the concept of acceptance of money as owner in respect thereof." [paragraphs 13 to 16]

31. After carefully going through these two Division Bench judgments, and also the judgments of Sathiadev, J. (as he then was) and Srinivasan, J. (referred to above), in the light of the views expressed by the Supreme Court in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346,* with due respect, we are unable to agree with the views expressed by the Division Bench of the Calcutta High Court in *Usha v. Smriti, A.I.R. 1988 Cal. 115.* Our reasons are these:

"Sec.5 of the Employees' Provident Fund Act enables the Central Government to frame a Scheme. Sec.5(1-B) of the said Act specifically states that a scheme framed under sub-sec.(1) of Sec.5 may provide for all or any of the matters specified in Schedule II. Coming to Schedule II, item 10 which alone is necessary for our purpose, reads as follows:

"The nomination of a person to receive the amount standing to the credit of a member after his death and the cancellation or variation of such nomination." (*Emphasis supplied*)

It is to be noted that Schedule II is part of the main Act. Therefore, when the substantive legislation enables the Central Government to frame a Scheme in respect of matters of nomination, it must conform to Item 10 of Schedule II of the Act. If there is any conflict between the Scheme and the Act, the Scheme must be read subject to the main provisions. Thus, on a reading of paragraphs 61 and 70 of the Scheme, (alread extracted), we feel that though it is possible to read paragraphs 61 and 70 and also Form-2, on which reliance was placed by the learned counsel for the first defendant, to mean that they provide a different line of succession, such meaning cannot be given if due regard is given to the main provision, namely, item 10 of Schedule II under which alone the Central Government framed the Scheme regarding nomination of person to receive the amount. Unless the main section clearly unequivocally prescribes a different line of succession, it cannot be presumed that a different line of succession is prescribed by reading paragraphs 61 and 70 of the Scheme alone. No doubt, the Division Bench of the Calcutta High Court (referred to supra) has referred to Sec.10(2) of the Act which we have extracted above to support its view. Here again, we are unable to subscribe to the view expressed by the Calcutta High Court, on the scope of Sec.10(2) of the Act. There is nothing to suggest that a different mode of succession is prescribed even under Sec.10(2) of the Act. On the other hand, we are inclined to think that Sec.10(2) of the Act was intended to save the provident fund money from the clutches of debtors of the nominee so as to enable him to distribute it to the heirs of the deceased, who are entitled to the money under the personal law.

32. In this context, it is relevant to recall to our mind the view expressed by the Supreme Court in *Sarbati Devi v. Usha Devi, A.I.R. 1984 S.C. 346,* about the scope of nomination. The Supreme Court has categorically held that the nomination only indicates the hand which is authorised to receive the amount. The same view was expressed by Sathiadev, J. (as he then was) even before the judgment of the Supreme Court, and also by Srinivasan, J. after the judgment of the Supreme Court. Therefore, we are inclined to agree with the view taken by the Division Bench of the Andhra Pradesh High Court for additional reason given by us based on Sec.5(1-B) of the Act read with item 10 of Schedule II. In other words, we read down

paragraphs 61 and 70 of the Scheme to be in conformity with item 10 of Schedule II, read with Sec.5 of the Act, and by so reading, the nominee gets only a right to receive the amount to distribute the same to the heirs of the deceased, in accordance with the law of succession governing them. In the view we have expressed above, the plaintiff is entitled to a half share in schedule 4 monies as well. To that extent, the plaintiff is entitled to a decree. Consequently, the judgment and decree of the trial court have to be modified.

33. In the result, the appeal is allowed only in respect of schedule 2 house property and schedule 4 moneys declaring plaintiff's half share in these two schedules. However, there will be no order as to costs.

B.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Nainar Sundaram, Acting C.J.* and *Somasundaram, J.*

W.A.No.442 of 1992 *22nd April, 1992.*

B.Rajammal Ammal ...*Appellant*
v.
The State of Tamil Nadu and another ...*Respondents.*

Forest Conservation Act (1980) - Lease of forest lands granted for 25 years - Coming to an end on 4.7.1989 - Application for renewal of lease on 1.2.1989 - Renewal declined relying on G.O.Ms.No.779, Forests and Fisheries, dated 1.7.1988 - Petitioner if can rely on earlier G.O.Ms.No.1220, dated 7.11.1979 and claim to have acquired right to have lease for 15 years from 5.7.1989 - Earlier G.O., if superseded by later G.O.

The deceased first petitioner 'B' was the successful bidder in the auction for the sale of the right to do cardamom cultivation and was granted lease of forest lands to the extent of 16.25 acres in Kodaikanal range for a period of 25 years with effect from 5.7.1964. The lease came to an end on 4.7.1989. On 1.2.1989 'B' submitted an application for renewal of the lease for a further term, treating the renewal as a fresh lease in terms of G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979. The District Forest Officer, Kodaikanal Range declined to renew the lease on the ground of subsequent Government Order No.779, Forests and Fisheries Department, dated 1.7.1988. 'B' filed a writ petition to quash the order declining to renew his lease. During the pendency of the petition, 'B' died. The second and third petitioners were substituted. A learned single Judge dismissed the petition. It was contended that the later G.O. did not expressly or by implication repeal or substitute the earlier G.O. and that the lease given to the petitioner was protected by the earlier G.O.

Held:- The recitals in G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988 with reference to the earlier G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979 would have the effect of superseding the earlier policy it has taken in G.O.Ms.No.1220, dated 7.11.1979. Therefore, the petitioners cannot place any reliance on G.O.Ms.No.1220, dated 7.11.1979 in support of their claim that the petitioners acquired a right to have a lease of the forest land for 15 years on the ground that the deceased first petitioner had a valid lease on the date of issue of G.O.Ms.No.1220. Admittedly, in the present case, the period of lease granted in favour of the deceased first petitioner expired on 4.7.1989. G.O.Ms.No.778, Forests and Fisheries Department came into force with effect from 1.7.1988 and therefore, only the said G.O.775 will apply to the case of the deceased first petitioner when he applied for the renewal of the lease on 1.2.1989. In those circumstances, the second respondent by the order challenged in the petition relying on G.O.Ms.No.779, dated 1.7.1988 rightly refused to renew the lease of the forest land in favour of the deceased first petitioner. Taking note of the above position the learned single Judge rightly dismissed the writ petition. *[Para 8]*

Appeal under Clause 15 of the Letters Patent against the order of Raju, J., dated 12.3.1992 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.8549 of 1989 presented under Art.226 of the Constitution of India to issue a writ of *certiorarified mandamus* calling for the records relating to Na.Ka.No.1664 of 1989 A-2, dated 16.5.1989 on the file of the second respondent herein and quash the said order and direct the respondents herein to treat Lease No.131 of the petitioner herein in Pambar

undeveloped Reserve Forest originally Bodinaickanur Range now Kodaikanal Range of an extent of 16.25 acres as fresh lease for a period of 15 years from 5.7.1989.

V.S.Ramakrishnan, for Appellant.

The Order of the Court was made by

Somasundaram, J.: The second petitioner in W.P.No.8549 of 1989 is the appellant in this writ appeal. The respondents in the said writ petition are the respondents in this writ appeal. For the sake of convenience, the parties are referred to in this judgment as per their nomenclature in the writ petition.

2. The deceased first petitioner K.Balu Chettiar was the successful bidder in the auction for the sale of the right to do cardamom cultivation and was granted lease of forest lands measuring 16.25 acres in Pambar undeveloped Reserve forest of Bodinaickanur Range (Now Kodaikanal range), with effect from 5.7.1964 for a period of 25 years. The said lease by efflux of time, came to an end on 4.7.1989. On 1.2.1989 the said Balu Chettiar submitted an application for renewal of the lease for a further term, treating the renewal as a fresh lease in terms of G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979. The second respondent by the order dated 16.5.1989, declined to renew the lease on the ground of subsequent government orders and the revised policy of the State Government and called upon the deceased Balu Chettiar to surrender possession of the forest land to the forest ranger concerned. The first petitioner again pursued his claim by submitting his further application dated 23.5.1989 and inasmuch as the first petitioner was not successful in his attempt, he approached this Court by filing W.P.No.8549 of 1989, projecting the following prayer:

> "For the reasons stated in the accompanying affidavit the petitioner herein prays that this Hon'ble Court may be pleased to issue a writ of *certiorarified mandamus* or any other appropriate writ, order of Direction in the nature of a writ, calling for the records relating to Na.Ka.No.1664 of 1989 A-2, dated 16.5.1989 on the file of the second respondent herein and quash the said order and direct the respondents herein to treat Lease No.131 of the petitioner herein in Pambar undeveloped Reserve Forest originally Bodinaickanur Range now Kodaikanal Range of an extent of 16.25 acres as fresh lease for a period of 15 years from 5.7.1989 and pass such further or other orders as this Hon'ble Court may deem fit and proper and thus render justice."

3. During the pendency of the writ petition, the first petitioner Balu Chettiar died and in W.M.P.No.22193 of 1989, the second petitioner who is the wife and the third petitioner who is the son of the deceased first petitioner came to be substituted as petitioners 2 and 3 by the order dated 18.1.1990.

4. The respondents filed a counter affidavit contending that the Government Order dated 7.11.1979 did not assure any grant of fresh lease in favour of the first petitioner and the G.O.Ms.No.1220, dated 7.11.1979, only declared that the existing lease on expiry will be treated as grant of fresh leases and that the grant of fresh leases would depend upon the person concerned fulfilling the conditions prescribed in G.O.Ms.No.1220, dated 7.11.1979. The respondents further contended that the subsequent G.O.Ms.No:779, Forests and Fisheries Department, dated 1.7.1988 alone will apply to the grant of lease on and after 1.7.1988 and that no lease of the forest land could be granted after the issue of G.O.Ms.No.779. It is the further case of the respondents that in view of the subsequent policy decision taken by the Government not to grant leases of forest lands for cardamom cultivation, the petitioners are not entitled to the relief claimed in the writ petition.

5. Mr.V.S.Ramakrishnan, the learned counsel for the petitioners relying on G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979, urged before the learned single Judge that in respect of leases which were current at the point of time when G.O.Ms.No.1220, dated 7.11.1979 was issued, the lease concerned have to be dealt with and regulated only in terms of the said G.O. and the subsequent G.O.Ms.No.779, Forests and Fisheries Department, dated 11.7.1988 would apply only to new leases and not to those leases which were already covered by G.O.Ms.No.1220 of 1979, dated 7.11.1979. The learned counsel for the petitioners further contended before the learned single Judge that the lessees like the lease in favour of 1st petitioner are given protection by G.O.Ms.No.1220, dated 7.11.1979, by providing 15 years lease in their favour and therefore, the respondents are bound to treat the lease in favour of the 1st petitioner in respect of 16.25 acres of forest land as a

fresh lease for a period of 15 years from 5.7.1979. The learned single Judge found no warrant to accept the pleas of the learned counsel for the petitioners and dismissed the writ petition. This writ appeal is directed against the order of the learned single Judge.

6. Mr.V.S.Ramakrishnan, the learned counsel for the petitioners reiterated, before us, the very same contentions urged before the learned single Judge and further submitted that on 5.7.1964, a lease of forest land measuring 16.25 acres was granted in favour of the deceased first petitioner for a period of 25 years; the said period of 25 years expired by the efflux of time on 4.7.1989. On 1.2.1989; the deceased first petitioner applied for renewal of the lease for a further term treating that the renewal as a fresh lease in terms of G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979, the said G.O.Ms.No.1220, dated 7.11.1979 has not been expressly or by implication repealed or substituted; the lease in favour of the deceased first petitioner is given protection by G.O.Ms.No.1220, dated 7.11.1979, and as per the terms of G.O.Ms.No.1220, the petitioners are entitled to have a fresh lease for a period of 15 years from 4.7.1989. The learned counsel for the petitioners further contended that the subsequent G.O.No.779, dated 1.7.1988 would apply only to new leases and not to those which are already covered by G.O.Ms.No.1220, dated 7.11.1979.

7. To appreciate the contention of the learned counsel for the petitioner, it is necessary to refer to the relevant clause in G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979, relied on by the learned counsel for the petitioners which runs as follows:

> "There may be cases where the lease is already in force according to earlier orders in excess of 15 years. In all such cases the lease will expire after the current period is over and thereafter it will be treated as a fresh lease subject to the present conditions, for a period of 15 years only and subject to the eligibility of the persons concerned."

It must be remembered that subsequently, the Government issued G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988 on the subject of grant of lease of forest land for cultivation of cardamom, after reviewing the policy which was in force earlier. As pointed out just now, the Government reviewed the policy which was in force before the issue of G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988 and on the basis of which the lease of forest land for cardamom cultivation to private persons was granted. The revision of the policy was necessitated because of the reasons stated in G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988 in the following terms;

> "Excessive use of fertilizer application and pesticides pollutes the soil and the water, affecting the health of environment. Keeping the ground in a loose condition by removing all ground flora on the pretext of elimination of weed growth for promoting the growth of cardamom adversely affects the soil edaphic conditions peculiar to semi ever green and evergreen forests, with far-reaching consequences. Hence it is considered necessary to re-examine the whole issue from ecological angles of cropping system under the fragile mountainous evergreen climax forests and see whether the cardamom growers can be gradually persuaded to give up cardamom cultivation eventually. The question of optimising yield should not be aided at, since it goes against the basic tenets of maintaining this fragile ecosystem itself. Hence it has to be considered whether it should be supported as a scheme for boosting up cardamoms production by private growers at the expenses of the general well-being and health of the fragile eco-system, in the larger national interests and they constitute the watershed of rivers emanating from such tracts.
>
> While examining the proposal it has been considered that in view of the changed circumstances, no forest land may be leased out for cultivation of cardamom or any other crop in future in view of the policy laid down by the Forests Conservation Act, 1980, of the Government of India. The Chief Conservator of Forests had been consulted in the matter and he has agreed to the above view."

In view of the reasons extracted above for changing its policy the Government in G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988, directed that no forest land be leased for any cultivation purpose including cardamom cultivation.

8. In *S.Balasubramaniam v. The State of Tamil Nadu and others, W.P.No.19 of 1990, dated 8.1.1990*, a Division Bench of this Court, to which one of us

is a party (Nainar Sundaram, J., as he then was), while upholding the constitutional validity of G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988, has observed as follows:

"The reasons for the revision of the policy have been clearly spelt out. The same are intelligent and cogent. It is also not the case of the appellant that after the issuance of the impugned Government Order any private party has been given a lease, and therefore the charge against the Government Order as levelled in the petition has to fail. It is settled position that the State is obliged to protect the ecological balance and preserve the green forests from being exploited and eroded. If in the past the Government had allowed private leases, but has now decided, for the purpose of promoting the growth of the green forest and preserving the flora and the ecological balance, not to allow the exploitation of the forest land any further, no fault can be found with the same. In our opinion, it is not proper to make the Government a slave or prisoner of its policy once made for all times to come, particularly when revision of policy is in the interest of the State, the preservation of forests and ultimately for the benefit of the public at large. The interest of an individual cannot be preferred over the rights of the general public and the State. Preservation of forests, which is the green wealth of the nation, cannot be frowned upon, but deserves to be encouraged. The grievance of the petitioner that the policy should not have been reviewed has no merits and deserves notice only to be rejected. The revised policy applied to all equally and therefore the charge of discrimination is futile. In the above decision, the Division Bench of this Court taking note of G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988 repelled the contention of the appellant in that case, that the first renewal after the expiry of the original lease period is automatic and renewal should be granted. The ratio of the decision in W.A.No.19 of 1990 directly applies to the facts of the present case and therefore, the claim of the petitioner either for renewal of the lease as such or for a fresh lease for a further period of 15 years in terms of G.O.Ms.No.1220, dated 7.11.1979, cannot be countenanced. G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988 after specifically referring to the earlier policy of the Government with regard to the grant of leases of forest lands for cardamom cultivation as laid down in G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979, states that the policy with regard to the lease of Forests land for cultivation of cardamom has been reviewed and the Government after reviewing its earlier policy issued the said G.O."

The recitals in G.O.Ms.No.779, Forests and Fisheries Department, dated 1.7.1988, with reference to the earlier G.O.Ms.No.1220, Forests and Fisheries Department, dated 7.11.1979, would have the effect of superseding the earlier policy it has taken in G.O.Ms.No.1220, dated 7.11.1979. Therefore, the petitioners cannot place any reliance on G.O.Ms.No.1220, dated 7.11.1979 in support of their claim that the petitioners acquired a right to have a lease of the forest land for 15 years, on the ground that the deceased first petitioner had a valid lease on the date of issue of G.O.Ms.No.1220. Admittedly, in the present case, the period of lease granted in favour of the deceased first petitioner expired on 4.7.1989. G.O.Ms.No.779, Forests and Fisheries Department, came into force with effect from 1.7.1988 and therefore, only the said G.O.779 will apply to the case of the deceased first petitioner when he applied for the renewal of the lease on 1.2.1989. In those circumstances, the second respondent by the order challenged in this petition, relying on G.O.Ms.No.779 dated 1.7.1988 rightly refused to renew the lease of the forest land in favour of the deceased first petitioner. Taking note of the above position, the learned single Judge rightly dismissed the writ petition. We cannot take exception to the view taken by the learned single Judge. There is no merit in this writ appeal and the same is liable to be dismissed. Accordingly it is dismissed.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Nainar Sundaram* and *Swamidurai, JJ.*

W.A.No.36 of 1991 *11th June, 1991.*

Periasamy, Minor, represented by his father and natural guardian Kandasamy *...Appellant*

v.

The Government of Tamil Nadu represented by its Secretary, Social Welfare Department and another *...Respondents.*

Tamil Nadu Land Acquisition Rules, Rule 3(b) and Explanation - Scope - Land acquisition proceedings - Social Welfare Department requiring land - Procedure prescribed in Rule 3 if applicable.

A notification under Sec.4(1) of the Land Acquisition Act was issued by the Social Welfare Department. It was contended in a writ petition, that the Social Welfare Department could not be considered as Revenue Department and hence the requirements of the Rule 3 of Tamil Nadu Land Acquisition Rules could not be dispensed with. It was rejected. In appeal, the same contention was taken.

Held:- If in fact the Department requiring the land is one concerned with administration of the affairs of the Harijan Welfare and Backward Classes or in other words factually manning or administering the affairs concerning Harijan Welfare and Backward Classes, the court should not be tied down to the prevailing bare nomenclature of the Departments and it should go only by the factual aspects of the administration. That should be the legitimate guideline to work out Rule 3(b). If the Social Welfare Department only is in charge of the affairs of the Harijan Welfare and Backward Classes, certainly, that alone will be the Department of Harijan Welfare and Backward Classes within the meaning of and for the purposes of the Explanation to 3(b) of Tamil Nadu Land Acquisition Rules. The specific and categoric stand taken by the respondents and that is not being disputed before the court, is that the Social Welfare Department alone manned and administered the affairs of the Harijan Welfare amongst other subjects. *[Para 4]*

Case referred to:

Annamalai v. The Collector of Ramanathapuram, (1988)2 M.L.J. 398.

Appeal under clause 15 of the Letters Patent against the order of S.Ramalingam, J., dated 19.11.1990 and made in the exercise of the Special Original Jurisdiction of the High Court in W.P.No.600 of 1983 presented under Art.226 of the Constitution of India to issue a writ of *mandamus* forbearing the respondents from proceeding further with the acquisition of the land of the petitioner in Survey No.184/2-A of Periamanali village, Thiruchengodu Taluk, Salem District of an extent of 0.70 acres pursuant to Sec.4(1) Notification issued in G.O.Ms.No.2573, Social Welfare, dated 25.10.1982 and published at page 101 of Part II, Sec.2 of Tamil Nadu Government Gazette No.44-A, dated 17.11.1982 on the file of the 1st respondent and the order of the 2nd respondent in R.C.N.158/81-A, dated 18.12.1982 in so far as they relate to the petitioner.

K.Doraisami, Senior Counsel for *M/s.Muthumani Doraisami, V.N.Mohanraj* and *R.Kottravel,* for Appellant.

Mrs.M.Gomathi, Government Advocate, for Respondents.

The Judgment of the Court was delivered by

Nainar Sundaram, J.: This writ appeal is directed against the order of the learned single Judge in W.P.No.600 of 1983. The successor-in-interest of the petitioner in W.P.No.600 of 1983 is the appellant in this writ appeal. The respondents in this writ appeal are the respondents in the writ petition. For the sake of convenience, we shall refer to the parties as per their nomenclature in the writ petition.

2. The petitioner challenged the land acquisition proceedings. The only grievance expressed on behalf of the petitioner before the learned single Judge who heard and disposed of the writ petition, was that compliance with Rule 3(b) of the Tamil Nadu Land Acquisition Rules, hereinafter referred to as the Rules, would be skipped over taking cover under the Explanation to that rule, introduced by G.O.Ms.No.996, Revenue, dated 19.5.1976. We will presently look into the scope of the said rule along with the Explanation so as to understand the grievance expressed on behalf of the petitioner. Suffice it to state at this juncture that this grievance of the petitioner was not countenanced by the learned single Judge and as a result the writ petition was dismissed.

3. Before us, the very same grievance is being

expressed by Mr.K.Doraisami, learned Senior Counsel appearing for the petitioner. Rule 3(b) runs as follows:

"Rule 3 ......

(b) If any objections are received from a person interested in the land and within the time prescribed in Sub-sec.(1) of Sec.5-A, the Collector shall fix a date for hearing the objections and give notice thereof to the objector as well as to the department or company requiring the land where such department is not the Revenue Department. Copies of the objections shall also be forwarded to such department or company. The department or company may file on or before the date fixed by the Collector a statement by way of answer to the objections and may also depute a representative to attend the enquiry."

As per the language of the said rule, when objections are received from a person interested in the land and within time prescribed under Sub-sec.(1) of Sec.5-A of the Land Acquisition Act I of 1894, hereinafter referred to as the Act, the Collector shall fix a date for hearing the objections and give notice thereof to the objector as well as to the Department or Company requiring the land, where such Department is not the Revenue Department. The said rule further requires that copies of the petition shall be forwarded to such Department or Company. The implication of the said rule is that in case where the Department requiring the land is the Revenue Department, the above requirements need not be complied with. By G.O.Ms.No.996, Revenue, dated 19.5.1976, the following explanation was introduced to Rule 3(b):

"*Explanation:* For the purpose of this sub-rule, the Revenue Department shall be deemed to include the departments of Harijan Welfare and Backward Classes at the district level."

The result of the explanation is, that Departments of Harijan Welfare and Backward Classes at the District level will also fall within the Revenue Department for the purpose of Rule 3(b); and in such a case, the requirements of Rule 3(b) need not be complied with.

4. What was contended before the learned single Judge and which contention again is being pressed forth before us, is that the notification under Sec.4(1) of the Act has been issued by the Social Welfare Department and it must be taken to be the Department requiring the land and it is not the Revenue Department; and the respondents could not take cover under the Explanation which equates only the Departments of Harijan Welfare and Backward Classes as Revenue Department to skip over compliance with Rule 3(b). Of course, this contention has been repelled by the learned single Judge. If in fact the Department requiring the land is one concerned with administration of the affairs of the Harijan Welfare and Backward Classes or in other words, factually manning or administering the affairs concerning Harijan Welfare and Backward Classes, we do not think that we should be tied down to the prevailing bare nomenclature of the Departments; and we should go only by the factual aspects of the administration. That should be the legitimate guideline to work out Rule 3(b). If the Social Welfare Department only is in charge of the affairs of the Harijan Welfare and Backward Classes, certainly that alone will be the Department of Harijan Welfare and Backward Classes within the meaning of and for the purposes of the Explanation referred to above. The specific and categoric stand taken by the respondents, and that is not being disputed before us, is that the Social Welfare Department alone manned and administered the affairs of the Harijan Welfare amongst other subjects. Further, when we peruse the notification under Sec.4(1) of the Act, we find that the acquisition is for Arunthathiars of the locale and the authorisation has been given to the Special Tahsildar (Adi Dravidar Welfare) to exercise the powers under the Act.

5. A view similar to what we have expressed above has been taken by a Bench of this Court in *Annamalai v. The Collector of Ramanathapuram, (1988) 2 M.L.J. 398.* The reasonings expressed by the learned Judges of the earlier Bench, we respectfully adopt to repel the attempt to get over the implications flowing from the explanation referred to above. This being our view, there is no warrant for interference in Writ appeal and accordingly this writ appeal fails and the same is dismissed. No costs.

B.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[Special Original Jurisdiction]

Present: *K.S.Bakthavatsalam, J.*

W.P.No.1778 of 1990 *25th March, 1992.*

K.G.K.Prabha ...*Petitioner*
v.
The State of Tamil Nadu, represented by the Secretary to Government, Department of Education, Madras and others ...*Respondents.*

Public Services - Employment - Oral interview test, if can be relied upon as an exclusive test - Only three to five minutes allotted to each candidate in interview and marks awarded - Oral interview, if vitiated. Following the principle laid down by the Supreme Court in *Periakaruppan v. State of Tamil Nadu, (1971)1 S.C.C. 38,* in the matter of public employment, the oral interview test should not be relied upon as an exclusive test but it may be resorted to only as an additional supplementary test. As the interview in the present case is only an interview and not a written test-cum-interview, the principle laid down in the decision of *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722,* may apply to the facts of the case on hand. As such it has to be held that the oral interview must be held to be vitiated and the selection made in this case is arbitrary. *[Para 11]*

Cases referred to:
Munindra Kumar v. Rajiv Govil, (1991)3 S.C.C. 368; Mohinder Sain Garg v. State of Punjab, (1991)1 S.C.C. 662; Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722: (1981)1 L.L.J. 103; Vikram Singh v. Subordinate Services Selection Board, (1991)1 S.C.C. 686; R.Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823; A.Periakaruppan v. State of Tamil Nadu, (1971)1 S.C.C. 38.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *declaration,* declaring that the Selection of Secondary Grade Assistants to fill up the vacancies in Kanyakumari District for the year 1989 made by the respondents 2 to 4 as illegal and *ultra vires* of the Constitution.

K.Chandru, for Petitioner.
B.Radhakrishnan, Government Advocate, for Respondent Nos.1 to 5.
V.K.Sethukumar, for Respondent No.6.

The Court made the following

ORDER: The prayer in the writ petition is as follows:

> "......to issue appropriate writs, orders or directions and in particular issue a writ in the nature of declaration declaring that the selection of secondary grade assistants to fill up the vacancies in Kanyakumari district for the year 1989 made by respondents 2 to 4 as illegal and *ultra vires* of the Constitution, award exemplary costs....."

2. The petitioner having passed S.S.L.C. during the year 1982 underwent secondary grade training at St.Lawrence Higher Secondary School, Madathattavilai, Kanyakumari District after having passed Higher Secondary Course in the year 1984. She came out successful during the year 1987 and got herself registered in the employment exchange. It seems that she was called for interview twice in the year 1988 for appointment as secondary grade assistant, but she was not selected. The State of Tamil Nadu, the first respondent herein, has prescribed guidelines for the purpose of recruitment to the post of secondary grade teachers by G.O.Ms.No.909, Education, dated 27.5.1988 and marks were allotted for various categories.

3. The petitioner alleges in the affidavit filed in support of the writ petition that during the year 1987, the second respondent herein recruited secondary grade teachers for over 500 posts from all over the State and that the selection was made on a centralised basis for the entire State. It is also alleged that in respect of the said selection list of the respondents, the names of those selected candidates were not removed from the live employment register maintained by the fifth respondent, that the fifth respondent deliberately kept the live register with names of employed teachers alive, that it acted contrary to the rules and regulations, and that when the second respondent called for names for filling up over 150 vacancies in primary and middle schools in Kanyakumari district, the fifth respondent sent names including names of persons who are already holding secured employments elsewhere. It seems that the petitioner was one of the candidates who was called for by the third respondent and that the interview

was fixed on 2.9.1989. It is stated in the affidavit that to select the teachers to fill up the vacancies, a strange procedure was adopted, that the fourth respondent conducted the interview lasting 3 to 5 minutes for each candidate and that on each day 150 persons were asked to appear for the interview. It is also stated in the affidavit that in the said interview, the petitioner was questioned two questions, that she answered both the questions correctly, that the fourth respondent gave marks only in pencil and that there was no record of procedures kept with her with reference to the questions asked and the answers obtained from candidates. It is also alleged in the affidavit that the interview is a farce one, that the entire selection list was tinkered with by the second respondent who only sent the final list. It is also alleged in the affidavit that the sixth respondent herein who got selected, has done her Plus Two course and also teacher training in the vocational stream and got registered herself in the employment exchange only in the year 1989. It is also stated in the affidavit that several irregularities have taken place in the selection made for the post of secondary grade teachers, that the interview conducted by the fourth respondent under the orders of the second respondent was only a farce, and that for the head relating to general knowledge which carries 8 marks and personality and bearing for 5 marks it is largely left to the whims and fancies of the fourth respondent to award marks. It is also stated in the affidavit that the very concept of awarding marks in pencil and granting 3 to 5 minutes for an interview, there can hardly be any selection worth mentioning its name. It is also alleged in the affidavit that the interview marks alone were to tilt the balance in favour of the candidates, and that if it is so such an interview has to be stated as arbitrary and violative of Arts.14 and 16 of the Constitution. It is alleged by the petitioner in the affidavit that two teachers, with X standard and vocational training for Secondary Grade teacher and who were registered only in the year 1988, that the whole selection process conducted for selecting the teachers smacks of a scandal and that the entire selection process is vitiated on account of favouritism, nepotism shown by the respondents in favour of selected candidates.

4. Notice of motion has been ordered by Srinivasan, J. on 16.2.1990.

5. By order of this Court in W.M.P.No.2377 of 1990 dated 13.2.1990 a notice has been published in the newspapers under Rule 2-B so as to put on notice all the candidates who got selected in the said interview.

6. Two counter-affidavits have been filed in this writ petition, one by respondents 1 to 4 and another by the 5th respondent.

7. It is stated in the counter affidavit filed by respondents 1 to 4 that during the academic year 1989-90, the selection of secondary grade teachers among the candidates sponsored by the concerned District Employment Officer was entrusted to the Chief Educational Officer of another district or any other equivalent officer to the post of Chief Educational Officer, that the fourth respondent herein was nominated as an officer to hold the interview of the candidates for the selection to the post of secondary grade teachers in Kanyakumari district, that the fifth respondent sponsored 1905 candidates for interview, that 1733 candidates were interviewed by the fourth respondent in a period 13 days at 133 candidates per day, that only 116 candidates were selected to the post of secondary grade teachers purely on merit and that the candidates were selected on merit after testing their aptitude for the requisite post of a teacher and on their other qualifications. It is also claimed in the counter affidavit that the Government of Tamil Nadu by G.O.Ms.No.636, Education Department, dated 6.6.1989 have stipulated certain guidelines for recruitment of teachers and prescribed certain marking systems to be adopted for selection to the post of secondary Grade Teachers, that there are opportunities for candidates employed in private managements to register their names in the employment exchange after getting 'no objection certificate' from the employers concerned, that the petitioner has not given any specific instance in which candidate employed in Panchayat Union School in other districts has appeared for interview to the post of Secondary Grade Teachers in Kanyakumari District in the year 1989. The allegation that the fifth respondent has deliberately kept the employment numbers of the candidates alive who were already selected by the second respondent and posted in other district so as to enable to appear for the interview for getting employment in Kanyakumari district is denied in the counter affidavit. It is pointed out that the names of employed candidates will remain in the live register only until the fact of appointment was

brought to the notice of Employment Officer. It is also claimed in the counter affidavit that the fourth respondent issued check-slips to all the candidates, who attend the interview to fill up the particulars regarding their waiting in the employment exchange, previous experience, possessing of higher qualifications, proficiency of the candidates in the public examination, general knowledge and personality etc. to assess the marks as per the guidelines prescribed in G.O.Ms.No.636, Education Department, dated 6.6.1989 for the selection of candidates for the year 1989 and that there is no Government Order to the effect that those who were already in employment should not be selected. It is also pointed out in the counter affidavit that the interview time allotted for questioning 3 to 5 minutes, that the questions were asked to find out the aptitude of the candidate for the post of Secondary Grade Teacher, that marks were awarded only in pen and not by pencil, that there is no necessity to keep a record of questions asked and the answers obtained and that it was only an oral interview and not a written examination. In so far as the 6th respondent's selection is concerned, it is pointed out in the counter affidavit that she answered all the questions in general knowledge very well and scored 8 marks, that she got 5 marks for personality apt test, for her marks in the secondary grade teacher training certificate, she got five marks and one mark has been awarded for waiting in the employment exchange totalling 19 marks and as such she got selected. A tabular column is given in the counter affidavit to show as to how the reservation policy is maintained. It is further claimed in the counter affidavit that the petitioner has not given any specific instance in which candidate employed in Panchayat Union School in other district has appeared for interview to the post of secondary grade teacher in Kanyakumari district in the year 1989.

8. With regard to the three candidates mentioned by the petitioner in the affidavit, it is pointed out in the counter affidavit that those candidates obtained 19, 20 and 19 marks respectively and as such they were got selected. It is further claimed in the counter affidavit that the questions were prepared well in advance, that the interview was conducted properly and that the petitioner's statement that the interview was only a farce is a statement out of frustration and that the interview was conducted observing the rules and regulations in force. It is further claimed in the counter affidavit that marks were awarded only by pen and not by the pencil, that 3 to 5 minutes were enough to test the aptitude of the candidate to the post of Secondary Grade Teacher, that during the interview marks were awarded for waiting in employment exchange, previous experience, proficiency, higher qualifications and extra curricular activities. The allegation of the petitioner that one G.K.Asha and T.Syamala had registered their names in the employment exchange only in the year 1988 is denied in the counter-affidavit stating that they were registered in the year 1987. It is further claimed in the counter affidavit that the petitioner has got only 12 marks, securing 2 marks for long waiting in the employment exchange, 5 marks for proficiency, 3 marks for personality bearing, and 2 marks for general knowledge. It is further claimed in the counter affidavit that the candidates of forward and backward community who have obtained marks from 18 and above has alone been selected, that the petitioner has got only 12 marks and that there is no justification to select the petitioner.

9. The fifth respondent has filed a separate counter affidavit in which it is claimed that the petitioner has registered her secondary grade training course certificate at District Employment Office, Nagercoil on 10.6.1987, that she was nominated twice in the year 1988 and that for the present selection of the year 1989, which is impugned herein, the petitioner's name was sponsored. It is also claimed in the counter affidavit that the names of the persons who secured employment were removed from the Live Register only on receipt of intimation regarding their selection and appointment either from the employer or from the candidate himself, that in the absence of the same, the index cards of those candidates cannot be removed from the liver register. It is also pointed out in the counter affidavit that the appointed candidates will not be considered again for nomination unless the candidates who seek re-registration of their names again in the role furnishes the order of termination of service. It is also stated that the employment exchange will not keep the live register with the name of the employed teachers alive at any point of time, that once the result of the selection is received from the employers, registration cards of the candidates who are appointed by the employers, will be removed from the live register. It is also

pointed out that in response to the notification of the third respondent dated 1.6.1989, the fifth respondent sponsored the names of 1908 candidates including that of the petitioner to the third respondent, that the 6th respondent herein has registered with the 5th respondent in the year 1988; that she was nominated alongwith others to the third respondent under Serial No.1359, that she was selected for appointment, that it was not deliberate and that only on the averments made in the affidavit it was brought to light. With regard to other three candidates it is pointed out in the counter affidavit that the fifth respondent herein has sponsored the said candidates as it has no information on its records to the effect that the said persons were already employed elsewhere. It is further claimed in the counter affidavit that the petitioner's name was sponsored along with other candidates and that the fifth respondent has not done any injustice to the petitioner.

10. Mr.K.Chandru, the learned counsel appearing for the petitioner contends that the interview marks fixed by the Government are on the higher side, especially on the heads of personality and bearing and for general knowledge, which according to the learned counsel appearing for the petitioner is vague. The learned counsel also points out that out of 40 marks in the interview, that 13 marks were allotted for under two heads *i.e.* personality bearing and general knowledge without any basis, that an interview of 2 to 3 minutes will tilt the balance in favour of anybody and as such the entire selection has to be quashed. The learned counsel cites various decisions of the Supreme Court in *Munindra Kumar v. Rajiv Govil, (1991)3 S.C.C. 368*, in *Mohinder Sain Garg v. State of Punjab, (1991)1 S.C.C. 662* and in *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722: (1981)1 L.L.J. 103*, for the proposition that the interview mark should not exceed a percentage of the mark in a particular *viva voce* test. The learned counsel also points out that this vitiates the entire interview and the system of interview itself is bad. The learned counsel further points out that persons working elsewhere were called for the interview; that the petitioner who has been registered in the year 1987 has not been selected just because the petitioner has got lower marks in view of awarding of marks in the interview, when each candidate is interviewed for not more than three minutes.

11. *Per contra*, Mr.B.Radhakrishnan, the learned Government Advocate appearing for the respondents contends that the interview has been conducted properly, that guidelines were prescribed in G.O.Ms.No.636, Education Department, dated 6.6.1989 to be followed by the Chief Educational Officer for the selection of candidates for the year 1989 that the petitioner has been interviewed and that due to the low marks she could not be selected. The learned Government Advocate also contends that there is no violation of guidelines and that just because the petitioner has not been selected, it cannot be contended that the interview held in the year 1989 is arbitrary and bad in law.

12. I have considered the arguments of Mr.K.-Chandru, the learned counsel appearing for the petitioner and of Mr.B.Radhakrishnan, the learned Government Advocate appearing for the respondents. By G.O.Ms.No.636, Education Department, dated 6.6.1989 for recruitment of teachers for the primary schools, middle schools and high schools, it has been decided by the Government to revise the marking system during 1989-90 and the marks to be awarded are in the following terms:

"1.	Marks for long waiting Employment Exchange.	For every year of waiting one mark subject to a maximum of 6 marks. (6 marks)
2.	Previous experience.	One mark for every year of service duly authenticated by the Inspecting Officers subject to a maximum of 6 marks. (Marks 6)
3.	For higher qualification (i.e. for possession of Higher qualifications. viz. B.A., M.A. etc. 3 marks and for B.Eds. 2 marks)	(Marks 5)
4.	Proficiency	Marks 5 (for 60% and above otherwise 3 marks in respect of Teachers Training Course.
5.	Personality - bearing	Marks 5

6.	General Knowledge.	Marks 8
7.	Social service/handicapped persons and other extra curricular activities having distinctions in District/State levels.	Marks 5
	Total	40 Marks

Whether this system is bad in law is the only question to be decided in this case. In *Mohinder Sain Garg v. State of Punjab, (1991)1 S.C.C. 662*, it has been held that allocation of more than 15 per cent of the total marks for *viva voce* test would be unreasonable and excessive, in a case of composite process of selection comprising written examination and interview of candidates fresh from schools/colleges for public employment. It was a case for the selection of Excise and Taxation Inspectors. In *Vikram Singh v. Subordinate Services Selection Board, (1991)1 S.C.C. 686*, when considering the selection of Excise Inspectors by Subordinate Services Selection Board, the Supreme Court has held that the allotment of 28.5 per cent of the total marks for *viva voce* test is unreasonable. In *Munindra Kumar v. Rajiv Govil, (1991)3 S.C.C. 368*, the Supreme Court has held that where a selection comprises written test, group discussion and interview, maximum marks for group discussion and interview should not exceed 5 per cent and 10 per cent respectively of the total marks. In that case, a Rule fixing 40 per cent of the total marks for group discussion and interview was held to be arbitrary. The abovementioned case was with regard to the selection of Assistant Engineers by the U.P. State Electricity Board. In *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722: (1981)1 L.L.J. 103*, the Supreme Court has held that the allocation of above 15 per cent of the total marks for interview was arbitrary and unreasonable. The case before me is not a written test-cum-oral interview. It is purely an oral interview, wherein 40 marks have been awarded and guidelines have been fixed by the Government as to how the marks should have been awarded under each head. So I am not able to see that the principle laid down by the Supreme Court in the abovementioned cases will apply to the facts of this case. In all the abovementioned cases, a written test was there, apart from oral interview. In that context, the Supreme Court has categorically stated that a *viva voce* test fixing certain per centage of marks is unreasonable. It is not the case here. But in *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722: (1981)1 L.L.J. 103*, after referring to a passage on "public Administration in Theory and Practice" by M.P.Sharma and after referring to a passage from the book on "public Personnel Administration" the Supreme Court has observed as follows (at p.743)

> "......the oral interview method continues to be very much in vogue as a supplementary test for assessing the suitability of candidates wherever test of personal traits is considered essential. Its relevance as a test for determining suitability based on personal characteristics has been recognised in a number of decisions of this Court which are binding upon us. In the first case on the point which came before this Court, namely, *R.Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823*, this Court pointed out--
> In the field of education there are divergent views as regards the mode of testing the capacity and calibre of students in the matter of admissions to colleges. Orthodox educationists stand by the marks obtained by a student in the annual examination. The modern trend of opinion insists upon other additional tests, such as interview, performance in extracurricular activities, personality test, psychiatric tests etc. Obviously we are not in a position to judge which method is preferable or which test is the correct one..... The scheme of selection, however, perfect it may be on paper, may be abused in practice. That it is capable of abuse is not a ground for quashing it. So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, this Court cannot obviously have any say in the matter.
> and on this view refused to hold the oral interview test as irrelevant or arbitrary. It was also pointed out by this Court in *A.Periakaruppan v. State of Tamil Nadu, (1971)1 S.C.C. 38*: "In most cases, the first impression need not

necessarily be the best impression. But under the existing conditions, we are unable to accede to the contentions of the petitioners that the system of interview as in vogue in this country is so defective that selecting candidates for admission on the basis of oral interview in addition to written test ,must be regarded as arbitrary. The oral interview test is undoubtedly not a very satisfactory test for assessing and evaluating the capacity and calibre of candidates, but in the absence of any better test for measuring personal characteristics and traits, the oral interview test must, at the present stage, be regarded as not irrational or irrelevant though it is subjective and based on first impression, its result is influenced by many uncertain factors and it is capable of abuse. We would, however, like to point out that in the matter of admission to college or even in the matter of public employment, the oral interview test as presently held should not be relied upon as an exclusive test, but it may be resorted to only as an additional or supplementary test and, moreover, great care must be taken to see that persons who are appointed to conduct the oral interview test are men of high integrity, calibre and qualification....."

Following the principle laid down by the Supreme Court in the abovementioned case, I am of the view that in the matter of public employment, the oral interview test should not be relied upon as an exclusive test but it may be resorted to only as an additional supplementary test. In this case, the oral interview test has been approved by the Supreme Court, taking into consideration the earlier cases decided by it in *R.Chitralekha v. State of Mysore, A.I.R. 1964 S.C. 1823* and *A.Periakaruppan v. State of Tamil Nadu, (1971)1 S.C.C. 38.* It is also held by the Supreme Court in *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722: (1981)1 L.L.J. 103,* as follows: (at p.746)

".....Now there can be no doubt that if the interview did not take more than 2 or 3 minutes on an average and the question asked had no bearing on the factors required to be taken into account, the oral interview test would be vitiated, because it would be impossible in such an interview to assess the merit of a candidate with reference to these factors....".

It has been further observed as follows: (at p.747)

".....We think that it would also be desirable if the interview of the candidates is tape-recorded, for in that event there will be contemporaneous evidence to show what were the questions asked to the candidates by the interviewing committee and what were the answers given and that will eliminate a lot of unnecessary controversy besides acting as a check on the possible arbitrariness of the interviewing committee......"

Though I am not inclined to accept the arguments of Mr.K.Chandru, the learned counsel for the petitioner with regard to the per centage of marks as arbitrary on the facts of this case as I have already stated that this is only an interview and not a written test-cum-interview, the principle laid down on the decision of *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722,* may apply to the facts of the case on hand. Though in the counter affidavit it is denied that 3 to 5 minutes are enough to interview a candidate and marks were awarded according to the norms fixed by the Government order in G.O.Ms.No.636, Education Department, dated 6.6.1989 the fourth respondent, who has been nominated to hold the interview by the second respondent has not filed any counter affidavit. This is a case similar to that *Ajay Hasia v. Khalid Mujib Sehravardi, (1981)1 S.C.C. 722: (1981)1 L.L.J. 103.* As such it has to be held that the oral interview must be held to be vitiated and the selection made in this case is arbitrary. But I am not inclined to exercise my discretion to quash the entire selection made in the year 1989 since none of the selected candidates has come up before me inspite of the fact that notice has been taken in the newspapers. Since the selection has been taken place in the month of September, 1989 and posting orders were given in the month of December, 1989 and the petitioner thought it fit to approach this Court in the month of February 1990 only, I am not inclined to set aside the entire selection made in the year 1989. In the result, the writ petition is to be ordered as if any one of the Secondary Grade Assistants post is vacant or is kept vacant, it is for the respondents 1 to 4 to absorb the petitioner in that post since no other candidate, who appeared for the interview is questioning the selection before me. The writ petition is ordered accordingly. However, there will be no order as to costs.

B.S. ------ *Petition ordered issuing directions.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Dr.Adarsh Sein Anand, C.J.* and *Raju, J.*

W.A.No.624 of 1988 *22nd January, 1991.*

K.Palaniappan *alias* **K.Subramanian** ...*Appellant*
v.
The Government of Tamil Nadu represented by its Commissioner and Secretary, Revenue Department and others ...*Respondents.*

Board Standing Orders, S.O.15, Para 9, Special Form D - Clause (9) - Government land assigned to Harijan - Prohibition of alienation in favour of a non-Harijan - If unconstitutional.

The Classification is both rational and has a clear nexus with the object sought to be achieved, that is to prevent alienation by exploitation of the Harijans by persons other than Harijans. In view of the settlement of law by the Supreme Court in *Sri Manche Gowda v. State of Karnataka, A.I.R. 1984 S.C. 1151,* which has again been reiterated in *Lingappa Pochanna v. State of Maharashtra, A.I.R. 1985 S.C. 389,* Clause (9) of Special Form D, Board Standing Order 15, paragraph 9 is constitutionally valid. *[Para 6]*

Cases referred to:

Sisili Ammal v. Sundararajan Nairdu, A.I.R. 1946 Mad. 52; State of U.P. v. Zahoor Ahmad, A.I.R. 1973 S.C. 2520; Sri Manche Gowda v. State of Karnataka, A.I.R. 1984 S.C. 1151; Lingappa Pochanna v. State of Maharashtra, A.I.R. 1985 S.C. 389.

Appeal under Clause 15 of the Letters Patent against the order of Samikannu, J., dated 14.3.1988 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.2928 of 1981 presented under Art.226 of the Constitution of India to issue a writ of *certiorari* calling for the records on the file of the 3rd respondent in his proceedings R.Dis.No.19241 of 1980, dated 11.12.1980 and that of the 2nd respondent in D-Dis No.9113 of 1981, dated 21.3.1981 and quash them.

K.Doraisamy, Senior Counsel, for *N.Chinnu,* for Appellant.

V.Sridevan, Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Anand, C.J.: This writ appeal is directed against the judgment of a learned single Judge dismissing W.P.No.2928 of 1981 vide judgment dated 14.3.1988.

2. The facts are short and not in dispute. An area measuring 3.39 acres in Survey No.249 in Karahathahalli village, Palacode Taluk, Dharmapuri District, which was Government land, was assigned to one Akkumaran by the Government *vide* order of assignment dated 31.12.1955. The assignment was subject to certain conditions which have been enumerated in Special Form D of Board Standing Order 15, para 9. The assignment of the land was made out of the land which was reserved for Harijans to Akkumaran who was an Adi Dravida. The land was sold by the assignee, Akkumaran, in favour of one Muthu *vide* sale deed dated 26.11.1979. Muthu also like the assignee was also a Harijan. Subsequently on 4.6.1977 the appellant purchased the land from Muthu.

3. On account of the violation of the terms of the assignment, a show cause notice was issued by the third respondent on 31.10.1980 calling upon Muthu as well as the appellant to show cause as to why the original assignment made in favour of Akkumaran on 31.12.1955 be not cancelled as the alienation had been made in violation of the conditions of assignment. An explanation was submitted by the appellant on 11.12.1980 after considering which the third respondent cancelled the assignment originally made in favour of Akkumaran principally on the ground that sale had been made of the assigned land in favour of a caste Hindu, not a Harijan, in violation of the conditions of assignment contained in Clause (9) in Special Form D, Board Standing Order 15, para 9. The order of cancellation was questioned in appeal, but to no avail. The appellant thereafter came to this Court through W.P.No.2928 of 1981 which, as already stated, was dismissed by the learned single Judge. Hence this appeal.

4. Appearing for the appellant, the learned counsel submitted that the condition imposed in clause (9) of the Special Form D. Board Standing Order 15, para 9 was unreasonable as it would be violative of the rights available to a *bona fide* purchaser under the Transfer of Property Act. The other ground of attack by the learned Counsel for the appellant was that the restriction contained in Clause (9) prohibiting the alienation in favour of a non-Harijan by a Harijan was unconstitutional and therefore liable to be struck down.

5. Both the arguments raised by the learned

counsel for the appellant need not detain us, as the questions are no longer *res integra.* So far as the submission that the condition of restriction on alienation is violative of the provisions of the Transfer of Property Act is concerned, a Division Bench of this Court in *Sisili Ammal v. Sundararaja Nairdu, A.I.R. 1946 Mad. 52,* while dealing with a condition, similar to the one contained in Clause (9) in this case, in the Crown Grants Act, 1895 held that though such a condition would be invalid if the grant was made by a private individual, the condition was perfectly valid in the case of a Crown grant. It was held by the Bench, that the prohibition against alienation was not violative of the provisions of the Transfer of Property Act. The Supreme Court of India also in *State of U.P. v. Zahoor Ahmad, A.I.R. 1973 S.C. 2520,* considered a similar argument and repelled the contention identical to the one raised by the learned counsel for the appellant. The apex court observed as follows:

> "Sec.3 of the Government Grants Act declares the unfettered discretion of the Government to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. The meaning of Secs.2 and 3 of the Government Grants Act is that the scope of that Act is not limited to affecting the provisions of the Transfer of Property Act only. The Government has unfettered discretion to impose any conditions, limitations, or restrictions in its grants, and the right, privileges and obligations of the grantee would be regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law."

Both the aforesaid judgments are the complete answer to the first submission made by the learned counsel for the appellant.

6. Coming not to the second contention raised by the learned counsel for the appellant, suffice it to say that the classification is both rational and has a clear nexus with the object sought to be achieved, that is to prevent alienation by exploitation of the Harijans by persons, other than Harijans. In *Sri Manche Gowda v. State of Karnataka, A.I.R. 1984 S.C. 1151,* the apex Court was considering the vires of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978, which provided for cancellation of alienation in contravention of the conditions relating to the transfer of such assigned land. Before the Supreme Court, the appellants were the purchasers of land which had been originally granted by the State of Karnataka to persons belonging to the Scheduled Castes and Scheduled Tribes under the provisions of law or on the basis of rules or regulations governing such grant. After the coming into force of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978 (Karnataka Act 2 of 1979), notices were issued by the appropriate authority to the transferees of such lands to show cause as to why the lands transferred to them in violation of the terms of assignment should not be resumed for being restored to the original grantees or their legal heirs or for distribution otherwise to the members of Scheduled Castes and Scheduled Tribes. The question about the vires of such a condition was raised before the Supreme Court and it was repelled. The apex Court held that the object of the Act was to protect and preserve the economic interests of persons belonging to Scheduled Castes and Scheduled Tribes and to prevent their exploitation. The Supreme Court found that for the purpose of that Act, the classification has a clear nexus to the object sought to be achieved. The Bench expressed the view that special provisions made for the resumption of "granted" lands, originally granted to the members of Scheduled Castes and Scheduled Tribes and restoration of the same to the original grantees or their heirs and legal representatives and failing them to other members of these communities do not infringe Art.14 of the Constitution. In view of the settlement of law by the Supreme Court which has again been reiterated in *Lingappa Pochanna v. State of Maharashtra, A.I.R. 1985 S.C. 389,* the second ground of attack *viz.*, the unconstitutionality of the restrictions contained in Clause (9) of Special Form D, Board Standing Orders 15, paragraph 9 must also fail and holding that Clause (9) is constitutionally valid, we reject the argument raised to the contrary by Mr.Doraiswamy.

7. For what we have discussed above, we find no reason to interfere with the judgment of the learned single Judge. The writ appeal consequently fails and is dismissed. No costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.M.P.No.13722 of 1990 in S.A.No.1536 of 1984
7th November, 1990.

A.P.S.Bahurudeen and another ...*Petitioners*
v.
Antony and others ...*Respondents.*

Civil Procedure Code (V of 1908), O.23, Rule 1(3)(a) and (b) - Permission to withdraw suit with liberty to file a fresh suit - When can be granted - Application for permission filed in appellate court - Matters to be considered - Sufficient grounds' in clause (b) if to be read ejusdem generis with formal defect - Plaintiff, if can be allowed to adduce fresh evidence or more evidence in a fresh suit.

It has been generally accepted by the courts that permission to withdraw a suit with liberty to file a fresh suit can be granted if the suit has to fail by reason of a formal defect or a ground analogous thereto. But courts are uniform in holding that a plaintiff who has failed to establish his case on merits, is not entitled to as of right to withdraw the suit and file a fresh suit. On a reading of the two clauses in Sub-rule (3) of O.23, Rule 1 of the Code of Civil Procedure, it is clear that the legislature has advisedly used a distinctly different language. While Clause (a) refers to the pending suit which must fail by reason of some formal defect, Clause (b) refers to the suit to be instituted with the leave of the court. If a matter falls under Clause (a), the court is concerned only with the question whether the suit must fail by reason of a formal defect. On the other hand, if Clause (b) is invoked by a party, then the court must address itself to the question whether there are sufficient grounds for allowing the party to institute a fresh suit for the same subject matter or part thereof. Hence it is not correct to say that sufficient grounds' should be read *ejusdem generis* with 'formal defect or that they should be analogous thereto. 'Sufficient grounds' would cover a wider field and not restricted to 'formal defect' or a similar defect. However, when the question arises before an appellate court after the adjudication of the matter on merits by one court or two courts, the test will be whether the court is justified in depriving the defendant of the benefit of a finding rendered in his favour after a full trial. It is well known that when a court grants leave to file a fresh suit on the identical cause of action, the withdrawn suit had no existence in the eye of law. It is not available for any purpose and the parties are relegated to the same position which they occupied before the suit was brought. Hence, the court has to consider in each case when an application is filed in the appellate stage for withdrawing the suit with liberty to file a fresh suit, whether the defendant should be driven back to original position in which he was prior to the filing of the suit, even though he has come out successful after a full trial. Non-joinder of necessary parties is not a formal defect. Permission to withdraw a suit cannot be granted for the purpose of enabling the plaintiff to adduce fresh evidence or more evidence in a fresh suit.

[*Para 28*]

Cases referred to:

Balide Kamayya v. Pragada Papayya, I.L.R. 40 Mad. 259: 5 L.W. 558 (F.B.); Robert Watson and Company v. The Collector of Zillah Rajshahye, 13 M.I.A. 160; Willis v. The Central Railway Company of Canada, A.I.R. 1914 P.C. 249; Aiya Koundan v. Jagan Mandalathipathiar, Gopanna Marudiar, 27 M.L.J. 480: 1 L.W. 726; Kannusami Pillai v. Jagathambal, I.L.R. 41 Mad. 701; R. v. Rayna, (1866) L.R. 1 C.C. 27; Shillito v. Thomson, (1875) L.R. 1 P.B.D. 12; R. v. Edmundson, (1959)2 E. and E. 77; The Queen v. Sprafley, (1856)6 E. and B. 363; Lowther v. Bentinck, 1974 L.R. 19 Eq.C. 166; Kharoa Company Ltd. v. Durga Charan Chandra, (1910)2 C.L.J. 45; Mabulla Sardar v. Rani Hemangani Debi, (1910)2 C.L.J. 512; Lakshminarayana Tentri v. Ramachandra Tentri, (1918)34 M.L.J. 71; Abdur Rahim following Lutawan v. Lachya, (1914) I.L.R. 36 All. 69; Burathagupta Pentadep v. Thurulapani Rajamma, (1911)1 M.W.N. 105; Mahipati v. Muthu, (1909) I.L.R. 33 Bom. 732; Hriday v. Akshai, (1917)25 C.L.J. 454; Ramachandra Doss v. Rachanna Fakir, (1916)35 I.C. 843; Sai Mahakore v. Shankelchand Shukkabai Saha, A.I.R. 1935 Bom. 26; Ramrao Bhaghantrao Inamdar v. Babu Appanna Samach, A.I.R. 1940 Bom. 121; Narandas v. Raghunathdas v. Santilal Bholabhai, I.L.R. 45 Bom. 377: A.I.R. 1921 Bom. 267; Sivaganinatha Pillai v. S.A. Venkataswami Naicker, A.I.R. 1949 Mad. 295: 61 L.W. 647; Veeraswami v. Lakshmudu, (1951)1 M.L.J. 194: A.I.R. 1951 Mad. 715; Abdul Ghafoor v. Abdul Rahman, A.I.R. 1951 All. 845; Taruchand

Bapuchand v. Gaibiji Ahmed Bagwan, A.I.R.1956 Bom. 632; Mandalathipathian, Aiya Koundan v. Jagan Mandalathipathian, Rakki v. Samaiyan, 78 L.W. 618; Nadipatha v. Peeda Venkataraju, A.I.R. 1966 Mad. 346; Charles Samuel v. Board of Trustees, (1978)2 M.L.J. 243: 91 L.W. 320; Ram Dhan v. Jagat Prasad, A.I.R. 1982 Raj. 235; K.Chinna Vaira Thevar v. S.Varia Thevar, A.I.R. 1983 Mad. 160: 95 L.W. 566; Khatuna v. Ramsewak Kashinath, A.I.R. 1986 Orissa 1; Jagadambal v. Minor Sundarammal, (1940)2 M.L.J. 389; Venkata v. Himmakayala, A.I.R. 1949 Mad. 457; Varadarajulu Naidu v. Narayanaswamy, (1949)2 M.L.J. 457.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to permit the petitioners/appellants to withdraw the suit O.S.No.9392 of 1980 on the file of the Court of the District Munsif, Manamadurai and the Second Appeal No.1536 of 1984 granting liberty to file suit on the same cause of action (S.A.No.1536 of 1984 against A.S.No.147 of 1981 Sub Court, Sivaganga against O.S.No.392 of 1990 D.M.C., Manamadurai).

Abdul Wahab, for Petitioners.

A.Ramanathan and *K.N.Basha*, for Respondents.

The Court made the following

ORDER:- This is an application for permission to withdraw the suit out of which the second appeal has arisen with liberty to file a fresh suit on the same cause of action. The petitioners filed O.S.No.392 of 1980 on the file of District Munsif, Manamadurai for declaration that the suit property is a wakf property and a consequential injunction restraining the respondents from in any way interfering with the peaceful possession of the plaintiffs. The suit has been filed in a representative capacity by the plaintiffs for themselves and as representatives of Muslim residents of the village of *Rajagopuram*, Sivaganga Taluk, Ramnad District. Defendants 1 and 2 were impleaded as representatives of the Christian community residents of the said village. The third defendant was the Tamil Nadu Wakf Board. The courts below negatived the claim of the petitioners and dismissed the suit. One of the grounds on which the suit has been dismissed is that the State Government is a necessary party and the non-joinder of the Government is fatal to the suit. On the merits also, the courts found the petitioners failed to establish their claim that the suit property is a wakf property in their possession. The concurrent judgments of the courts below were challenged in the second appeal.

2. The second appeal was heard at some length and on 11.9.1990 the arguments concluded and I directed the matter to be posted for judgment on 14.9.1990. On that date, a representation was made by learned counsel for the petitioners that he had advised his clients to withdraw the suit and the matter was being considered by the members of the community. He prayed for an adjournment. I adjourned the matter to 21.9.1990. There were some subsequent adjournments at the instance of the petitioners and on 19.10.1990 the present petition for withdrawal was filed. The prayer as it stood at that time was for permission to withdraw the second appeal with liberty to file a fresh suit on the same cause of action. When the matter came up on 24.10.1990 for orders, learned counsel for the petitioners realised the mistakes in the prayer and requested for permission to file a supplemental affidavit and correct the prayer in the petition. That was granted and the matter was posted to 26.10.1990.

3. The affidavit filed in support of the petition sets out two grounds in support of the prayer for withdrawal of the suit with liberty to file a fresh suit. The first ground relates to the non-joinder of the Government. It is stated in the affidavit that the petitioners were under the impression that the Government was not a necessary party, as the Government did not object to their possession and enjoyment of the suit property. It is alleged that the petitioners are now advised that the Government should be impleaded as a party, to the suit. The other ground is that the petitioners have been able to obtain four material documents during the pendency of the second appeal which would have considerable bearing on the issues in the suit and in order to produce all the relevant evidence and have a trial, it has become necessary for them to withdraw the suit and file a fresh suit. In the course of arguments learned counsel for the petitioners added a third ground. He submitted that as the prayer for injunction in the suit was made as a consequence to the prayer for declaration, the petitioners are not in a position to get the relief of injunction on the strength of their possession without reference to the title to the property. According to learned counsel, the plaint suffers from a formal defect inasmuch as the prayer for injunction was made as a consequential one instead of it being an independent one. The

contention of learned counsel for the petitioners is that the present suit suffers from formal defects such as non-joinder of parties and inarticulate framing of the prayers. It is also contended that there are other sufficient grounds in this case to permit the withdrawal of the suit and filing of a fresh suit as the petitioners have been able to get hold of material documents, the existence of which was not previously known to them.

4. *Per contra*, learned counsel for the respondents contended that non-joinder of a party is not a formal defect and the discovery of the alleged material documents is not a ground for permitting the suit to be withdrawn. Learned counsel contended that the documents have been filed along with a petition to accept them as additional evidence in the second appeal and they do not help the petitioners in any manner to prove their case on merits. Even if the petitioners had no knowledge of the documents previously, that would not enable them to withdraw the suit at the second appeal stage in order to have a fresh trial with more evidence. It was also argued that the alleged defect in the framing of the plaint in the prayer paragraph is not a defect at all. The relief of injunction has been prayed for as a consequence to the relief of declarations. It was argued that two courts have considered the case on merits and held against the petitioners and if they are permitted to withdraw this suit and file a fresh suit, it would affect considerably the rights vested in the respondents. It was also argued that the only ground on which a suit could be permitted to be withdrawn is that it suffers from a formal defect or defects analogous to it.

5. Counsel on both sides referred to the rulings of this Court as well as other courts laying down the law on the subject of withdrawal of suits at the appellate stage. The relevant provision in the Code of Civil Procedure is found in O.23, Rule 1. It is sufficient for the purpose of this case to refer to Sub-rule (3) which reads as follows:

> "(3) where the court is satisfied,-
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,
>
> It may, on such terms as it thinks fit, grant the plaintiffs permission to withdraw from such suit of such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim."

Though the Rule refers only to a suit, by virtue of Sec.107(2) of the Code of Civil Procedure, an appellate court is also empowered to permit withdrawal of the suit at the appellate stage. A Full Bench of this Court in *Balide Kamayya v. Pragada Papayya, I.L.R. 40 Mad. 259: 5 L.W. 558. (F.B.)*, held that it is open to an appellate court in proper cases, when reversing the decree of the lower court, to give the plaintiff leave to withdraw the suit with liberty to file a fresh suit.

6. It is now well settled that permission to withdraw a suit with liberty to file a fresh suit is governed by O.23, Rule 1(3)(f) the Code of Civil Procedure only and the court is bound to function within the four corners of the Rule. The Sub-rule comprises of two parts. The first part found in Sub-rule (3)(a) refers to a suit which must fail by reason of "some formal defect', while the other part in sub-rule (3)(b) speaks of 'sufficient grounds' for allowing the plaintiff to institute a fresh suit. Divergent views have been expressed as to whether "sufficient grounds" found in clause (b) should be read *ejusdem generis* some formal defect found in clause (a) or independent of clause (a) of O.23, Rule 1(3) of the Code of Civil Procedure. One view is that the words "sufficient grounds" have been used by the Legislature *ejusdem generis* with "formal defect". Another view is that "sufficient grounds" in sub-rule 3(b) need not be "formal defect" and they must be given a wider meaning and scope. A third view which is in between the two extremes has also been expressed that 'sufficient grounds' should mean grounds analogous to formal defects though not of the same genus.

7. The earliest case on the subject which is cited very often is *Robert Watson and Company v. The Collector of Zillah Rajshahye, 13 M.I.A. 160.* In that case, a suit to set aside an auction sale of a *Putnee Talook* for arrears of rent, under Bengal Regulation VIII of 1819, was dismissed for want of evidence on the part of plaintiffs, with a reservation by the court, that the order made was not to be a bar to the plaintiff or any other person who might substantiate their rights, from proceeding to recover. On a fresh suit by the same parties for the same matter, it was held that the reservation was of no effect and the decision in the former suit was a bar to the latter suit as *res judicata* "The Privy Council stated the law thus:

"We have not been referred to any case, nor are we aware of any authority which sanctions the exercise by the County Courts of India of that power which courts of Equity in this Country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a non-suit known in those courts. There is a proceeding in these courts called a non suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit, but that seems to be limited to cases of non joinder either of parties or of the matters in contest in the suit, to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but Their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce. In support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them."

It is to be noted that Courts in England granted permission to bring a fresh suit only in cases where the suit failed by reason of some point of form and not in a case where a party failed to produce the relevant evidence and got the suit dismissed on merits.

8. The proposition was reiterated by the Privy Council in *Charles, J. Willis v. The Central Railway Company of Canada, A.I.R. 1914 P.C. 249,* in the following passage:

"It cannot be a matter of right that a plaintiff having put in issue damages already accrued and having attempted to prove them and failed should be at liberty to bring a fresh action in respect of them."

9. In *Aiya Koundan v. Jagan Mandalathipathiar, Gopanna Marudiar, 27 M.L.J. 480: 1 L.W. 726,* a Division Bench comprising of Justice Oldfield and Mr.Justice Seshagiri Aiyar held that 'sufficient grounds' in clause (b) must be *ejusdem generis* with formal defect' in clause (a). However, the Bench observed as follows:

"But whether or not this interpretation of the phrase "sufficient ground" be adopted, we must hold that his discretion was not exercised judicially, since it was exercised inspite of the defendants' opposition to condone defects in the plaintiff's conduct of his case, which were due entirely to his own default and for which no excuse was attempted."

Thus, the Bench did not rely upon the proposition of law for the purpose of deciding that case.

10. That was pointed out and taken advantage of by Justice Sadasiva Ayyar in *Kannusami Pillai v. Jagathambal, I.L.R. 41 Mad. 701.* That case is also decided by a Division Bench to which Justice Oldfield was a party Referring to the ruling in *Aiya Koundan v. Jagan Mandalathipathiar, Gopanna Marudiar, 27 M.L.J. 480: 1 L.W. 726,* Justice Oldfield expressed his disinclination to reconsider the principle that sufficient grounds should be *ejusdem generis* with formal defect. The learned Judge held on the facts that the order of the District Munsif was not one passed in the exercise of judicial discretion. However, the other learned Judge, Justice Sadasiva Ayyar entered into a detailed discussion as to whether 'sufficient ground' should be read *ejusdem generis* with 'formal defect'. It is worthwhile obstructing the relevant passage:

"This doctrine of *ejusdem generis* has, in my humble opinion, been pushed too far in some of the English cases:-

(a) Where the generic words follow specific words in the very same clause of sentence, (b) where the specific words are all of the same genus and not of different genra and (c) where the general object of the Act is not clearly expressed and the intention of the statute is patently opposed to giving the wider meaning to the succeeding words, then alone in my opinion the meaning of the general words ought to be restricted as coloured by the preceding specific terms. New as regards O.23, Rule 1 (old Sec.373), I find that the expression "formal defect occurs in clause (a) of Sub-sec.(2) in a separate sentence relating to the whole suit failing, whereas the expression "other sufficient grounds" occurs in clause (b) which contemplates cases where the suit may not wholly fail but the plaintiff might be put to great inconvenience if he is not allowed to withdraw, which contemplates again cases where only a part of the claim may fail in that same suit if he is not allowed to withdraw with liberty to bring a fresh suit for that part and where if he

is not given such permission, he might be precluded also from bringing a separate suit therefor. Further clause (a) does not mention several things which could be brought under one genus, but it refers to a single class of things as "formal defect" while clause (b) refers to "other sufficient grounds,". There is nothing again clearly indicated in the section itself from which we could infer that the legislature intended to allow withdrawal with permission only in the cases where the suit was led by reason of formal defect or something analogous to a formal defect. Thus in *R. v. Rayne, (1866) L.R. 1 C.C. 27,* it was held that an Act which made it penal to convey to a prisoner in order to facilitate his escape "any mask, dress or disguise or any letter or any other article or then, did not intend to restrict the meaning of the general terms "any other article or thing" by the particular words "disguise or letter" and that therefore a crowbar was also included under the expression 'other article or thing. See also *Shillito v. Thomson, (1875) L.R. 1 P.B.D. 12, R. v. Edmudson, (1959)2 E. and E. 77, The Queen v. Sprafley, (1856)6 E. and B. 363, Lowther v. Bentinck, 1974 L.R. 19 Eq.C. 166.* In *Watson v. The Collector of Rajashahye, 13 M.I.A. 160,* the first suit in which liberty to bring a fresh suit was given was instituted in 1956 and decided in 1957 even before the enactment of the first Civil Procedure Code of 1859 (See Sec.97 of that Code where the provision as to 'withdrawal appears), the suit was again not allowed to be withdrawn, but it was dismissed for want of sufficient evidence and then the Judge said that his order dismissing the suit was "not intended to bar the plaintiffs from proceeding again as if the action had not been brought". The remarks of their Lordships of the Privy Council at page 170 mainly dealt with the procedure of the Courts of Equity in England as distinguished from other courts even in England and could have no reference whatever to the powers of Indian Courts under the provisions of the Civil Procedure Code. I therefore with the greatest respect feel myself unable to agree with the dicta of Mukherji, J., in *Kharoa Company Ltd. v. Durga Charan Chandra, (1910)2 C.L.J. 45* and *Mabulla Sardar v. Rani Hemangani Debi, (1910)2 C.L.J. 512,* that other sufficient grounds" means grounds analogous to a "formal defect". Suppose a case like this; A sues B on a mortgage bond for sale of B's family house within three years of its execution. It is found that it would ruin B's credit and health to have a decree for sale of his dwelling house passed just then and as the security is good and as A has nine years more to sue and as he was paid up his costs, he applies at the request of B and of mutual friends to withdraw that suit with liberty to bring a fresh suit five years afterwards if the money be not paid up meanwhile. Even such an application would have to be refused if the expression "other sufficient grounds" or to something analogous to "formal defect". Again in *Lakshminarayana Tentri v. Ramachandra Tentri, (1918)34 M.L.J. 71 at p. 75,* Mr.Justice Abdur Rahim following *Lutawan v. Lachya, (1914) I.L.R. 36 All. 69,* refused to apply the doctrine of *ejusdem generis* for interpreting the word "otherwise invalid" in Rule 15(c) of Schedule II of the C.P.C. on the ground that the intention of the legislature was to allow an attack on the validity of an award on all other grounds besides those mentioned in the earlier clauses. I think that similar reasons apply to give a wide meaning to words "other sufficient grounds" in O.23, Rule 1, Clause (b), *Kharda Company Ltd. v. Durga Charan Chandra, (1910)2 C.L.J. 45* and *Mabulla Sardar v. Rani Hemangani Debi, (1910)2 C.L.J. 512* and *Burathagupta Pentadep v. Thurulapani Rajamma, (1911)1 M.W.N. 105, Mahipati v. Muthu, (1990) I.L.R. 33 Bom. 732, Hriday v. Akshai, (1917)25 C.L.J. 454, Ramachandra Doss v. Rachanna Fakir, (1916)35 I.C. 843* and *Aiya Koundan v. Jagan Mandalathipathian, (1914)27 M.L.J. 480: 1 L.W. 726,* might have been supported on other grounds and in fact, so far as the cases in this Court are concerned, namely. *Burathagupta Pentader v. Thurlapatti Rajamma, (1911)1 M.W.N. 105,* and *Aiya Koundan v. Jagan Mandalathipathian, (1914)27 M.L.J. 480: 1 L.W. 726,* they were supported on such other grounds principally Mr.Justice Krishnaswami Ayyar says for instance in *Bhurathagupta Pentade v. Thurlapatti Rajamma, (1911)1 M.W.N. 105,* "But even apart from that", that is, the interpretation of the word 'other' in clause (b) of O.23, Rule 1, "that mere inability of the party to prove her case does not appear to me to be a sufficient

ground for giving her leave to institute a fresh suit". So also Mr.Justice Oldfield says in *Aiya Koundan v. Jagan Mandalathipathian, (1914)27 M.L.J. 480: 1 L.W. 726.*

But whether or not this interpretation of the phrase 'sufficient grounds' be adopted, we must hold that this discretion was not exercised judicially."

With respect, I agree with the reasoning of the learned Judge, However, the learned Judge proceeded to hold on the facts of the case that even if the principle laid down in *Aiya Koundan v. Jagan Mandalathipathian, (1914)27 M.L.J. 480: 1 L.W. 726,* was applied, the District Munsif had acted with material irregularity in not exercising the judicial discretion and that his order was rightly not aside by a single Judge of this Court. Consequently, both the Judges concurred in dismissing the Letters Patent Appeal which had come before them.

11. In *Sai Mahakore and others v. Shankelchand Shukkabai Saha and another, A.I.R. 1935 Bom. 26,* Beaumont, C.J., held that there is no scope for applying the *ejusdem generis* rule. He observed as follows:

"To my mind the language of the Rule is quite plain, and there is no scope for the introduction of the *ejusdem generis* Rule. The court must be satisfied either that the suit must fail by reason of some formal defect or that there are other sufficient grounds for allowing the order asked for. If the sufficient grounds with Clause (b) are to be analogous to the grounds specified in Clause (a), it would seem that Clause (b) must be confined to cases in which the court thinks that the suit must fail and on that reading Clause (a) would deal with suits which fail for some formal defect, and Clause (b) with suits which must fail for some defect which is not formal, but is of a similar nature. It seems to me that to read the clause in that way is to ignore the plain language in which it is expressed. I have no doubt whatever that Clause (b) is not limited to cases in which the court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit. No doubt the two clauses must be read together, and one has in Clause (a) an illustration of the sort of reason which the legislature thought would be sufficient, and in that way Clause (a) may, to some extent, limit the generality of the words in Clause (b), but I am not prepared to go further than that in limiting the very Sub-clause (b). I observe that the view I take of the rule was also taken by Martin, J. as he then was in the case of *Narandas Raghunathdas v. Santilal Bholabhai, I.L.R. 45 Bom. 377: A.I.R. 1921 Bom. 267.*

12. A Full Bench of the Bombay High Court concurred with the view taken by Beaumont, C.J., in the above case and held in *Ramrao Bhaghantrao Inamdar v. Babu Appanna Samach, A.I.R. 1940 Bom. 121,* that the grounds contemplated in Clause (b) must be analogous to a formal defect mentioned in Clause (a). The relevant passage in the judgment of the Full Bench reads thus:

"The learned Chief Justice however has added that the two clauses must be read together" and one has in Clause (a) an illustration of the sort of reason which the Legislatures through would be sufficient, and in that way Clause (a) may to some extent, limit the generality of the words in Clause (b) with great respect we concur in this view, which is exactly what we mean by saying that Clause (a) is illustrative of the grounds" referred to in Clause (b) and although the "grounds" need not be ejusdem generis with the grounds mentioned in Clause (a) they must be "at last analogous" to it. The ground in Clause (a) requires that the suit must fail by reason of some formal defect whereas the grounds contemplated in Clause (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect. To determine what grounds are analogous to formal defects, it is necessary to know what defects, are to be deemed formal." The instances of defects "of form" cited by the Privy Council in *Robert Watson and Company v. The Collector of Zillah Rajshahye, 13 M.I.A. 160,* include non joinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject matter of the suit. This shows that the expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not."

13. In *Jagadambal v. Sundarammal, A.I.R. 1941 Mad. 46,* Horwill, J. held that the grounds in clause

(b) must be, if not *ejusdem generis*; with the ground in clause (a), at any rate analogous to it.

14. In *Sivagaminatha Pillai v. S.A.Venkataswami Naicker, A.I.R. 1949 Mad. 295: 61 L.W. 647,* Yahya Ali, J. felt it unnecessary to consider the question whether the expression "other sufficient grounds" in clause (b) was *ejusdem generis* with the expression "some formal defect" in Clause (a). On the facts of the case, the learned Judge held that an appreciable portion of the material evidence had been adduced and the plaintiff found the same to be insufficient to establish the case propounded by him in the plaint and in such a situation if he was allowed to institute a fresh suit on the same subject matter, it would be contrary to the letter as well as the spirit of the rule.

15. In *Venkata v. Himmakayala, A.I.R. 1949 Mad. 457,* Panchapakesa Ayyar, J. held that a court allowing a party to withdraw from a suit with liberty to file a fresh suit or a late stage when arguments also had been addressed in appeal, was bound to give satisfactory reasons falling within O.23, Rule 1(2) of the Code of Civil Procedure, He set aside the order of the court below which has not supported by any reason and remanded the application for fresh disposal.

16. In *Varadarajulu Naidu v. Narayanaswami Naidu, (1949)2 M.L.J. 457,* Horwill, J. held that there must be something in the nature of a formal defect before permission could be granted for withdrawing a suit and filing a fresh suit on the same cause of action.

17. In *The Asian Assurance Co. Ltd. v. Madholal Sindhu, A.I.R. 1950 Bom. 378,* a Division Bench presided by Chagla, C.J. held that non-joinder of parties is not a formal defect contemplated by O.23, Rule 1(2) of the Code of Civil Procedure.

18. In *Veeraswami v. Lakshmudu, A.I.R. 1951 Mad. 715,* Panchapakesa Ayyar, J. held that insufficient evidence or a false genealogical table or even the fraud of plaintiff's vakil will not fall under clause (a) or clause (b) of O.23, Rule 1(2) of the Code of Civil Procedure, being neither a formal defect not "other sufficient grounds". The learned Judge also observed that there is nothing in law forcing a court to give reasons when refusing permission, though it must give reasons when granting permission.

19. A Full Bench of the Allahabad High Court in *Abdul Ghafoor v. Abdul Rahman, A.I.R. 1951 All. 845,* held that the words "other sufficient grounds" in clause (b) covered grounds analogous to those mentioned in clause (a) and if the court purports to exercise discretion under clause (b), but the grounds are not analogous to the defects referred to in clause (a), the decision even though judicial can be interfered with under Sec.115 of the Code of Civil Procedure.

20. In *Taruchand Bapuchand v. Gaibihaji Ahmed Bagwan, A.I.R. 1956 Bom. 632,* Gajendragadkar, J. held that the two clauses (a) and (b) of O.23, Rule 1(2) have to be read by applying the rule of *ejusdem generis* and a cause which is sufficient within the meaning of O.23, Rule 1(2)(b) must be similar or alike to the cause mentioned in O.23, Rule 1(2)(a) of the Code of Civil Procedure. The learned Judge has not referred to the judgment of the Full Bench of that court in *Ramrao Bhagwan Rao Inamdar' case, A.I.R. 1940 Bom. 121.*

21. In *Sambanda Naicker and others v. Ranganayaki Ammal, A.I.R. 1957 Mad. 207: 69 L.W. 767,* Basheer Ahmed Sayeed, J. held that a wider discretion is given to the courts under Clause (b) and the two clauses deal with different situations and not with similar or analogous situations. Referring to the provisions in the Code of Civil Procedure of 1859, the learned Judge observed as follows:

> "The old Sec.97, Civil Procedure Code 1859 provided that "if the plaintiff at any time, before the final judgment, satisfied the court that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit in the same matter, it shall be competent to the court to grant such permission on such terms as to costs or otherwise as it may deem proper.".
>
> This old provision appears to me to have been much more liberal and gave a wider discretion to the court to allow a suit to be withdrawn on any ground that were considered sufficient by the court, where liberty was asked to bring a fresh suit on the same cause of action. But this old section was amended later on and it took the form in which it is now found. In the amended a form a distinction is made between a plaintiff withdrawing a suit and a plaintiff withdrawing from a suit. Whatever the distinction be, it is not clear what exactly was the intention of the legislature when the amendment was made.
>
> Whether the idea was to liberalise the

discretion vested in the court or to narrow it down, we cannot say at this stage. But, however, the fact remains that the trend of the decisions in this Court and also in the Allahabad High Court, as could be gathered from the decision in *Abdul Ghafoor v. Abdul Rahman, A.I.R. 1951 All. 865 (F.B.),* seems to have been to narrow down the scope of the discretion vested in the court permitting a plaintiff to withdraw from a suit with liberty to file a fresh suit on the same cause of action. The tendency does not appear to me to be in consonance with the real object underlying the amended clause. Sub-clauses (a) and (b) seem to deal with two different situations, and not with similar or analogous situations. Otherwise there seems to be no need for having introduced the terms "other and sufficient" in Sub-clause (b) in contra-distinction from the terms contained in Sub-clause (a). Some meaning and significance should be attached in the context in which they appear. The first ground is stated to be the possibility of a failure of the suit by reason of formal defect. If it was the case that any other ground shown for withdrawal of the suit with liberty to file a fresh suit should also be more or less the same or analogous to the formal defect, then the terms other and sufficient" lose all meaning and significance in the context.

The Clause seems to read and convey sufficient meaning even if it is read without the words "other" and "sufficient". Therefore is will not be doing any violence to the language or to the spirit and object underlying the same, if we were we hold that a wider discretion is sought to be given to the courts under Sub-clause (b) than under Sub-clause (a). I do not see any justification to restrict the scope of Sub-clause (b) when the courts is satisfied on other and sufficient grounds to give leave to withdraw on those contained in Sub-clause (a).

Mr.Justice Horwill in two decisions referred to above, namely *Jagadambal v. Minor Sundarammal, (1940)2 M.L.J. 389: A.I.R. 1941 Mad. 46* and *Varadarajulu Naidu v. Narayanaswamy, (1949)2 M.L.J. 457,* has persistently held that view that the term "other sufficient grounds" must be *ejusdem generis* with the grounds under the Sub-clause 2(a) or at any rate they must be analogous to the formal defect mentioned therein.

At the same time he has taken the view that if once lower court in exercising its discretion has granted permission to the plaintiff to withdraw from the suit on other and sufficient grounds, the High Court need not interfere in revision against the order of that type, when once it has been a considered order passed on taking into account all the merits of the case and as well as the authorities placed before the court. I am inclined to agree with this view and it accords with my own reading of the import of Sub-clause (b) of R.1.

(7) In this case the learned counsel, Mr.T.R.Srinivasan on behalf of the respondent relied on the decision in *Chidambara Mudali v. Kozhandavelu Mudali, Ind. Case 395 Mad.,* a decision in which Justice Sundarsam Aiyer and Justice Sadasiva Aiyar have agreed that permission could be granted to withdraw the suit under O.23, Rule 2, with liberty to file a fresh suit even at a very late stage at the second appeal. This decision has not been dissented from in any of the decisions cited by the learned counsel for the petitioner.

In *Munuswami Pillai v. Jagathambal, I.L.R. 41 Mad. 731: A.I.R. 1919 Mad. 1071: 8 L.W. 145,* also the two Judges, namely, Oldfield and Sadasiva Aiyar, J. 33, stuck to their respective views one holding that the term "other and sufficient grounds" should be interpreted as being *ejusdem generis* with the formal defect and the other holding that it should not be so interpreted. The Bombay view seems to be in accordance with the view taken by Justice Sadasiva Aiyar as can be seen from the decision in *Bai Mahakore v. Shikabai Sankalchand Shah, I.L.R. 59 Bom. 114: A.I.R. 1935 Bom. 29,* following the decision in *Narandas Raghunathdas v. Shantilal Bholabai, I.L.R. 45 Bom. 377: A.I.R. 1921 Bom. 267.*

"I am myself inclined to agree with the view that seeks to give a more liberal interpretation to the Sub-clause (b) of Rule 1 as that will have the effect of causing less hardship to the plaintiff seeking leave to withdraw the suit.

22. In *Rakki v. Samaiyan, 78 L.W. 618,* Ramamurti, J. held that it is settled law that if the plaintiff's suit fails on the merits after a detailed adjudication by the court, the plaintiff cannot get over the effect of that adjudication, by withdrawing the suit with

liberty to file a fresh suit.

23. In *Nadipatha v. Pedda Venkataraju, A.I.R. 1966 Mad. 346,* Natesan, J. held that a mis-description or inaccurate description of the property in the plaint is not a formal defect necessitating the withdrawal of the suit after the trial court has given a decision in the matter. The learned Judge observed that the appellate court should be slow and cautious to exercise the powers under O.23, Rule 1 and permit a defeated plaintiff to withdraw his suit with liberty to file a fresh suit and reagitate the matter over once again. It was also observed that when the defect, if any, could be cured by an amendment, the court should not ordinarily permit the withdrawal of the suit with liberty to institute a fresh suit.

24. In *Charles Samuel v. Board of Trustees, (1978) 2 M.L.J. 243: 91 L.W. 320,* Balasubramanyam, J. held that the grant of permission to withdraw a suit would always be a matter for the discretion of the court whether it is moved under Clause (a) or Clause (b). While dealing with the question of withdrawal at the appellate stage, the learned Judge observed thus:

> "It seems to me, however, that even at the appellate stage, the way must be clear for the plaintiff to withdraw his suit without prejudicially affecting the position of the other parties to the litigation. I can very well visualise a situation where the plaintiff succeeds in the trial court in obtaining a decree, and in the appeal against his decree by the defendant the plaintiff might wish to withdraw the suit, forging the decrees on hand in his favour. If such a situation could be visualised, a withdrawal of the suit at the appeal stage, although it may amount to withdrawal nullification of the trial court's decree also, might still not hurt any party other than the withdrawing plaintiff, excepting on the question of costs, for which the court may make suitable provision or reservation in the order granting leave to withdraw."

On the interpretation of clauses (a) and (b) the learned Judge has stated thus:

> "Clause (b) of the Rule says that the court may allow a suit to be withdrawn if it is satisfied that sufficient grounds' exist therefor in the case. This clause does not say what grounds may be regarded as sufficient. It is in this context that Clause (a) and its specific reference to 'formal defects' becomes clear. By enacting this clause, the legislature has only relieved the court from having to decide whether a formal defect can be a sufficient ground for exercising its discretion. But thereby the legislature has not enacted a different rule for the exercise of the discretion itself. In my view, whether the court is moved under Clause (a) or Clause (b), what is invoked for exercise is the court's discretion."

Though the learned Judge has not expressly stated so, his view appears to be that 'sufficient grounds' in Clause (b) have a wider scope than formal defects in Clause (a) and that the discretion of the court under Clause (b) is not fettered by the language used in Clause (a).

25. In *Ram Dhan v. Jagat Prasad, A.I.R. 1982 Raj. 235,* the question of granting permission to withdraw the suit at the appellate stage was considered in detail. Justice Kasliwal, after referring to the various authorities, observed that the plaintiff has no absolute right to withdraw from the suit where some vested right had accrued to the defendant. Making a distinction between withdrawal of a suit during the trial and withdrawal during the appellate stage, the learned Judge observed thus:

> "The position for a plaintiff to withdraw his suit without any reservation *i.e.*, without any prayer to allow him to bring a fresh suit in respect of the same subject-matter, would be considered under the provisions of sub-rule (1) of Rule 1 of O.23 but in my view the considerations would be different if such request is made during the trial of a suit and during the stage of first appeal or second appeal where the plaintiff has lost his case in the lower courts. There can be no manner of doubt that the appeal is a continuation of the suit, but at the same time a court of first appeal or second appeal may not even admit the appeal and can dismiss at the admission stage. It would be certainly unfair to the defendant if a plaintiff having lost in the two courts below and after making arguments for admission of second appeal in the High Court and having not been able to succeed in getting the appeal admitted, may be allowed to withdraw the suit itself by way of absolute right and thus negative the benefit of long trial having culminated in favour of the defendant. It is no doubt correct that there is provision under Sub-rule (3) of

Rule 1 of O.23 that the plaintiff shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim, but in my view the award of costs along can hardly be a just and proper solace to the defendant. It is right that the plaintiff will be precluded from bringing a fresh suit on the same subject matter, but it also cannot be denied that the defendant would not be entitled to use the findings given in such a suit, as *res judicata* in subsequent proceedings."

26. In *K.Chinna Vaira Thevar v. S.Vaira Thevar, A.I.R. 1983 Mad. 160: 95 L.W. 566*, a Division Bench of this Court held that the failure or inability of the plaintiff to secure necessary evidence to support his case will not be a ground contemplated in clause (b) and that the object of the rule is not to enable the plaintiff after he has failed to establish his case by adducing requisite evidence to have a further opportunity to file a fresh suit to reagitate the matter so as to prejudice the other side. The Bench also pointed out that if such a thing is permitted, there will be no end to litigation.

27. In *Khatuna v. Ramsewak Kashinath, A.I.R. 1986 Orissa 1*, it is held that the expression formal defect' in Clause (a) even if given a wide and liberal meaning, must be deemed to connote every kind of defect which does not affect the merits of the case or does not strike at the root of the plaintiff's case. On the facts it is held that non-joinder of a necessary party is not a formal defect, but it strikes at the root of the case.

28. An analysis of the above judgments shows that it has been generally accepted by the courts that permission to withdraw a suit with liberty to file a fresh suit can be granted if the suit has to fail by reason of a formal defect or a ground analogous thereto. But, courts are uniform in holding that a plaintiff who has failed to establish his case on merits, is not entitled to as right to withdraw the suit and file a fresh suit. On a reading of the two clauses in Sub-rule (3) of O.23, Rule 1 of the Code of Civil Procedure, it is clear that the legislature has advisedly used a distinctly different language. While Clause (a) refers to the pending suit which must fail by reason of some formal defect, Clause (b) refers to the suit it is instituted with the leave of the court. If a matter falls under Clause (a), the court is concerned only with the question whether the suit must fail by reason of a formal defect. On the other hand, if Clause (b) is invoked by a party, then the court must address itself to the question whether there are sufficient grounds for allowing the party to institute a fresh suit for the same subject matter or part thereof. Hence, in my view, it is not correct to say that sufficient grounds' should be read *ejusdem generis* with 'formal defect or that they should be analogous thereto. 'Sufficient grounds' would cover a wider field and not restricted to a 'formal defect' or a similar defect. However, when the question arises before an appellate court after the adjudication of the matter on merits by one court or two courts, the test will be whether the court is justified in depriving the defendant of the benefit of a finding rendered in his favour after a full trial. It is well known that when a court grants leave to file a fresh suit on the identical cause of action, the withdrawn suit has no existence in the eye of law. It is not available for any purpose and the parties are relegated to the same position which they occupied before the suit was brought. Hence, the court has to consider in each case when an application is filed in the appellate stage for withdrawing the suit with liberty to file a fresh suit, whether the defendant should be driven back to original position in which he was prior to the filing of the suit, even though he has come out successful after a full trial.

29. Applying the above tests to the case, it is clear that there is no ground for granting the permission sought by the petitioners. With reference to the first ground urged by the petitioners that they have been advised that the Government is a necessary party, the objection was taken by the respondents at the earliest stage in the written statement. An issue was framed in the trial court as to whether the suit was bad for non-joinder of necessary parties. The issue was answered against the petitioners. In the lower appellate court also, the point was considered again and answered against the petitioners. In the Second Appeal, the question was argued before me. Learned Counsel for the petitioners contended that the Government is not necessary party. It is only after I indicated my view against the said contention, the present petition has been filed alleging that the petitioners are advised that the Government is a necessary party. I have already referred to the uniform view taken by the courts that non-joinder of necessary parties is not a formal defect. Hence, I hold that the first

ground urged by the petitioners is not sufficient for granting permission to them to withdraw the suit.

30. The second ground is that material documents have been discovered. These documents have been filed along with an application for admitting them as additional evidence in the second appeal. (*Vide:* C.M.P.No.10808 of 1990). When the appeal was argued, the civil miscellaneous petition was also argued. Learned counsel for the respondents pointed out that none of the documents would be of any use to the petitioners in the present case. It has been repeatedly held, as seen already, that permission to withdraw a suit cannot be granted for the purpose of enabling the plaintiff to adduce fresh evidence or more evidence in a fresh suit. Thus, the second ground also fails.

31. The third ground urged in the course of arguments though not set out in the affidavit filed in support of the petition, is that the plaint is defectively framed. There is no substance in this contention. In the course of argument in the appeal learned counsel for the appellants contended that even if the plaintiffs have not made out a case for declaration of their title, an injunction should be granted on the basis of their possession. It was then pointed out by the court that the prayer for injunction was only consequential to the prayer for declaration. That does not mean that the case of the petitioners that they are in possession has been accepted. There is no defect in the framing of the prayers to such.

32. Thus, all the three grounds urged in support of the petition are unsustainable. I do not find any justification in this case for permitting the petitioners to withdraw the suit and thereby setting at nought the findings of the suits below enabling them to file a fresh suit with a clean slate particularly when the suit instituted in 1980, was disposed of after full trial and the petitioner had an opportunity in the lower appellate court with a further opportunity in this Court in second appeal to establish their claim.

33. In the circumstances, the petition is dismissed. There will be no order as to costs.

B.S. ---- *Petition dismissed.*

[Full Bench]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan, Bakthavatsalam* and *Raju, JJ.*

W.P.Nos.10367, 12199 and 15935 of 1989, 12043, 13442 and 15588 of 1990, 5841, 5945, 9437, 9438, 10847, 10848, 12632, 12633, 15797, 15798, 17620, 17621, 18565 and 18621 to 18624 of 1991, 301, 475, 476, 1761, 1762, 2242, 2270, 2271, 2565, 2617, 2618, 2772 and 3558 of 1992 *27th July, 1992.*

Terminated Full Time Temporary L.I.C. Employees' Welfare Association ...*Petitioner*

v.

Senior Divisional Manager, Life Insurance Corporation of India Ltd., Thanjavur Division, Thanjavur ...*Respondent.*

(A) Appellate Side Rules of Madras High Court, O.1, Rule 6 - Reference of question of law to Full Bench by Chief Justice - Competency of Full Bench to hear, if can be challenged on the ground that such a question of law does not arise.

It is not necessary for the purpose of reference to a Full Bench that a question of law should arise. Under Rule 6 of O.1 of the Appellate Side Rules of the High Court, the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench notwithstanding anything in the earlier rules. Once the reference is made by the Chief Justice the competence of the Full Bench to hear the matter cannot be challenged on the ground that such a question of law does not arise. *[Para 20]*

(B) Life Insurance Corporation of India (Staff) Regulations (1960), Regns.8 and 12, Explanation - Industrial Disputes Act (XIV of 1947), Sec.2(oo)(bb) - Scope - Persons covered by Regn.8 - If 'retrenched employees' as contemplated by Explanation to Regn.12 of Sec.2(oo) of Industrial Disputes Act.

The Explanation to Regn.12 only excludes retrenched temporary employees from the categories mentioned in the Regulation. That does not mean that the said Regulation provides for re-employment of retrenched temporary employees. The persons covered by Regn.8 cannot claim to be retrenched temporary employees as contemplated in the Explanation to Regn.12. Regn.8 deals with a particular situation of employment of

staff in Classes III and IV on a temporary basis, who will be governed by special directions as may be issued by the Chairman from time to time. Such employees cannot by reason of such appointment only be entitled to absorption to the service of the L.I.C. or claim preference for recruitment to any post. *[Para 30]*

(C) Life Insurance Corporation of India (Staff) Regulations (1960), Regn.8 - Validity - If violative of Arts.14, 16 and 21 of the Constitution.

Regn.8 cannot be struck down as violative of the provisions of Arts.14, 16 and 21 of the Constitution of India or on the ground of violation of right to public employment guaranteed by the Constitution. It is not shown to be arbitrary or discriminatory. Hence, it must be held that Regn.8 is valid and enforceable. *[Para 41]*

(D) Life Insurance Corporation of India (Staff) Regulations, 1960 - Validity - Applicability to persons employed under Regn.8 on temporary basis.

It cannot be contended that the Life Insurance Corporation of India (Staff) Regulations insofar as it relates to terms other than salary structure and bonus is in excess of delegated legislation and hence is invalid. Sec.48(2)(cc) of the L.I.C. Act, introduced by L.I.C. Amendment Act, 1981, refers to all the terms and conditions of service of the employees and agents of the L.I.C. and is not confined to salary or bonus. *[Para 29]*

It was argued that the L.I.C. of India Staff Regulations are not valid as they were not placed before each House of Parliament as required by Sec.48(3) of the L.I.C. Act. There is a basic fallacy in this contention. The Regulations were framed in 1960 and they were notified in the Gazette of India dated 22.7.1960 and they are in force from 1.7.1960. At the time the Amendment Act of 1981 was passed the Regulations were already in force. There is no presumption that the Regulations were not placed before the Parliament. On the other hand, the presumption is the other way as Sec.114(e) of the Evidence Act would apply whereunder the court may presume that judicial and official acts have been regularly performed. In any event the enforceability of the Regulations does not depend on any approval of the Parliament. The language of sub-sec.(3) of Sec.48 is tell tale. Under this provision unless both Houses decide to make a modification or take the view that the rule shall not be made, the rules are enforceable. That is why a provision is made in the last part of the sub-section that any modification or annulment of the rule shall not prejudice the validity of anything previously done under the rule. Hence, there is no substance in the argument advanced in this behalf. *[Para 42]*

It is beyond doubt that the petitioners are appointed under Regn.8 on a temporary basis. There is no warrant for contending that Regn.8 is itself not applicable to the petitioners. *[Para 44]*

Consequently, it must be held that the Life Insurance Corporation of India (Staff) Regulations are valid and that they are applicable to the petitioners appointed temporarily under Regn.8 thereof. *[Para 45]*

(E) Evidence Act (I of 1872), Sec.115 - Estoppel against statute - L.I.C. not estopped from contending inapplicability of Industrial Disputes Act to its employees, due to previous conduct.

It is too well settled that there can be no estoppel against a statute. The fact that the L.I.C. did not object to the dispute being decided by the National Tribunals on the earlier occasions would not prevent them from raising a contention that the applicability of the Industrial Disputes Act is excluded from the field occupied by Sec.48(2C) of the Life Insurance Corporation Act. *[Para 64]*

(F) Life Insurance Corporation Act (XXXI of 1956 as amended by Act I of 1981), Sec.48(2C) - Life Insurance Corporation of India (Staff) Rules (1960) - Industrial Disputes Act (XIV of 1947), Sec.25-J - Applicability of Industrial Disputes Act to employees and agents of L.I.C. - If and to what extent excluded.

A plain reading of Sec.48(2C) of the L.I.C. Act as amended in 1981, leaves no doubt that the rules made under Sec.48(2)(oo) will prevail over the provisions of the Industrial Disputes Act. When the legislature has thought fit to exclude specifically the provisions of the Industrial Disputes Act by the Amendment of 1981 there can be no doubt that the provisions of Sec.25-J of the Industrial Disputes Act have become ineffective to the extent to which the *non obstante* clause in Sec.48(2C) of the L.I.C. Act operates. The legislature was conscious of the existence of the Industrial Disputes Act and the provisions thereof including Sec.25-J. When it used the expression "anything contained in the Industrial Disputes Act, 1947" in Sec.48(2C) of the L.I.C. Act, it had clearly repealed the provisions of Sec.25-J of the Industrial Disputes Act *pro tanto*. *[Paras 47 and 49]*

It is well settled that the expressions "terms and conditions of service" includes "tenure of service". Hence, Sec.25-J of the Industrial Disputes Act is repealed with reference to matters covered by the rules referred to in Sec.48(2C) of the L.I.C. Act. *[Para 53]*

(G) Industrial Disputes Act (XIV of 1947), Sec.2(ra) - L.I.C. held not guilty of unfair labour practice after 20.5.1985 as they were only obeying court orders.

(H) Industrial Disputes Act (XIV of 1947) as amended by Act (XLIX of 1984), Sec.2(oo)(bb) - Constitutional validity.

Nothing was urged to show that the amendment by which Clause (bb) was inserted to Sec.2(oo) offends the provisions of Part III of the Constitution of India. There is no question of the sub-clauses being invalid on the ground that it runs counter to the provisions of Secs.25-F, 25-G and 25-H of the Industrial Disputes Act. The expression "retrenchment" used in those sections must be understood only in the way in which it is defined in Sec.2(oo) of the Act. It must therefore be held that sub-clause (bb) of Sec.2(oo) of the Industrial Disputes Act is valid and constitutional. *[Para 80]*

Cases referred to:

A.V.Nachana v. Union of India, (1982)1 S.C.C. 208; (1982)1 Lab.L.J. 466: 1982 Lab.I.C. 181: A.I.R. 1982 S.C. 1126; Madan Mohan Pathak v. Union of India, (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 466: 1978 Lab.I.C. 613: A.I.R. 1978 S.C. 803; Cawnpore Tennery v. B.Guba, (1967)3 Fac.L.R. 237: (1967)2 Lab.L.J. 110: A.I.R. 1967 S.C. 667; T.Siva Rao v. Andhra Pradesh State Road Transport Corporation, (1979)2 An.W.R. 338; P.V.Mani v. Union of India, A.I.R. 1986 Ker. 86; Olga Tellis v. Bombay Municipal Corporation, (1985)3 S.C.C. 545: A.I.R. 1986 S.C. 180; Central Inland Water Transport Corporation Ltd. v. Brojo Nath, (1986)3 S.C.C. 156: (1986)2 S.C.J. 201: (1986)69 F.J.R. 171: (1976)3 Com.L.J. 1: (1986)60 Com.Cas. 797: (1986)3 Fac.L.R. 523: 1986 Lab.I.C. 1312: A.I.R. 1986 S.C. 1571; Delhi Transport Corporation v. D.T.C. Mazdoor Congress, A.I.R. 1991 S.C. 101; Sant Ram, In re., (1960)3 S.C.R. 499: A.I.R. 1960 S.C. 932; D.S.Garawal v. State of Punjab, A.I.R. 1959 S.C. 512; Sant Ram Bhai v. State of Haryana, 1992 Lab.I.C. 976; Parshotam Lal Bhingra v. Union of India, 1958 S.C.R. 828: A.I.R. 1958 S.C. 36; Jadish Mittur v. Union of India, (1964)1 Lab.L.J. 418: A.I.R. 1964 S.C. 449; State of Punjab v. Shri Shukh Raj Bahadur, 1968 Lab.I.C. 1286: (1968)3 S.C.R. 234; State of U.P. v. Kaushal Kishore Shukla, (1991)1 Ser.L.R. 606: A.I.R. 1991 S.C. 793; Om Prakash Sharma v. State of Haryana, (1981)1 Ser.L.R. 314; G.K.Verma v. State of Punjab, 1979 Lab.I.C. 575: A.I.R. 1979 P. & H. 149; Ratanlal v. State of Haryana, 1978 Lab.I.C. 199: A.I.R. 1987 S.C. 478; Kuldeep Chand Sharma v. Delhi Administration, (1978)2 Ser.L.R. 379: 1978 Lab.I.C. 1596; Mrs.Anita v. State of Rajasthan, (1991)4 Ser.L.R. 145; Union of India v. Arun Kumar Roy, (1986)1 Ser.L.R. 474: 1986 Lab.I.C. 686; Delhi Development Horticulture Employees Union v. Delhi Administration, A.I.R. 1992 S.C. 789; State of Punjab v. Surinder Kumar, (1992)1 S.C.C. 489; Life Insurance Corporation of India v. D.J.Bahadur, A.I.R. 1980 S.C. 2181; Municipal Council, Palai v. T.J.Joseph, A.I.R. 1963 S.C. 1561; Dominion of India v. Shrimbai, 1954 S.C.J. 813: (1955)1 S.C.R. 206: A.I.R. 1954 S.C. 596; J.K.Cotton Spinning and Weaving Mills Company Ltd. v. State of Uttar Pradesh, A.I.R. 1961 S.C. 1170; Pratap Singh v. Manmohan Dev, A.I.R. 1991 S.C. 1931; J.K.Steel Ltd. v. Union of India, A.I.R. 1970 S.C. 1173; Maubai Kongor Sabha v. Abdulbhai, A.I.R. 1976 S.C. 1455; Manager, Government Branch Press v. O.B.Bellappa, 1979 Lab.I.C. 146: A.I.R. 1979 S.C. 429: (1979)1 Lab.L.J. 156: (1979)1 S.C.C. 477: (1979)2 S.C.R. 458; The Authorised Officer, Thanjavur v. S.Naganatha Ayyar, A.I.R. 1979 S.C. 1487: (1979)3 S.C.C. 456; Union of India v. G.M.Kokil, A.I.R. 1984 S.C. 1022: 1984 Lab.I.C. 663: (1984)65 F.J.R. 1: (1984)2 Lab.L.J. 20; Ajay Kumar v. Union of India, A.I.R. 1984 S.C. 1130: 1984 Lab.I.C. 691: (1984)1 Lab.L.J. 368; South India Corporation (P) Limited v. Secretary, Board of Revenue, Trivandrum, A.I.R. 1964 S.C. 207: (1964)4 S.C.R. 280; Krishna District Cooperative Marketing Society Ltd. v. N.V.P.Deo, A.I.R. 1987 S.C. 1960; C.T.Shang v. S.D.Brijal, A.I.R. 1988 S.C. 603; All India Reporter, Karmachari Singh v. All India Reporter Ltd., A.I.R. 1988 S.C. 1325; Asoka Marketing Ltd. v. Punjab National Bank, A.I.R. 1991 S.C. 855: (1990)4 S.C.C. 406; R.S.Raghunath v. State of Karnataka, A.I.R. 1992 S.C. 81; The State of Punjab v. Jagdip Singh, A.I.R. 1964 S.C. 521: 1964 S.C.D. 500; A.V.Nachappa v. Union of India, A.I.R. 1982 S.C. 1126: 1982 Lab.I.C. 181: (1982)1 S.C.C. 505: (1982)1 Lab.L.J. 119: (1982)2 S.C.R. 246; Hariprasad v. A.D.Divolkar, A.I.R. 1957 S.C. 121: 1957 S.C.J. 83: 1957 S.C.R. 121: 1957 S.C.A. 57; The State Bank of India v. Sundara Money, A.I.R. 1976 S.C. 1111; Municipal Corporation of City of

Ahmedabad v. The New Shrock Spinning and Weaving Company Ltd., A.I.R. 1970 S.C. 1292; I.N.Saksena v. State of U.P., A.I.R. 1976 S.C. 2250; Indira Nehru Gandhi v. Raja Narain, A.I.R. 1975 S.C. 2299: 1975 S.C.C. (Supp.) 1; Hari Singh v. Military Estate Officer, A.I.R. 1972 S.C. 2205: (1973)1 S.C.R. 515.

R.Singaravelu, K.Chandru, T.K.Rajeswaran and *D.A.Sugumar,* for Petitioner.

M.R.Narayanaswamy, Senior Counsel, for *M.S.Umapathy, Sanjay Mohan* for *Ramasubramaniam Associates, P.Narasimhan.* Senior Central Government Standing Counsel and *Meera Guptha,* Additional Central Government Standing Counsel, for Respondent.

The Order of the Full Bench was delivered by *Srinivasan, J.*: I. *Introduction*: By an order of reference dated 23.4.1992, a Division Bench referred seven of the above writ petitions to a larger Bench. The Honourable the Chief Justice constituted this Bench for hearing the cases. The matters were listed for orders on 30.4.1992 and with the consent of counsel, we fixed the date of hearing as 22.6.1992. At the instance of counsel appearing in the other writ petitions, the Honourable the the Chief Justice directed those matters also to be posted before us as the questions involved are common. When the matters were heard, 18 writ petitions were posted in all for hearing. In the course of the hearing, it was pointed out that several writ petitions had been filed for similar reliefs by persons in similar position after the Division Bench heard the matters and reserved orders and before it made the order of reference. Counsel had no objection to our passing orders on those writ petitions too, as no further argument was involved. The detailed particulars of all the writ petitions covered by this judgment are set out in the east part of this judgment.

2. *II. HISTORY:* It will be convenient to refer to the facts chronologically before setting out the questions which arise for our consideration. In May, 1985, the Central Government constituted a National Industrial Tribunal presided over by Dr.Justice D.R.Tulpule and referred the following matter for its consideration:

> "What should be the wages and other conditions of service of Badli, Temporary and Part-time Workmen of the Life Insurance Corporation of India, as well as the conditions in their absorption in their regular cadre?"

It was taken on file as Reference No.N.T.B. 1 of 1985 under Sec.10 of the Industrial Disputes Act. Initially, the Western Zone Insurance Employees' Association, Bombay and Central Zone National Life Insurance Corporation Employees' Association, Kanpur were alone parties to the references, besides Life Insurance Corporation of India. Subsequently, all the Unions of all the Regions and the Zones in the country were joined as parties and they filed statements putting forth their claims. Thus, the reference covered the entire country. An interim award was passed by the Tribunal on a prayer for restraining the Life Insurance Corporation of India (hereinafter referred to as 'the L.I.C.'), from recruiting or absorbing any person without the prior permission of the Tribunal. As per the Interim Award, L.I.C. was restrained from making any new appointment except where persons had to be appointed over and above the then existing vacancies against which the concerned workmen who were working or had worked with the L.I.C. in their capacity as Badlis, Temporary or Part-time workmen and who would be concerned in the reference had to be appointed and that where an employee was appointed from amongst the Badli, Temporary or Part-time workmen against any vacancy, he would have to be continued as long as the vacancy continued, provided an undertaking was given that no benefit would be claimed. If by that circumstance, he continued to be in a position for more than 85 days, it was directed that the workmen concerned shall give an undertaking that they would not claim any benefit on account of such continuation for a period of more than 85 days, if it occurred, for absorption or any other benefit and subject to that he may be continued. Ultimately, the Tribunal passed an award on 17.4.1986. It was held that only those workmen who had worked during the period 1.1.1982 to 20.5.1985 (date of reference to the Tribunal) be considered as eligible for absorption and that a workman claiming absorption in a Class III Post should have worked for 85 days in a period of two years and a workman claiming absorption in Class IV Post should have worked for 70 days in a period of three years. It was held that the calculation of number of days of work should be upto the date of reference. The L.I.C. was directed to appoint a Screening Committee to consider the suitability and desirability of such eligible workmen for absorption. It was further directed that the workmen considered to be suitable and

desirable for absorption should be absorbed against vacancies which existed in the L.I.C. as on 31.3.1985 and which may arise subsequently. It was ruled that the L.I.C. should not recruit outsiders in a particular Division till such lists were exhausted.

3. Paragraphs 65 to 67 of the Award read as follows:

"65. In the light of the directions above, with regard to absorption and creation of additional posts by the Corporation, I do not think that there would be any occasion in future for the Corporation to employ workmen in the temporary and badli categories, excepting for the occasional and temporary increase in work which necessitate employment of temporary staff. That temporary staff in all probability would be only amongst class-III cadre, in which case there would be no occasion and there need not be, I think, any case or situation requiring consideration or grant of any other benefit apart from the wage to such workmen.

66. I hope and expect that in the light of what has been said and the past experience of the Corporation the situation where a large number of such employees come to be engaged without adherence to any formalities or procedures by the various local managements would be completely eliminated and done away with and this kind of employment in the Corporation's history would be the last occasion. Excepting the temporary employment, the Corporation will have no occasion or necessity to employ badli workmen, it is hoped in future. Though part-time employees will continue to be in existence for some more time, as I indicated, the Corporation will also see its own way to absorb the part-time employees in its regular employment as far as possible and reduce the number of part-time employees to the minimum. However, whenever, hereafter any occasion or vacancy arises of regular employment in part-time categories of employment, then those who have worked part-time in accordance with their seniority should be given preference for absorption in the regular cadre of the corporation's employment. This should be irrespective of the qualifying age for the entry into Corporation's service and qualification, but subject to his being found suitable.

67. I have already indicated that retrospective effect in the circumstances and in the case of this award has to be given from 1.1.1982. The procedure for absorption would also at the same time and simultaneously place in the hands of the Corporation a record of the service which the concerned workmen have rendered during this period. On that basis and in the light of the directions above, and as indicated, the workmen should be paid wages to which they would have been entitled to reduced by the wages which have been actually paid to them. They would not however, be entitled to payment of ex-gratia bonus for that period."

4. Aggrieved by some of the directions contained in the Award, L.I.C. filed W.P.No.1801 of 1986 in the High Court of Bombay challenging the same. The writ petition was dismissed on 14.8.1986; but certain clarifications were given by the court. Pursuant thereto, the L.I.C. issued as many as six circulars commencing from 17.9.1986 and ending with 25.2.1987. Disputing the instructions given in the Circulars, the Unions approached the Central Government and a reference was made by the latter under Sec.36-A of the Industrial Disputes Act to a National Industrial Tribunal presided by Justice M.S.Jamdar. It was taken on file as Reference No.N.T.B.1 of 1987. The question referred was, "Could the Award dated 17.4.1986 with special reference to paragraphs 44, 45, 46, 48, 49, 51, 52, 54, 55, 56, 57, 60, 64 and 66 and the interim order dated 14.3.1986 be interpreted to mean that the Central Office of the Life Insurance Corporation of India is empowered to issue instructions as contained in their circular issued in this behalf to implement the directions of the Award. If not, what could be the correct interpretation of various directions covered by the said paragraphs in the circumstances of the case? Whether the term 'absorption' referred to at various places in the Award can be interpreted to mean recruitment?

5. The Tribunal passed an interim Order directing the L.I.C. not to make any recruitment from the open market during the pendency of the proceedings before it. By order dated 26.8.1988, the Tribunal answered the reference by its Award giving its own interpretation of the earlier Award. The Tribunal held that "absorption" contemplated by the previous Award did not mean "recruitment".

6. Challenging the said Award, L.I.C. filed S.L.P.No.14906 of 1988 in the Supreme Court of India and obtained Special Leave. A compromise

was entered between the L.I.C. and eight of the nine Unions and on the basis of the same, the Supreme Court passed orders on 1.3.1989 pending the final disposal of the appeal. The Supreme Court permitted the L.I.C. and the members of the said eight Unions to implement the terms of compromise by way of interim measure without, however, any prejudice to the rights and contentions of the members of the other Union, who had not entered into such compromise with the Management.

7. It is stated that pursuant to the compromise, the L.I.C. have appointed 1875 persons to posts in Class III and 1324 persons to posts in Class IV in various Divisions. It is not in dispute that the award passed by the National Tribunals and the order of the Supreme Court covered only the persons recruited on temporary basis between 1.1.1982 and 20.5.1985. Persons claiming to have been appointed temporarily subsequent to 20.5.1985 started filing writ petitions after the order of the Supreme Court referred to above. The writ petitions have been filed through Associations said to have been formed by such temporary employees in each Division. The Association in Thanjavur Division filed W.P.No.10367 of 1989 praying for issue of *mandamus* to the Senior Divisional Manager, L.I.C., Thanjavur Division, to give first priority and preference to the members of the petitioner association, numbering 49 in total as shown in the list attached thereto, in filing up the existing 80 vacancies to the posts of Assistants for Mofussil Branch Offices of L.I.C. in Thanjavur Division and to appoint them in the said posts. An interlocutory application was filed for stay of recruitment to the posts of Assistants in 80 vacancies referred to in the writ petition. Though interim stay was granted initially for a period of four weeks, it was vacated ultimately and the interlocutory application was dismissed. The court gave liberty to L.I.C. to proceed with the recruitment and complete the same, but directed that the same would be subject to the result of the writ petition. That was affirmed by a Division Bench in W.A.No.751 of 1989 by order dated 5.10.1989.

8. A similar writ petition by an Association in Madras Division was filed in W.P.No.12199 of 1989 for similar relief. The interlocutory application was dismissed on 30.10.1989 and it was affirmed by a Division Bench on 30.11.1989 in W.A.No.1012 of 1989.

9. The Association in Coimbatore Division filed W.P.No.15935 of 1989, but no interim order was passed. An individual by name Chelladurai filed W.P.No.11828 of 1989 for similar relief as against the Senior Divisional Manager, Trichy, the Zonal Manager, Madras and the Chairman, L.I.C. By order dated 14.9.1990, the writ petition was dismissed by Mishra, J. It is worthwhile extracting the order therein:

"Heard. it is not known how none-the-less the petitioner was given a temporary appointment as clerk in one of the offices of the Life Insurance Corporation in the year 1988. Since regular vacancies have come to exist, the respondents have now proceeded to make recruitments in accordance with the rules. The petitioner has moved this Court saying that he has been recruited on temporary basis and extension also granted to him and that he should be regularised and given substantive appointment. The sheet-anchor is a certain award made in the year 1985 in dispute with respect to regularisation of the services of certain persons who had been appointed on temporary basis. In that award, it is stated that a scheme was worked out under which temporary employees were directed to be regularised. According to learned counsel for the petitioner, it shall be a discrimination in the teeth of Art.16(1) read with Art.14 of the Constitution of India.

2. Had this been a case showing that the petitioner's temporary appointment was made following the procedure prescribed for recruitment of Clerks and after affording equal opportunity to other qualified candidates, I would not have hesitated to consider the case of the petitioner. It appears, however that the petitioner somehow got the temporary appointment. That appointment was regular or not, is not known.

3. So far as the award is concerned, it is admitted that it related to the service of those who have been appointed on temporary basis until 1985. Such employees who are covered by the award constituted a class by themselves, the petitioner does not fall in that class.

4. The so called regularisation of temporary appointment is unknown to law. Any attempt to do so without adhering to the rule enshrined under Art.16(1) of the Constitution of India will be unconstitutional. Instead of the alleged

discrimination that by not regularising the petitioner's temporary appointment, the respondents are said to have done, if they regularise the petitioner's appointment, that will be arbitrary and indiscriminatory. There is no merit in this petition. It is accordingly dismissed. There will be no order as to costs."

10. The Association in Thanjavur filed W.P.No.4907 of 1990 as against the Zonal Manager of the L.I.C., (South Zone), Madras, for issue of *mandamus* directing the L.I.C., to absorb and appoint all the members of the petitioner Association in respective Divisions of L.I.C. in the State of Tamil Nadu in Class III and Class IV posts. On issue of notice of motion, the L.I.C. filed a counter-affidavit and the matter was heard in detail. The Central Government was also impleaded as party to the writ petition. Ultimately, by a detailed order dated 29.11.1990, one of us dismissed the writ petition. The contention of the petitioner therein that the members thereof would be entitled to be absorbed and to get permanent employment was negatived in view of the provisions of the Regulations and Recruitment Instructions governing the L.I.C. It was also held that the awards of the National Tribunal were not applicable to the members of the Association. The judgment of Mishra, J. in *Chelladurai's case, W.P.No.11828 of 1989, order dated 14.9.1990,* was referred. Expressing concurrence with the view taken by him it was held that the petition deserved to be dismissed. It was also observed that there were considerable disputes with regard to material facts which could not be conveniently adjudicated in the writ petition and it was more appropriate for adjudication under the Industrial Disputes Act. The learned Judge expressed the view that it was open to the petitioner association to seek remedy by way of reference by taking appropriate steps under the Industrial Disputes Act, if so advised, to redress the grievances of its members.

11. It should be mentioned here that an application was made under Sec.10(2) of the Industrial Disputes Act by the Tamil Nadu Terminated Full Time Temporary L.I.C. Employees' Welfare Association for a reference to the National Tribunal. The Government of India by its letter dated 29th August, 1990, addressed to the counsel for the Association informed him that all applications under Sec.10(2) of the Act had to be made by both parties to the dispute either jointly or separately and as L.I.C. had not submitted a similar application on the subject, the application by the Association was not maintainable. That matter was also brought to the notice of the learned single Judge at the time of arguments in W.P.No.4907 of 1990. It was only after taking note of all the contentions advanced from both sides, the order referred to above was passed. The said order was challenged on appeal in W.A.No.42 of 1991. By order dated 18.1.1991, a Division Bench comprising Mishra and Govindasamy, JJ., dismissed the appeal affirming the view taken by the single Judge.

12. Certain individuals claiming to be in temporary service and apprehending termination thereof, filed W.P.Nos.12043 of 1990 and 13442 of 1990 on the footing that they were entitled to be regularised and continue in service. They prayed for interim injunction restraining L.I.C. from terminating their services. Though interim orders were granted initially, they were vacated on 20.9.1990.

13. Undaunted by the aforesaid orders of this Court, the Associations of Terminated Temporary L.I.C. Employees in various Divisions started filing writ petition after writ petition in this Court praying for directions to the L.I.C. to absorb and appoint their members in Class III and Class IV Posts in respective Divisions. Significantly, counsel for the petitioners in all of them was the same. We are now concerned with such writ petitions. In these writ petitions, the L.I.C. represented by the Zonal Manager, South Zone, Madras, is the first respondent and the Union of India is the second respondent. It is stated in the affidavit that these writ petitions are wider in scope and they differ from the earlier writ petitions filed against the Divisional Managers. The basis of the claim is, however, the same. Though the petitioners are not claiming that they are covered by the awards of the National Tribunals referred to earlier, it is their contention that the directions given in the Awards to the L.I.C. and the general observations made therein would confer absolute rights on the members of the petitioner association. It is alleged that the L.I.C. is indulging in unfair labour practice as defined by the Industrial Disputes Act and it is not entitled to terminate the services of the members of the petitioners association, though admittedly they were appointed for specific periods temporarily. It is claimed that the members of the petitioners associations are entitled to the benefits of

Sec.25H of the Industrial Disputes Act. After the L.I.C. filed its counter-affidavit refuting the claim made by the petitioners, further contentions were raised by filing supplementary affidavits. In the writ petitions filed later, it is contended that the members of the petitioners' association are retrenched employees and as such would be entitled to claim the benefits of Secs.25F, 25H and 25N of the Industrial Disputes Act. It also became necessary for the petitioners to challenge the validity of sub-clause (bb) of Sec.2(oo) of the Industrial Disputes Act, which excluded from the definition of 'retrenchment', termination of the service of the workmen as a result of the non-renewal of the contract of employment between the employer and the workmen concerned on its expiry or termination of such contract under a stipulation in that behalf contained therein.

14. Separate writ petitions were also filed for declaration that Sec.2(oo)(bb) of the Industrial Disputes Act is unconstitutional and invalid. The petitioners also challenged the validity of Regulation 8 of Life Insurance Corporation of India (Staff) Regulations, 1960, which provides that no person appointed on a temporary basis as per Regulations, shall only by reason of such appointment be entitled to absorption in the service of the Corporation, or claim preference for recruitment to any post.

15. When W.P.No.15588 of 1990 was filed, the petitioner therein applied for interim orders. On 25.9.1990 Janarthanam, J. passed an order restraining the L.I.C. for appointing any one in Class III and Class IV temporarily or permanently other than the petitioners. When the interlocutory petitions were posted for final orders after service, Mishra, J. felt that one of the questions raised therein was not covered by any previous decision of this Court and passed an order on 7.12.1990 that L.I.C. shall make only temporary appointments without prejudice to the rights of the petitioners therein. That order was confirmed on appeal but for a clarification of the word 'retrenched' used by the learned single Judge. Thereafter, similar orders were being passed in all the subsequent writ petitions.

16. *III. Reference:* While passing an order in a Contempt Application *viz.*, C.A.No.74 of 1991 on 20.6.1991, Mishra, J. expressed his opinion that it would be proper if the administrative discretion is exercised to place the writ petitions for hearing before a Division Bench and necessary orders be obtained from the Hon'ble the Chief Justice for the needful. Thereafter, W.P.Nos.15588 of 1990, 5841, 5945, 9437, 9438, 10847 and 10848 of 1991 were posted before a Division Bench comprising of Mishra and Janarthanam, JJ. and arguments would appear to have been heard in detail. Orders were reserved on 6.9.1991. Nearly eight months thereafter, the Division Bench thought fit to pass an order on 23.4.1992 referring the cases to larger Bench on the following reasoning:

"After detailed arguments in which several judgments have been cited showing that the Life Insurance Corporation Act, 1956, is a special enactment and under which special terms and conditions of services are created, an attempt has been made to suggest that the provisions of the Industrial Disputes Act including those as found in Chapter V-A in which some of the relevant provisions on which reliance have been placed on behalf of the petitioners occur, are not attracted to the employees satisfying the definition of the word 'workman' in the service of the Life Insurance Corporation. Judgments of the courts cited before us have shown the approach to exclude the application of the provisions of the Industrial Disputes Act. None of the judgments, however, cited at the Bar appear to have taken notice of the provisions in.

Sec.25-J falling in Chapter V-A of the Industrial Disputes Act, which reads as follows:

"25-J. *Effect of laws inconsistent with this Chapter*: (1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946)."

This appears to be a salutary provision which makes all the provisions in Chapter V-A of the Industrial Disputes Act, 1947 applicable in cases of all categories of employees notwithstanding a special or specific enactment relating to their service conditions. Since, however, we have found that even cases involving Life Insurance Corporation, have proceeded on the footing that service conditions therein are independent of the conditions under the Industrial Disputes Act, we do not propose to finally adjudicate on this question without there

being any authoritative pronouncement."

17. Immediately thereafter, the then Acting Chief Justice constituted this Full Bench and the matters were listed before us on 30.4.1992 for orders as to fixing a date for hearing. Between 6.9.1991 and 23.4.1992 several writ petitions were filed. Among them were W.P.Nos.18621 to 18624 and 18565 of 1991, 2565 of 1992 and 2772 of 1992 filed by the Insurance Corporation Employees' Union. Learned counsel for the petitioners in the above writ petitions made a representation to the Hon'ble the Chief Justice and got them posted before us along with the other writ petitions, for which we had fixed the date of hearing as 22.6.1992. Number of other writ petitions were also filed during that period and interim orders had been obtained. Thus, as many as 18 writ petitions were listed before us for hearing.

18. *IV. Judicial fiction:* When the matter was taken up for hearing, it was brought to our notice by counsel for the first batch of writ petitions which were the subject matter of the reference as such, that he filed a petition for review before the Division Bench for reviewing the order of reference to the Full Bench and that the Division Bench passed an order on 19.7.1992 directing him to raise the question before us. The order of the Division Bench reads as follows:

> "A contention has been raised suggesting that the question of law that has, according to the reference order, arisen in fact does not arise for the reason of certain provisions in the regulations of the Life Insurance Corporation. Since the reference has already been accepted by the Hon'ble the Chief Justice and a Full Bench has been constituted, any contention as to the competency of the reference, in our opinion, should be decided by the Full Bench itself. If the Full Bench finds that the reference is not competent, it may turn down the reference and the case then will stand remitted to the bench hearing the writ petitions. He accordingly does not propose to make any observation on the merits of the contentions. It shall be open to the learned counsel for the petitioner to raise all contentions in this behalf before the Full Bench. This petition is accordingly deemed to have been filed in the reference for consideration by the Full Bench."

19. The Division Bench ought to have dismissed the petition for review when it found that it was not competent to decide the question of the validity of the reference. But, the Division Bench declared that the petition for review should be deemed to have been filed in the reference for consideration by the Full Bench. We are required to decide that question too by introduction of a "judicial fiction", if we may say so.

20. At any rate, there is no substance in the contention of the petitioners' counsel that the reference is invalid. According to him, the question of law set out in the order of reference does not arise in these cases. That contention is clearly erroneous, inasmuch as the question of law does arise for consideration squarely. Apart from that, it is not necessary for the purpose of reference to a Full Bench that a question of law should arise. Under Rule 6 of O.1 of the Appellate Side Rules of this Court, the Chief Justice may direct that any application, petition, suit, appeal or reference shall be heard by a Full Bench notwithstanding anything in the earlier rules. In these matters, the Hon'ble the Chief Justice had directed the writ petition to be heard by this Full Bench. It might have been at the instance of a Division Bench on the footing that a question of law had arisen which required to be decided by a Full Bench. But, once the reference is made by the Hon'ble the Chief Justice, the competence of the Full Bench to hear the matter cannot be challenged on the ground that such a question of law does not arise.

21. *V. Contentions:* We now proceed to refer to the contentions put forward by the petitioners and the respondents. Mr.Singaravelan, counsel representing the petitioners in the first batch of writ petitions which were actually referred by the Division Bench to us, raised the following contentions:

> "(1) The Life Insurance Corporation of India (Staff) Regulations, 1960, do not apply to the petitioners, as they are expressly excluded in the letters of appointment issued to them.
>
> (2) The said Regulations cannot override the provisions of the Industrial Disputes Act and by virtue of Sec.25-J of the said Act. the petitioners are entitled to invoke all the provisions of the Industrial Disputes Act.
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> (3) The said Regulations are not enforceable as they were not placed before Parliament for approval.
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> (4) The said Regulations are unconstitutional as they offend the provisions of Arts.14 and 16 of the Constitution of India.

(5) The L.I.C. is estopped by the Awards of the National Tribunals from denying the claims of the petitioners.

(6) The L.I.C. is acting arbitrarily and in violation of Arts.14 and 16 of the Constitution of the India.

(7) The L.I.C. is guilty of unfair labour practice.

(8) Sec.2(oo)(bb) of the Industrial Disputes Act is unconstitutional."

22. Mr.K.Chandru, representing the petitioners in the later batch of the petitions which were posted before us by the Hon'ble the Chief Justice at his instance, put forth the following arguments:

(1) The L.I.C. is governed by the provisions of the Industrial Disputes Act.

(2) The provisions of the Industrial Disputes Act are excluded only to the extent to which they are repugnant to the Life Insurance Corporation of India (Staff) Regulations, 1960.

(3) The Regulations will govern only the matters relating to salary and such other terms of service.

(4) The right to raise an industrial dispute and get it adjudicated by the Tribunals constituted under the Industrial Disputes Act is not taken away by the provisions of the Life Insurance Corporation Act or the Regulations framed thereunder.

(5) Since a reference has already been made by the Central Government to the Central Government Industrial Tribunal in New Delhi, the questions raised in these petitions could be left open and the parties should be directed to agitate their rights before the said Tribunal.

(6) The validity of Sec.2(oo)(bb) of the Industrial Disputes Act is not questioned by his clients in these proceedings.

23. *Per contra*, Senior Counsel appearing for the L.I.C. contended as follows:

(1) The writ petitions should be dismissed *in limine* inasmuch as they are based on alleged unfair labour practice on the part of the L.I.C. and there is no warrant for such an allegation, because the L.I.C. was making temporary appointments, without making permanent appointments in accordance with the Regulations only because of the various interlocutory orders passed by the Tribunals and this Court.

(2) The Life Insurance Corporation of India (Staff) Regulations are valid and the validity of the same cannot be questioned by the petitioners.

(3) The provisions of the Industrial Disputes Act are excluded in matters covered by the Regulations which provide for all the terms and conditions of service of the employees of the L.I.C. and Sec.25-J of the Industrial Disputes Act cannot operate.

(4) Sec.2(oo)(bb) of the Industrial Disputes Act is quite valid and constitutional.

(5) The petitioners cannot claim to be retrenched workmen and they are not entitled to claim any relief before this Court in these petitions on the basis of the alleged retrenchment.

24. *VI. Points for decision:* After considering the arguments advanced from both sides, we formulate the following points for consideration:

(1) Are the Life Insurance Corporation of India (Staff) Regulations valid and are they applicable to the petitioners?

(2) Are the provisions of the Industrial Disputes Act applicable to the petitioners?

(3) Is the L.I.C. guilty of unfair labour practice?

(4) Is Sec.2(oo)(bb) of the Industrial Disputes Act unconstitutional?

(5) Are the petitioners "retrenched employees" as defined by the Industrial Disputes Act?

25. *VII. Point No.1: Validity and applicability of regulations:* The L.I.C. was constituted under the Life Insurance Corporation Act, 1956, to provide for the nationalisation of life insurance business in India by transferring all such business to a Corporation established for the purpose and to provide for the regulation and control of the business of the Corporation and for matters connected therewith or incidental thereto. Sec.48 of the Act enables the Central Government to make rules to carry out the purposes of the Act by notification in the Official Gazette. Sub-sec.(2) of Sec.48 of the Act specifies certain matters for which rules may provide without prejudice to the generality of the power conferred by Sub-sec.(1). Sub-sec.(3) provides for placing the rules made by the Central Government before each House of Parliament. Sec.49(1) of the Act empowers the L.I.C. to make regulations not inconsistent with the Act and the rules made thereunder, with the previous approval of the Central Government by notification in the Gazette of India, to provide for

all matters for which provision is expedient for the purpose of giving effect to the provisions of the Act. Sub-sec.(2) of Sec.49 of the Act lists certain matters for which regulations may, without prejudice to the generality of the power conferred by sub-sec.(1), be made. Clause (bb) of sub-sec.(2) thereof, which was introduced by Amendment Act 17 of 1957 with retrospective effect, relates to the terms and conditions of service of persons who have become employees of the L.I.C. under sub-sec.(1) of Sec.11 of the Act.

26. The Act was amended by the Life Insurance Corporation (Amendment) Act, 1981, which shall be deemed to have come into force on the 31st day of January, 1981. Sec.2 thereof amended Sec.48 of the Life Insurance Corporation Act by inserting Clause (oo) in Sub-sec.(2) after clause (c) thereof. The new clause refers to the terms and conditions of service of the employees and agents of the L.I.C. including those who became employees and agents of the L.I.C. on the appointed day under the Act. After sub-sec.(2) of Sec.48 of the Act, three more sub-sections numbered as (2-A), 2(-B) and (2-C) were introduced. They read as follows:

> "(2A). The regulations and other provisions as in force immediately before the commencement of the Life Insurance Corporation (Amendment) Act, 1981, with respect to the terms and conditions of service of employees and agents of the Corporation including those who became employees and agents of the Corporation on the appointed day under this Act, shall be deemed to be rules made under clause (cc) of sub-sec.(2) and shall, subject to the other provisions of this section, have effect accordingly.
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> (2B). The power to make rules conferred by clause (cc) of sub-sec.(2) shall include--
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> (i) the power to give retrospective effect to such rules; and
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> (ii) the power to amend by way of addition, variation or repeal, the regulations and other provisions referred to in sub-sec.(2A), with retrospective effect, from a date not earlier than the twentieth day of June, 1979.
>
> (2C). The provisions of Clause (cc) of sub-sec.(2) and sub-sec.(2B) and any rules made under the said clause (cc) shall have effect, and any such rule made with retrospective effect from any date shall also be deemed to have had effect from that date, notwithstanding any judgment, decree or order of any court, tribunal or other authority and notwithstanding anything contained in the Industrial Disputes Act, 1947 (14 of 1947) or any other law or any agreement, settlement, award or other instrument for the time being in force."

27. Sec.49 of the Life Insurance Corporation Act was amended by omitting clause (bb) and the words "and the terms and conditions of service of employees or agents" in clause (b) of sub-sec.(2). Sub-sec.(3) was inserted after sub-sec.(2), which reads as follows:

> "Every regulation made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session of the successive sessions aforesaid, both Houses agree in making any modification in the regulation or both Houses agree that the regulation should not be made, the regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that regulation."

28. The validity of the Amendment Act, 1981 and the Rules framed by the Central Government pertaining to bonus and dearness allowance for Class III and Class IV employees was challenged before the Apex Court in *A.V.Nachana v. Union of India, (1982)1 S.C.C. 208: (1982)1 Lab.L.J. 466: 1982 Lab.I.C. 181: A.I.R. 1982 S.C. 1126.* The Supreme Court held that the Act and the Rules were valid except in so far as the rules sought to abrogate the terms of certain settlement between the L.I.C. and the workers in 1974 relating to bonus. It was held that the said rules would operate only prospectively from February 2, 1981, the date of publication of the Rules.

29. Some of the contentions put forward by learned counsel for the petitioners were only repetitions of the contentions raised in the above case and rejected by the Supreme Court. It is certainly not open to the petitioners to challenge the validity of the Amendment Act, 1981 and the provisions introduced thereby. However, some of the provisions of the Life Insurance Corporation of India

(Staff) Regulations, 1960, which by virtue of Sec.48(2A) of the Life Insurance Corporation Act shall be deemed to be rules made under sub-sec.2(cc) of Sec.48, were attacked by the petitioners. A vague argument was advanced that the object of the Amendment Act was only to streamline the salary structure of the employees and agents of the L.I.C. and to overcome the financial difficulties faced by the L.I.C. on account of the settlements of 1974 relating to bonus which were held to be enforceable by the Supreme Court in *Madan Mohan Pathak v. Union of India, (1978)2 S.C.C. 56: (1978)1 Lab.L.J. 466: 1978 Lab.I.C. 613: A.I.R. 1978 S.C. 803* and, therefore, the Regulations relating to other terms and conditions of service of the employees and the agents should be held to fall outside the scope of the Amendment Act resulting in their invalidity as a subordinate legislation made in excess of the delegated power. We do not find any substance in the contention inasmuch as Sec.48(2)(cc) introduced by the Amendment Act refers to all the terms and conditions of service of the employees and agents of the L.I.C. and is not confined to salary or bonus. In fairness to learned counsel for the petitioners, it should be pointed out that he did not pursue the said contention any further.

30. However, he concentrated his attack on Regulation 8 of the Life Insurance Corporation of India (Staff) Regulations and contended that it was unconstitutional and it offends the provisions of Arts.14, 16 and 21 of the Constitution of India. Regulation 8 thereof is in the following terms:

> "8. (1) Notwithstanding anything contained in these Regulations, a Managing Director, Executive Director (Personnel), a Zonal Manager or a Divisional Manager may employ staff in Classes III and IV on a temporary basis subject to such general or special directions as may be issued by the Chairman from time to time.
>
> (2) No person appointed under sub-Regulation (1) shall only by reason of such appointment be entitled to absorption in the service of the Corporation or claim preference for recruitment to any post."

Learned counsel submitted that right to work is guaranteed by Part IV of the Constitution of India and right to livelihood is guaranteed under Art.21 of the Constitution of India. According to him, as Regulation 8 prevents a temporary employee from seeking absorption in the service of the L.I.C. or claiming preference for recruitment, it violates the provisions of Arts.14, 16 and 21 of the Constitution of India. It was also contended that right to public employment was recognised by the provisions of the Constitution and no person could be deprived of the same by a regulation of this type. It was further argued that Regulation 12 of the Life Insurance Corporation of India (Staff) Regulations recognised the principle of re-employment of retrenched temporary employees in the explanation appended thereto and thereby the principles underlying Sec.25H of the Industrial Disputes Act and inasmuch as Regulation 8 sought to curtail the same, it was arbitrary and, therefore, unconstitutional. Regulation 12 referred to by learned counsel provides that no person who has been dismissed from the service of the L.I.C. shall be re-employed. It is provided therein that a person who has been compulsorily retired or removed from service or whose services have been terminated, may be re-employed with the prior sanction of the L.I.C. in the case of appointments to posts belonging to Class I and the prior sanction of the Executive Committee in the case of appointments to posts belonging to Classes II, III and IV. The proviso enables the appointing authority to re-employ, with the approval of the Chairman, persons who have resigned from service. Thus, the Regulation prescribes the authorities who should sanction re-employment of certain categories of persons mentioned therein. The main part of the Regulation does not make any reference whatever to retrenched employees. However, the explanation refers to them and it is the following terms:

> "Re-employment of retrenched temporary employees shall not be deemed to be re-employment under this regulation and such persons may be re-employed without the sanction of the Chairman, the Executive Committee or the Corporation."

Thus, the explanation only excluding retrenched temporary employees from the categories mentioned in the regulation. That does not mean that the said regulation provides for re-employment of retrenched temporary employees. There may or may not be a specific provision regarding the same. Learned counsel for the petitioners has not been able to bring to our notice any specific provision relating to re-employment of retrenched

temporary employees. However, the persons covered by Regulation 8 cannot claim to be retrenched temporary employees as contemplated in the Explanation to Regulation 12. Regulation 8 deals with a particular situation of employment of staff in Classes III and IV on a temporary basis, who will be governed by general or special directions as may be issued by the Chairman from time to time. Such employees cannot by reason of such appointment only be entitled to absorption in the service of the L.I.C. or claim preference for recruitment to any post.

31. Learned counsel for the petitioners relied on the judgment of the Supreme Court in *Cawnpore Tannery v. S.Guba, (1967)3 Fac.L.R. 237: (1967)2 Lab.L.J. 110: A.I.R. 1967 S.C. 667* and submitted that the principle of giving an opportunity to a retrenched employee to join service if and when the employer had occasion to employ another hand, is of general application on the ground that it is based on considerations of fair play and justice. It is submitted that Sec.25H of the Industrial Disputes Act has only recognised the said right of a retrenched workman which already existed and was recognized by industrial adjudication prior to introduction of the said Section. The question whether the petitioners are retrenched employees is itself in dispute and it is being considered by us in a later part of this judgment. Hence, it cannot be assumed that the petitioners are retrenched employees for the purpose of deciding the validity of Regulation 8 of the Life Insurance Corporation of India (Staff) Regulations and holding that the said regulation is arbitrary and unconstitutional inasmuch as it prevents the petitioners from claiming absorption in the service or preference for recruitment.

32. Learned counsel drew our attention to the judgment of the Andhra Pradesh High Court in *T.Siva Rao v. Andhra Pradesh State Road Transport Corporation, (1979)2 An.W.R. 338*, in which it was held that public employment was a guaranteed right to the Indian citizen under Art.16 of the Constitution of India and the effect of guarantee cannot be whittled away or destroyed by any law made by the State or a contract forced upon a citizen. That was a case in which seniors were sought to be reverted while keeping the juniors in the higher posts and the general observations made in the judgment should be understood in the context of the facts of that case. That cannot have any bearing in the present case.

33. Reliance was placed on the judgment of a Full Bench of Kerala High Court in *P.V.Mani v. Union of India, A.I.R. 1986 Ker. 86.* In that case, the regulations made by the L.I.C. with reference to alteration of remuneration and other terms and conditions of service of Development Officers were challenged. While the Full Bench held that the Regulations were not valid as they altered the conditions of service of the petitioners to their prejudice without compliance with Sec.9A of the Industrial Disputes Act, found that the Life Insurance Corporation (Amendment) Act, (1 of 1981) validated the regulations with retrospective effect from the date of their promulgation. Thus, the judgment of the Full Bench far from helping the petitioners is only against them to some extent.

34. Learned counsel placed reliance on the judgment of the Supreme Court in *Olga Tellis v. Bombay Municipal Corporation, (1985)3 S.C.C. 545: A.I.R. 1986 S.C. 180*, holding that right to life in Art.21 of the Constitution of India included a right to livelihood. According to learned counsel, Regulation 8 violated Art.21 of the Constitution of India and also the Directive Principles inasmuch as it deprived the petitioners of their right to livelihood. The propositions laid down by the Supreme Court in that case cannot be torn out of the context of the facts and applied to the present case. The principle laid down in the above case has been explained later by the Supreme Court to which we will refer a little later. Suffice it for the present to say that the ruling in *Olga Tellis v. Bombay Municipal Corporation, (1985)3 S.C.C. 545: A.I.R. 1986 S.C. 180*, has no application to this case.

35. Strong reliance is placed on the ruling of the Supreme Court in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath, (1986)3 S.C.C. 156: (1986)2 S.C.J. 201: (1986)69 F.J.R. 171: (1976)3 Com.L.J. 1: (1986)60 Com.Cas. 797: (1986)3 Fac.L.R. 523: 1986 Lab.I.C. 1312: A.I.R. 1986 S.C. 1571.* The question which arose before the Court was whether a rule providing for removal of a permanent employee from service by giving him three months' notice in writing or paying him equivalent of three months' basic pay and dearness allowance in lieu of such notice was arbitrary and unreasonable. On the facts of the case, the court held that the said rule was unconstitutional and it was also opposed to public policy within the meaning of Sec.23 of the Contract Act and,

therefore, unenforceable. On the facts, the case related to permanent employees and has no application to temporary appointments. Apart from that, the Apex Court has taken care to point out clearly that the validity of such rules should be decided on the facts and circumstances of each case. It will be advantageous to extract the following passage in the judgment found at pages 1610 and 1611 of the report:

> "...This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or service of means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are business on and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organisations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

Hence, the above ruling as such does not help the petitioners in the present case.

36. A similar rule was considered by the Constitution Bench of the Supreme Court in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress, A.I.R. 1991 S.C. 101.* Learned counsel for the petitioners placed reliance on the same. That was also a case of a regulation providing for removal of permanent employees from service without holding any enquiry and without assigning any reason. That regulation was struck down as invalid. That ruling will have no application in this case, as this is not a case of permanent employees.

37. As stated earlier, the Supreme Court had considered similar contentions urged against the validity of the Amendment Act and the rules relating to bonus and dearness allowance in *A.V.Nachana v. Union of India, (1982)1 S.C.C. 208: (1982)1 Lab.L.J. 466: 1982 Lab.I.C. 181: A.I.R. 1982 S.C. 1126.* Some of the passages in the judgment of the court are relevant and useful for the purpose of considering the validity of the contentions of the petitioners in the present case. They are extracted hereunder:

> "7. The validity of the Amendment Act and the Life Insurance Corporation of India Class III and Class IV Employees (Bonus and Dearness Allowance) Rules, 1981 have been challenged on several grounds. It was argued that the Act and the rules were violative of Arts.14, 19(1)(g) and 21 of the Constitution. It was further contended that the said Act was invalid on the ground of excessive delegation of legislative functions. Another contention raised was that in any event sub-sec.(2C) of Sec.48 was invalid to the extent it permitted retrospective operation to Rule 3 to override the order of this Court disposing of *D.J.Bahadur's case, A.I.R. 1980 S.C. 2181.* The challenge based on Art.19(1)(g) and Art.21 does not appear to have any substance. Apart from anything else, a claim based on the 1974 settlements is certainly not a fundamental right that could be enforced through this Court. As regards Art.21, the first premise of the argument that the word 'life' in that Article includes livelihood was considered and rejected in *Sant Ram, In re., (1960)3 S.C.R. 499: A.I.R. 1960 S.C. 932.*

... ...

The Attorney General relied strongly on these observations in submitting that it is not really the rules framed by the Central Government in exercise of the delegated authority that override the Industrial Disputes Act or any other existing law but the power of abrogating the existing laws is in sub-sec.(2C) of Sec.48 enacted by Parliament itself. The observations quoted above, from *Harishankar Bagla's case, A.I.R. 1954 S.C. 465,* which was decided by a bench of five Judges appear to support the Attorney General's contention.

11. The question however remains to be answered, does the Life Insurance Corporation Act, 1956 as amended in 1981 state any policy to guide the rule making authority? We have earlier referred to the observations of Mukharjee, J. in the Delhi Laws case that the legislature can formulate a policy as broadly and with as little or as much details as it thinks proper and may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of the policy. In *Harishankar Bagla's case, A.I.R. 1954 S.C. 465,* one of the questions for decision was whether Sec.3 of the Essential Supplies (Temporary Powers) Act, 1946 amounts to delegation of legislative power outside the permissible limits. It was held that legislature had laid down a legislative principle which was "maintaining or increasing supplies of any essential commodity" and "ensuring their equitable distribution and availability at fair prices." That statement was held as offering sufficient guidance to the Central Government in exercising its powers under Sec.3. In the instant case, the policy as stated in the preamble of the Amendment Act is that "for securing the interests of the Life Insurance Corporation of India and its policy-holders and to control the cost of administration, it is necessary that revision of the terms and conditions of service applicable to the employees and agents of the Corporation should be undertaken expeditiously." The policy stated here is at least as clear as the one held in *Harishankar Bagla's case, A.I.R. 1954 S.C. 465,* offering sufficient guidance to the Central Government in exercising its powers under that Act. We have referred to Sec.48(3) of the Life Insurance Corporation Act which requires that every rule made by the Central Government under this Act shall be laid before each House of Parliament and that if both Houses agreed in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be. This Court in *D.S.Garewal v. State of Punjab, A.I.R. 1959 S.C. 512,* observed as follows in respect of a similar provision requiring the rules made by the delegated authority to be laid on the table of Parliament and making the rules subject to modification, whether by way of repeal or amendment on a motion made by Parliament (at p.518):

This makes it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate".

In view of what has been held in Harishankar Bagla and D.S.Garewal, both of which were decided by a larger bench, we do not find it possible to accept the contention that the Act is invalid on the ground of excessive delegation of legislative functions."

38. In *Sant Ram Bhai v. State of Haryana, 1992 Lab.I.C. 976,* a Full Bench of the Punjab and Haryana High Court has held that in the case of ad hoc appointments, the appointee does not acquire any right to hold the post and termination after the expiry of fixed period is neither arbitrary nor unreasonable. The relevant portions of the judgment are thus:

"3. A temporary Government servant has no right to hold a post. His service can be terminated without assigning any reason, either under the terms of the contract providing for such termination or under the relevant statutory rules regulating terms and conditions of temporary Government servants. Termination of services simpliciter does not visit him with any evil consequences. In *Parshotam Lal Dhingra v. Union of India, 1958 S.C.R. 828: A.I.R. 1958 S.C. 36,* which still holds the field, the view expressed by the Constitution Bench in that evil consequences do not include the termination of services of a temporary Government servant in accordance with the terms and conditions of service. This view has been subsequently reiterated in *Jadish Mitter v. Union of*

India, (1964)1 *Lab.L.J.* 418: *A.I.R.* 1964 *S.C.* 449 and *State of Punjab v. Shri Shukh Raj Bahadur*, 1968 *Lab.I.C.* 1286: (1968)3 *S.C.R.* 234. All these authorities have again been referred to, considered and applied in a recent decision by the Supreme Court in the *State of U.P. v. Kaushal Kishore Shukla*, (1991)1 *Serv.L.R.* 606: *A.I.R.* 1991 *S.C.* 793. The Hon'ble Mr.Justice K.N.Singh (as his Lordship then was), while delivering the judgment observed (at p.797 of A.I.R. S.C.)

"Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service."

We may also refer to a decision of Division Bench of this Court in *Om Prakash Sharma v. State of Haryana*, (1981)1 *Serv.L.R.* 314. In that case also, the appointment was for a period of six months and on ad hoc basis and the services were liable to be terminated without any prior notice. After referring to a decision of a Full Bench of this Court in *G.K.Verma v. State of Punjab*, 1979 *Lab.I.C.* 575: *A.I.R.* 1979 *P. & H.* 149, the Division Bench held that an *ad hoc* employee has no right to hold the post till the termination of his services for a valid justification and his services are liable to be terminated even otherwise without any prior notice in terms of his employment. In our opinion, the decision of the Supreme Court in *Kaushal Kishore Shukla, case*, (1991)1 *Serv.L.R.* 606: *A.I.R.* 1991 *S.C.* 793, and the decision of this Court in *Om Prakash Sharma case*, (1981)1 *Serv.L.R.* 314, furnish a complete answer to the first question.

... ...

5. We are aware of the Supreme Court decision in *Ratanlal v. State of Haryana*, 1986 *Lab.I.C.* 159: *A.I.R.* 1987 *S.C.* 478, wherein the policy of the State Government of ad hocism in public employment has been strongly deprecated. Nevertheless, circumstances may arise necessitating the appointment on *ad hoc* basis. It may be on account of the absence of necessary rules or non-availability of incumbents through due process of selection involving time, and exigencies of service may not allow the posts to remain unmanned meanwhile. All the same, such appointments do not confer any right on the appointees for regular appointment to such posts. Such appointments, as observed by the Division Bench of the Delhi High Court in *Kuldeep Chand Sharma v. Delhi Administration*, (1978)2 *Serv.L.R.* 379: 1978 *Lab.I.C.* 1596 (a decision relied upon by the learned counsel for the petitioner), are in the nature of stop gap arrangements. That decision itself is an authority for the proposition that an *ad hoc* appointee has no right to hold that post to which he is so appointed and may be reverted to the original position for valid reasons. As we have shown above, this stop gap arrangement by *ad hoc* appointment can well be terminated in terms of the contract. The learned counsel for the petitioner relied on yet another decision in *Mrs.Anita v. State of Rajasthan*, (1991)4 *Serv.L.R.* 145 (*Raj.*). This decision renders little assistance to the petitioner. In that case, the petitioner was appointed as a Lecturer in English and her appointment was terminated at the end of every academic session. she used to be reappointed at the beginning of the next academic session. Such process continued for long seven years. the Rajasthan Public Service Commission did not advertise the posts for regular appointment of Lecturers in English. It was under these circumstances that a Division Bench of the Rajasthan High Court in that case directed that the petitioner be allowed to continue in service till the regularly recruited candidates became available by due process of selection by the Rajasthan Public Service Commission. The appointment in the present case is under entirely different circumstances. It is the terms of that appointment which govern the present case.

... ...

10. Learned counsel for the petitioner however, urged that once a person was appointed to the post, the tenure expressed in the appointment order loses all significance and the person so appointed acquires a status which cannot be terminated except under the relevant law. The nature of the post and the intention to retain it should be ascertained. Learned counsel attempted to support such contention on the authority of the decision of the Supreme Court in *Union of India v. Arun Kumar Roy*, (1986)1 *Serv.L.R.* 474: 1986 *Lab.I.C.* 686. In our opinion, the reliance on this decision by

the learned counsel, is completely misplaced. That decision is only on authority for the proposition that after an appointment, it is the rule governing the service conditions of the employee which shall prevail over the initial terms of the appointment. In the present case, as we have indicated above, the petitioner has not acquired any status as the Veterinary and Livestock Development Assistant by force of the appointment under Annexure P-2, which appointment was only for a fixed tenure and on *ad hoc* basis. This argument, therefore, holds no water and must be rejected."

With respect we concur with the principles set out in the above judgment.

39. As stated earlier, the ruling in *Cawnpore Tannery v. B.Guba, (1967)3 Fac.L.R. 237: (1967)2 Lab.L.J. 110: A.I.R. 1967 S.C. 667,* has been explained by the Supreme Court in *Delhi Development Horticulture Employees' Union v. Delhi Administration, A.I.R. 1992 S.C. 789.* That was a case in which the petitioners were employed on daily wages. They filed petitions for their absorption as regular employees in the Development Department of the Delhi Administration and for injunction prohibiting the termination of their services and for the difference in wages paid to them and those paid to the regular employees. Rejecting the contentions of the petitioners, the Supreme Court held that they had no right to be regularised. Referring to the argument that right to life would include right to livelihood, the Court observed,

"13. There is no doubt that broadly interpreted and as a necessary logical corollary, right to life would include the right to livelihood and, therefore, right to work. It is for this reason that this Court in *Olga Tellis v. Bombay Municipal Corporation, (1985)3 S.C.C. 545: A.I.R. 1986 S.C. 180,* while considering the consequences of eviction of the pavement dwellers had pointed out that in that case the eviction not merely resulted in deprivation of shelter but also deprivation of livelihood inasmuch as the pavement dwellers were employed in the vicinity of their dwellings. The court had, therefore, emphasised that the problem of eviction of the pavement dwellers had to be viewed also in that context. This was, however, in the context of Art.21 which seeks to protect persons against the deprivation of their life except according to procedure established by law. This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles Art.41 which enjoins upon the State to make effective provision for securing the same "within the limits of its economic capacity and development". Thus even while giving the direction to the State to ensure the right to work, the Constitution-makers thought it prudent not to do so without qualifying it."

The court also took notice of the pernicious consequences which followed the direction for regularisation of such workmen on the only ground that they had put in work for 240 and more days. The Court observed,

"15. Apart from the fact that the petitioners cannot be directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchanges, and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years.

Not all those who gain such back-door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in Government Departments, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

40. In *State of Punjab v. Surinder Kumar, (1992)1 S.C.C. 489,* the Supreme Court held that part-time employees were not entitled to claim regularisation. In that case, the respondents before the Apex Court were offered posts of part-time Lecturers on the specific condition that they could be relieved at any time without notice and that payment would be made at the rate indicated at hourly basis. The offers were accepted and they were appointed accordingly. Their contention that they were entitled to be regularised in the posts of Lecturers with salary at regular pay scale was accepted by the High Court of Punjab and Haryana. Setting aside the said order, the Supreme Court held that no reliance could be placed by the respondents before them on earlier orders of that Court directing regularisation of temporary employees in certain cases. It was held that the terms on which the appointments were made were enforceable and binding on the parties.

41. Learned counsel for the petitioners has not been able to bring to our notice any circumstance vitiating the validity of Regulation 8. It is not shown to be arbitrary or discriminatory. Hence, we hold that Regulation 8 of the Life Insurance Corporation of India (Staff) Regulations, 1960 is valid and enforceable. The petitioners have not challenged the validity of any other regulation before us.

42. It was next argued that the Regulations are not valid as they were not placed before each House of Parliament as required by sub-sec.(3) of Sec.48 of the Life Insurance Corporation Act. There is a basic fallacy in this contention. The Regulations were framed in 1960 and they were notified in Gazette of India, Part IV, dated 22.7.1960 and they are in force from 1.7.1960. At the time when the Amendment Act was passed, the Regulations were already in force. Sub-sec.(2-A) of Sec.48 of the said Act expressly refers to the regulations which were in force before the Amendment Act and declares that they shall be deemed to be Rules under sub-sec.(2)(cc) of the section. There is no presumption that the regulations were not placed before the Parliament. On the other hand, the presumption is the other way as Sec.114(e) of the Indian Evidence Act would apply whereunder the Court may presume that judicial and official acts have been regularly performed. In any event, the enforceability of the Regulations does not depend on any approval of the Parliament. The language of sub-sec.(3) of Sec.48 of the Act is telltale. The sub-section reads as follows:

"Every rule made by the Central Government under this Act shall be laid, as soon as may be, after it is made before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and, if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any notification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of effect, as the case may be, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

Under the sub-section, the rules are to be placed before each House of the Parliament. If both Houses agree in making any modification in the rule, it shall have effect thereafter only in such modified form. If both Houses agree that the rule shall not be made, thereafter the rule shall be of no effect. The last part of the sub-section is very significant. That declares that any modification or annulment shall be without prejudice to the validity of anything previously done under the rule. Hence, the rules come into force from the date notified. The enforcement of the rules need not

wait till both Houses agree in making any modification or agree that the rule shall not be made. Unless both Houses decide to make a modification or take the view that the rule shall not be made, the rules are enforceable. That is why, a provision is made in the last part of the subsection that any modification or annulment of the rule shall not prejudice the validity of anything previously done under the rule. Hence, there is no substance in the argument advanced by learned counsel.

43. A curious contention is raised by counsel for the petitioners that the regulations do not apply to the petitioners. Reliance is placed on recitals in some of the Letters of Appointment. In particular, our attention was drawn to a Letter of Appointment dated 26.3.1990 issued to one T.Gunasekaran. It reads thus:

> "You are hereby offered the post of Assistant on temporary basis for a period of 30 (thirty) days from the date of your joining at the following office of the Corporation:
>
> "CBO IX."
>
> During the period of appointment, you will be paid a basic pay of Rs.1,000 per month and allowances as per rules.
>
> During this period of temporary appointment, you are liable to be discharged from the services of the Corporation at any time without notice and without assigning any reasons whatsoever.
>
> During this period of services with the Corporation, the Staff Regulations of the Corporation shall not apply to you, but you shall obey all such orders and instructions as may be given to you from time to time both orally and in writing.
>
> During the temporary period of your service, you shall not be entitled to any leave, whatsoever, other than the days on which the office of the Corporation are closed and if you remain absent on any working day, a proportionate amount shall be cut from your total monthly remuneration for the date of absence. You shall be entitled to Casual Leave at the rate of 1 1/4 days for each completed month of engagement.
>
> You shall not be entitled to any Travelling Allowance for joining the post of your temporary appointment.
>
> It is clearly to be understood that the appointment is purely temporary in nature and will not be entitle you to any priority or preference for employment in any of the cadres of the L.I.C. of India.
>
> If the terms and conditions of temporary appointment hereinabove offered are acceptable to you, please report for duty to the office of the Corporation, stated in para 1 immediately failing with this offer will lapse. Please note that this appointment will expire on 24.4.1990."

44. Reliance is placed on paragraph 4 thereof, in which it is stated that the staff regulations of the Corporation shall not apply to the appointee. The contention of learned counsel is wholly unsustainable. The sentence on which reliance is placed cannot be split up into two independent parts and construed independently. It is one sentence in all. The reason for stating that the Staff Regulations of the Corporation shall not apply to the appointee is obvious. It is stated therein clearly that the appointee shall obey all orders and instructions as may be given to him from time to time, both orally and in writing. This is clearly in accord with Regulation 8. Under that Regulation, staff employed on a temporary basis are subject to such general or special directions as may be issued by the Chairman from time to time. Hence, it is beyond doubt that the petitioners are appointed under Regulation 8 on a temporary basis. There is no warrant for contending that Regulation 8 is itself inapplicable to the petitioners. It is clear from the Letter of Appointment that the appointment is for a particular period of thirty days expiring on 24.4.1990.

45. Consequently, we hold that the Life Insurance Corporation of India (Staff) Regulations, 1960, are valid and they are applicable to the petitioners.

46. *VIII. Applicability of Industrial Disputes Act.*: It was argued for the petitioners by Sri Singaravelan that the Industrial Disputes Act is a special enactment and it will prevail over the general enactment, *viz.*, the Life Insurance Corporation Act. The position which prevailed before the Amendment Act of 1981 was considered in *L.I.C. of India v. D.J.Bahadur, A.I.R. 1980 S.C. 2181*. It was held by the Supreme Court that *vis-a-vis* industrial disputes between the Corporation and the workmen, the Industrial Disputes Act was a special legislation which prevailed over the Life Insurance Corporation Act, which was a general legislation.

It was pointed out that in the matter of compensation on nationalisation the latter Act was a special statute. According to learned counsel the position did not change after the amendment of Life Insurance Corporation Act, 1981. He placed reliance on several rulings of the Apex Court in support of his arguments. None of them helps learned counsel in his extreme contention. We advert to them a little later.

47. Before that, we will briefly refer to the relevant provisions of the Life Insurance Corporation Act after the amendment of 1981 and the relevant rulings of the Supreme Court considering the same. We have already extracted the provisions of sub-secs.(2cc), (2A), (2B) and (2C) of Sec.48. Sub-sec.2(cc) empowered the Central Government to frame rules providing for the terms and conditions of service of the employees and agents of the Corporation. By the fiction introduced in sub-sec.(2A), the regulations already in force are deemed to be rules made under clause (cc) of sub-sec.(2). Sub-sec.(2C) contains the '*non obstante*' clause. That sub-section gives overriding effect to the rules. The relevant part of the sub-section is found in the words "notwithstanding any judgment, decree or order of any Court, Tribunal or other authority and notwithstanding anything contained in the Industrial Disputes Act (14 of 1947)". A plain reading of the section leaves no doubt that the rules will prevail over the provisions of the Industrial Disputes Act. It goes without saying that the theory of 'occupied field' will apply and the matters for which the rules provide are excluded from the purview of the Industrial Disputes Act.

48. It is in this connection, the particular question raised by the Division Bench in its order of reference as to the effect of Sec.25-J of the Industrial Disputes Act arises. The said section is in the following terms:

> "(1) The provisions of this Chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law (including standing orders made under the Industrial Employment (Standing Orders) Act, 1946.
>
> Provided that where under the provisions of any other Act or Rules, orders or notifications issued thereunder or under any standing orders or under any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.
>
> (2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any State in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so far as they relate to lay-off and retrenchment shall be determined in accordance with the provisions of this Chapter."

49. This is a case of two *non obstante* clause in two enactments and the question raised is which clause will prevail over the other. On first principles, the answer is very simple. When the Legislature has thought fit to exclude specifically the provisions of the Industrial Disputes Act by the amendment of 1981, there can be no doubt that the provisions of Sec.25-J of the Industrial Disputes Act have become ineffective to the extent to which the *non obstante* clause in Sec.48(2C) of the Life Insurance Corporation Act operates. The Legislature was conscious of the existence of the Industrial Disputes Act and the provisions thereof including Sec.25-J. When it used the expression "anything contained in the Industrial Disputes Act, 1947" in Sec.48(2C) of the Life Insurance Act, it had clearly repealed the provisions of Sec.25-J of the Industrial Disputes Act *pro tanto*.

50. As this is a case of an express provision in the enactment, the general principle that a special Act will prevail over a general Act or that a later general Act may not repeal so earlier special Act will have no application. The language of the section is clear and unambiguous and effect must be given to it. There is no point in referring to the rulings dealing with enactments which are silent on that question. There is no need to resort to the theory of implication because the language is specific and clear. It will be useful in this connection to refer to certain observations made by the Supreme Court in *Municipal Council, Palai v. T.J.Joseph, A.I.R. 1963 S.C. 1561.* That was a case in which the doctrine of implied repeal was invoked. The following passages in the judgment set out the law succinctly:

"(9) It is undoubtedly true that the legislature

can exercise the power of repeal by implication. But it is on equally well-settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course, this presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together.

... ...

(1) It must be remembered that at the basis of the doctrine of implied repeal is the presumption that the legislature which must be deemed to know the existing law did not intend to create any confusion in the law by retaining conflicting provisions on the statute book and, therefore, when the court applies this doctrine it does no more than give effect to the intention of the legislature ascertained by it in the usual way *i.e.* by examining the scope and the object of the two enactments, the earlier and the later.

... ...

Of course, there is no rule of law to prevent repeal of a special by a later general statute and, therefore, where the provisions of the special statute are wholly repugnant to the general statute, it would be possible to infer that the special statute was repealed by the general enactment. A general statute applies to all persons and localities within its jurisdiction and scope as distinguished from a special one which in its operation is confirmed to a particular locality and, therefore, where it is doubtful whether the special statute was intended to be repealed by the general statute the Court should try to give effect to both the enactments as far as possible. For as has been pointed out at p.470 of Sutherland on Statutory Construction, Vol.1, where the repealing effect of a statute is doubtful, "the statute is to be strictly construed to effectuate its consistent operation with the previous legislation."

51. In the present case, the doctrine of implied repeal has no applicability as there is express repeal in unequivocal terms. The matter is not *res integra.* It has been considered by the Supreme Court in *Nachana's case, A.I.R. 1982 S.C. 1126.* While rejecting the contention that Art.14 of the Constitution was violated, the court observed:

"8. The contention that Art.14 is infringed arises on the provisions of sub-sec.(2-C) of Sec.48 that any rule made under clause (cc) of sub-sec.(2) of that section touching the terms and conditions of service of the employees of the Corporation shall have effect notwithstanding anything contained in the Industrial Disputes Act, 1947. It is true that after rules are made regarding the terms and conditions of service, the right to raise an industrial dispute in respect of matters dealt with by the rules will be taken away and to that extent the provisions of the Industrial Disputes Act will cease to be applicable. It was argued that there was no basis on which the employees of the Corporation could be said to form a separate class for denying to them the protection of the Industrial Disputes Act. The reply on behalf of the Union of India and the Life Insurance Corporation was that the remuneration that was being paid to class III and class IV employees of the Corporation was far in excess of what was paid to similarly situated employees in other establishments in the public sector. Some material was also furnished to support this claim though they were certainly not conclusive. The need for amending the Life Insurance Corporation Act, 1956 as appearing from the Preamble of the Amendment Act and the Ordinance is as follows:

"....for securing the interests of the Life Insurance Corporation of India and its policy-holders and control the cost of administration, it is necessary that revision of the terms and conditions of service applicable to the employees and agents of the Corporation should be undertaken expeditiously." Referring to the preamble of the Act the Attorney-General appearing for the Union of India and the Corporation submitted that the problem of mounting cost of administration led to the making of the impugned law. He added that it was felt that no improvement in the situation was possible by the process of adjudication and a policy decision was taken that in the circumstances the proper course was legislation and that is why the Amendment Act was passed and the impugned rules were framed. The learned Attorney-General submitted that it was for

Parliament to decide whether the situation was remediable by adjudication or required legislation. According to him the Life Insurance Corporation Act as amended and the rules made after amendment placed the Corporation in the same position as other undertakings, that the advantage being enjoyed by the employees of the Corporation which were not available to similarly situated employees of other undertakings have been taken away removing what he described as discrimination in favour of the employees of the Life Insurance Corporation. We have already said that the material produced on behalf of the Union of India and the Corporation to show that the terms and conditions of service of the employees in several other undertakings in the public sector compared unfavourably to those of the Corporation employees was not conclusive. But the burden of establishing hostile discrimination was on the petitioners who challenged the Amendment Act and the Rules. It was for them to show that the employees of the Life Insurance Corporation and the employees of the other establishments to whom the provisions of the Industrial Disputes Act were applicable were similarly circumstanced to justify the contention that by excluding the employees of the Corporation from the purview of the Industrial Disputes Act they had been discriminated against.

... ...

In the instant case Sec.48(2C) read with Sec.48(2)(cc) authorises the Central Government to make rules to carry out the purposes of the Act notwithstanding the Industrial Disputes Act or any other law. *This means that in respect of the matters covered by the rules the provisions of the Industrial Disputes Act or any other law will not be operative.*" (*Italics ours.*)

52. After the said pronouncement in unmistakable terms, how can there be any doubt whether Sec.25-J of the Industrial Disputes Act will prevail over the provisions of the Life Insurance Corporation Act in so far as the rules relating to the terms and conditions of service of the employees and agents of the L.I.C. are concerned?

53. It is well settled that the expression "terms and conditions of service" includes 'tenure of service'. *Vide: D.C. Saxena v. State of Haryana, A.I.R. 1987 S.C. 1463.* Hence, Sec.23-J of the Industrial Disputes Act is repealed with reference to matters covered by the rules referred to in Sec.48(2C) of the Life Insurance Corporation Act.

54. We shall now refer briefly to the rulings cited by Mr. Singaravelan and point out the inapplicability of the same to this case. In *Dominion of India v. Shrinbai, A.I.R. 1954 S.C. 596,* the Court had to construe Sec.3 of the Government of India Ordinance 19 of 1946 which provided for continuation of lands requisitioned under the Defence of India Act and the rules made thereunder to be subject to requisition until the expiry of the Ordinance notwithstanding the expiration of the said Act and Rules. The Court set out the principle of construction of *non obstante* clause when the language of the enactment was clear in the following words:

"(10) While recognising the force of this argument it is however necessary to observe that although ordinarily there should be a close approximation between the *non obstante* clause and the operative part of the section, the *non obstante* clause need not necessarily and always be extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof a *non obstante* clause cannot cut down the construction and restrict the scope of its operation. In such cases the *non obstante* clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. Whatever may have been the presumed or the expressed intention of the legislating authority when enacting Ordinance 19 of 1946 the words of Clause 3 read along with the definition of the requisitioned land contained in Clause 2(3) of the Ordinance are quite clear and it would not be within the province of the Courts to speculate as to what was intended to be covered by Clause 3 of the Ordinance when the only interpretation which could be put upon the terms thereof is that all requisitioned lands, that is, all immovable properties which when the Defence of India Act, 1939 expired were subject to 'any' requisition effected under the Act and the Rules were

to continue to be subject to requisition until the expiry of the Ordinance."

It is not known how the passage helps the petitioners in this case. Language of Sec.48 of the Life Insurance Corporation of India Act is clear enough and the terms thereof are not cut down by the *non obstante* clause in sub-sec.(2C).

55. In *J.K.Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh and others, A.I.R. 1961 S.C. 1170,* the Supreme Court held that in cases of conflict between a specific provision and a general provision, the former prevails over the latter. That universal rule has no bearing in this case. In *Pratap Singh v. Manmohan Dey, A.I.R. 1966 S.C. 1931,* the court held that a general later law does not abrogate an earlier special law by mere implication. When there is a specific provision for such abrogation as in this case, the general principle has no application. In *J.K.Steel Ltd. v. Union of India, A.I.R. 1970 S.C. 1173,* it was held that Acts *in pari materia* must be taken together as forming one system and as interpreting and enforcing each other. The two Acts with which we are concerned cannot by any stretch of imagination be said to be Acts *in pari materia.* In *Mambai Kangar Sabha v. Abdulbhai, A.I.R. 1976 S.C. 1455,* the court had to construe some sections of the Payment of Bonus Act. It was held that where two judicial choices are available, the construction in conformity with the social philosophy of Part IV of the Constitution has preference. In the present case, there is no question of two choices.

56. The ruling in *Manager, Government Branch Press v. D.B.Beliappa, A.I.R. 1979 S.C. 429,* that the rule of master and servant in its original absolute form is not applicable to persons in public employment to whom Arts.14, 15, 16 and 311 of the Constitution of India are available, has no relevance to this case as nobody is invoking the said rule of master and servant in this case. Nor does the judgment of the apex court in *The Authorised Officer, Thanjavur and another v. S.Naganatha Ayyar, etc., A.I.R. 1979 S.C. 1487,* under the Tamil Nadu Land Reforms and Fixation of Ceiling on Land Act, 1961 help the petitioners herein. The principle that in the case of welfare legislations, the Courts should adopt goal-oriented approach has no bearing here as the terms of Sec.48 of the Life Insurance Corporation Act are unequivocal and do not admit of any other construction.

57. The judgment in *Union of India v. G.M.Kokil, A.I.R. 1984 S.C. 1022,* is really against the petitioners. The relevant passage is as follows:

"...It is well-known that a *non obstante* clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus the *non obstante* clause in Sec.70, namely, "notwithstanding anything in that Act" must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the Act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the *non obstante* clause the Act is applicable even to employees in the factory who might not be 'workers' under Sec.2(2), the same *non obstante* clause will keep away the applicability of exemption provisions was all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the *non obstante* clause Sec.64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under Sec.59 of that Act read with Sec.70 of the Bombay Shops and Establishments Act, 1948."

58. Similarly, the principles laid down in *Ajay Kumar v. Union of India, A.I.R. 1984 S.C. 1130: 1984 Lab.I.C. 691: (1984)1 Lab.L.J. 368,* are against the petitioners. It is worthwhile referring to the following passages:

"The general rule to be followed in case of conflict between two statutes is that the latter abrogates the earlier one. In other words, a prior special law would yield to a later general law, if either of the two following conditions is satisfied:

(i) The two are inconsistent with each other.

(ii) There is some express reference in the later to the earlier enactment.

If either of these two conditions is fulfilled, the later law, even though general, would prevail. From the text and the decisions, four tests are deducible and these are: (i) The legislature has

the undoubted right to alter a law already promulgated through subsequent legislation, (ii) A special law may be altered, abrogated or repealed by a later general law by an express provision, (iii) a later general law will override a prior special law if the two are so repugnant to each other that they cannot co-exist even though no express provision in that behalf is found in the general law, and (iv) It is only in the absence of a provision to the contrary and of a clear inconsistency that a special law will remain wholly unaffected by a later general law. See in this connection, Maxwell on "The Interpretation of Statutes". Twelfth Edition, pages 196-198."

59. The judgment in *Chandavarkar Sita Ratna Rao v. Ashalate, A.I.R. 1987 S.C. 177*, is also against the petitioners. Paragraphs 62, 68 and 69 of the judgment read thus:

"62. If the view of the Full Bench of the Bombay High Court is to be given effect to, then it will defeat the purpose of the *non obstante* clause in Sec.15A of the Act. The rule of construction is to give effect to the intention of the legislature to amend what is actually expressed where the language is plain and admits of one meaning, the task of interpretation can hardly be said to arise. Here, in this case it is possible to give effect to the literal construction, nothing has been shown to warrant that such literal construction should not be given effect to. The words of a statute must *prima facie* be given their ordinary meaning. See *Nokee v. Doncaster Amalgamated Collieries Ltd., 1940 A.C. 1014 at p.1022*, where the grammatical construction is clear and manifest and without doubt that construction ought to prevail unless there are some strong and obvious reasons to the contrary. In this case there is none.

... ...

68. A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict and overriding effect over the provisions of the Act or the contract mentioned in the *non obstante* clause. It is equivalent to saying that in spite of the provisions of the Act or any other Act mentioned in the *non obstante* clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the *non obstante* clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in *South India Corporation (P) Limited v. Secretary, Board of Revenue, Trivandrum, A.I.R. 1964 S.C. 207: (1964) 4 S.C.R. 280,*

69. It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. This will be clarified in the instant case by comparison of sub-sec.(1) of Sec.15 with sub-sec.(1) of Sec.15-A. We are therefore unable to accept, with respect, the view expressed by the Full Bench of the Bombay High Court as relied on by the learned single Judge in the judgment under appeal."

60. In *Krishna District Co-operative Marketing Society Ltd. v. N.V.P.Rao, A.I.R. 1987 S.C. 1960*, the Court had to consider a conflict between a Central Act and a State Act. It was held that the former prevailed. It has no bearing on this case. Reliance is placed on the following passage in the judgment in *C.T.Shang v. S.D.Baijal, A.I.R. 1988 S.C. 603:*

"It is pertinent to mention that in interpreting a statute the Court has to ascertain the will and policy of the legislature as discernible from the object and scheme of the enactment and the language used therein."

We do not know how it helps the petitioners in this case when the language of the section is unambiguous.

61. In *All India Reporter, Karmachari Sangh v. All India Reporter Ltd., A.I.R. 1988 S.C. 1325*, the Court holding that working Journalists and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act (45 of 1955) was a beneficial legislation and observed thus:

"19. The Act in question is a beneficial legislation which is enacted for the purpose of improving the conditions of service of the employees of the newspaper establishments and hence even if it is possible to have two opinions on the construction of the provisions of the Act the one which advances the object of

the Act and is in favour of the employees for whose benefit the Act is passed has to be accepted."

As already stated, there is no question of two constructions being available in this case. Only one construction is possible here. Hence, the ruling does not apply.

62. In *Ashoka Marketing Ltd. v. Punjab National Bank,, A.I.R. 1991 S.C. 855: (1990)4 S.C.C. 406*, a question arose with reference to the provisions of the Delhi Rent Control Act and the Public Premises (Eviction of Unauthorised Occupants) Act (40 of 1971). The relevant principles of interpretation are set out in the following passages:

"49. This means that both the statutes, *viz.*, the Public Premises Act and the Rent Control Act, have been enacted by the same legislative powers in respect of the matters enumerated in the Concurrent List. We are, therefore, unable to accept the contention of the learned Additional Solicitor General that the Public Premises Act, having been enacted by Parliament in exercise of legislative powers in respect of matters enumerated in the Union List would *ipso facto* override the provisions of the Rent Control Act enacted in exercise of the legislative powers in respect of matters enumerated in the Concurrent List. In our opinion the question as to whether the provisions of the Public Premises Act override the provisions of the Rent Control Act will have to be considered in the light of the principles of statutory interpretation applicable to laws made by the same legislature.

50. On such principle of statutory interpretation which is applied to be is contained in the Latin maxim: *leges posteriores priores conterarias abrogant* (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim: *generalia specialibus non derogant* (a general provision does not derogate from a special one). This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Benion Statutory Interpretation pp.433-34).

... ...

In other words, both the enactments, namely the Rent Control Act and the Public Premises Act, are special statutes in relation to the matters dealt with therein. Since, the Public Premises Act is a special statute and not a general enactment the exception contained in the principle that a subsequent general law cannot derogate from an earlier special law cannot be invoked and in accordance with the principle that the latter laws abrogate earlier contrary laws, the Public Premises Act must prevail over the Rent Control Act."

There is nothing in the above passages referred to by learned counsel to support his contention in the present case. Nor does any other passage in the judgment help him.

63. The last of the decisions cited in this regard is that of the Supreme Court in *R.S.Raghunath v. State of Karnataka, A.I.R. 1992 S.C. 81.* Our attention is drawn to paragraph 15 of the judgment, in which it is observed that a later statute may repeal an earlier one either expressly or by implication and the Courts have not favoured such repeal by implication. It was also observed in that case that if earlier and later statutes can reasonably be construed in such a way that both can be given effect to, the same must be done. That ruling also does not support the extreme contention of learned counsel for the petitioners. Thus, none of the rulings relied on by him helps him in this case.

64. Another argument advanced by learned counsel which, in our opinion, is one in despair, is that the L.I.C. is estopped from contending that the provisions of the Industrial Disputes Act do not apply. According to him, such an objection was not raised when references were made to the National Tribunals under N.T.B.1 of 1985 and N.T.B.1 of 1987. It was argued that both the references were long after the amendment of the Life Insurance Corporation Act and no objection was raised by the L.I.C. as to the applicability of the provisions of the Industrial Disputes Act, with the result that it is estopped in the present case from contending to the contrary. Reference was made to a judgment in *The State of Punjab v. Jagdip Singh, A.I.R. 1964 S.C. 521: 1964 S.C.D. 500.* There is no substance in the contention. It is too well settled that there can be no estoppel against a statute. The fact that the L.I.C. did not object to the dispute being decided by the National Tribunals on the earlier occasions would not prevent

them from raising a contention that the applicability of the Industrial Disputes Act is excluded from the field occupied by Sec.48(2C) of the Life Insurance Corporation Act. The ruling cited has no relevance whatever to the question. That was a case in which supernumerary posts of Tahsildars were created by the Rajpramukh of Pepsu to provide liens for the Tahsildars who were confirmed as such, when no posts were available for confirmation. After the merger of the State of Pepsu with the State of Punjab by virtue of the operation of the States-Reorganisation Act, 1956, the successor Government cancelled the previous order of confirmation, the validity of which was challenged and which was upheld by the Supreme Court holding that Art.311(2) of the Constitution of India would not apply to the case and the earlier orders of confirmation were wholly void. It was also held that the creation of supernumerary posts was of no avail as a means of validating the original order of confirmation. That ruling has nothing to do whatever with the principle of estoppel now advanced by learned counsel.

65. Mr.Chandru, counsel for the petitioners in the later batch, did not take the extreme stand taken by the other counsel. He pointed out that the L.I.C. is expressly governed by the Industrial Disputes Act by referring to the definition of "appropriate Government" in Sec.2(a) of that Act. The definitions of 'Insurance Company' and 'Industry' in Sec.2(kk) and Sec.2(j) of the Industrial Disputes Act also prove that L.I.C. is not excluded from the purview of the Industrial Disputes Act. According to him, the effect of the Life Insurance Corporation (Amendment) Act, 1981 is only to nullify the bargaining power of the employees in financial matters. It was argued that 'terms and conditions of service' could only refer to salary, bonus and other financial matters. We are unable to accept this part of his argument. We have already pointed out that 'terms and conditions of service' would include tenure of service. It was next argued that an industrial dispute could be raised with reference to matters other than "terms and conditions of service." Our attention was drawn to the following observation of the Supreme Court in *Bahadur's case, A.I.R. 1980 S.C. 2181*:-

> "...the meant of the statute is industrial dispute, not conditions of employment or contract of service as such."

It was contended that the machinery constituted under the Industrial Disputes Act was available for adjudication of disputes between the workers and the L.I.C. Learned counsel submitted that the question whether the L.I.C. had adopted unfair labour practice as defined by the Industrial Disputes Act could be raised and canvassed before the industrial forum. According to learned counsel, Sec.25-J of the Industrial Disputes Act will come into play in matters other than those covered by Sec.48(2C) of the Life Insurance Corporation Act. He submitted that the Life Insurance Corporation (Amendment) Act of 1981 left untouched the provisions of Sec.48(2)(j) of the principal Act, which enabled the Central Government to make rules with reference to the "conditions subject to which the Corporation may appoint employees". He pointed out that inspite of the introduction of clause (cc) to sub-sec.(2) of Sec.48 relating to the terms and conditions of service of the employees and agents of the L.I.C., by the Amendment Act, clause (j) of the sub-section was retained. According to him, Sec.48(2-C) is confined only to the provisions of clause (cc) and sub-sec.(2-B) and it is not applicable to clause (j). It was, therefore, argued that whatever is not covered by sub-sec.(2C), falls under clause (j) of sub-sec.(2) and would be hit by Sec.25-J of the Industrial Disputes Act. It was also his contention that the petitioners would be entitled to enforce the provisions of Sec.25-F of the Industrial Disputes Act before the authorities constituted under that Act.

66. Sri M.R.Narayanaswamy, learned senior counsel for the L.I.C. argued that after the Amendment Act of 1981, all terms and conditions of service of the employees and agents of the L.I.C. are governed only by the rules and regulations and the provisions of the Life Insurance Corporation Act. He drew our attention to Secs.11(4), 23, 48 and 49 of the said Act. Sec.11(4) contains a *non obstante* clause with reference to employees whose services are transferred from an insurer to the L.I.C. Sec.23 thereof reads as 'the Corporation in employ such number of persons as it thinks fit for the purpose of enabling it to discharge its functions under the Act" and every employee of the L.I.C. shall be liable to serve anywhere in India. The relevant part of Secs.48 and 49 thereof have already been referred to by us. Before the amendment of 1981, Sec.49 empowered the L.I.C. to make regulations providing for the terms and conditions of service

of the employee and agents. Sub-sec.2(b) was in the following terms:

> "(2) In particular, and without prejudice to the generality of the foregoing power, such regulations provide for--
>
> (a) ... ...
>
> (b) the method of recruitment of employees and agents of the Corporation and the terms and conditions of service of such employees or agents;"

Sub-sec.2(bb) introduced by Act 17 of 1957 read thus:

> (bb) the terms and conditions of service of persons who have become employees of the Corporation under sub-sec.(1) of Sec.11."

The Amendment Act of 1981 omitted the words "and the terms and conditions of service of employees or agents" in clause (b) and omitted the entirety of clause (bb), obviously because provision has been made therefor in clause (cc) of sub-sec.(2) of Sec.48. thus, the power to prescribe rules for the terms and conditions of service of the employees, is transferred to the Central Government by the amendment from the L.I.C. However, the method of recruitment of employees and agents of the L.I.C. is left in its control and it can make Regulation therefor.

67. Strong reliance is placed by learned Senior Counsel on the following two passages found in the judgment of the Supreme Court in *A.V.Nachana v. Union of India, (1982)1 S.C.C. 208: (1982)1 Lab.L.J. 466: 1982 Lab.I.C. 181: A.I.R. 1982 S.C. 1126:*

> "It is true that after rules are made regarding the terms and conditions of service, the right to raise an industrial dispute in respect of matters dealt with by the rules will be taken away and to that extent the provisions of the Industrial Disputes Act will cease to be applicable. This means that in respect of the matters covered by the rules the provisions of the Industrial Disputes Act or any other law will not be operative."

Learned Senior Counsel, however, with his usual fairness, brought to our notice the latest ruling of the Supreme Court in *the National Life Insurance Employees Association (INTUC) v. L.I.C. of India and others, (S.L.P. (C) No.974 of 1992).* That was a case in which the order of the Patna High Court was reversed. The L.I.C. filed writ petitions before the Patna High Court challenging the initiation of a conciliation proceeding by the Regional Labour Commissioner (Central) under the Industrial Disputes Act on a dispute raised by an association of its employees. Some directions in the course of conciliation proceedings were also challenged. An argument was advanced by learned counsel for the Association that sub-sec.(2C) of Sec.48 of the Life Insurance Corporation Act meant that no dispute could be raised relating to the criteria for the promotions and in that regard, the provision of the rules governing the L.I.C. must prevail; but the provisions of sub-sec.(2C) would not bar to the raising of an industrial dispute to the limited extent that the L.I.C. was making promotions in violation of the said rules. The Patna High Court held that the said contention was contrary to the observations of the Supreme Court in *A.V.Nachana v. Union of India, (1982)1 S.C.C. 208: (1982)1 Lab.L.J. 466: 1982 Lab.I.C. 181: A.I.R. 1982 S.C. 1126.* The first of the passages referred to above was relied on by the High Court. In that view, the Writ petitions filed by the L.I.C. were allowed. On appeal, the Supreme Court by its order dated 17.2.1992 reversed the conclusion of the Patna High Court on the following reasoning:

> "Mr.Rao for respondents relied upon the decision of this Court in *A.V.Nachana v. Union of India, A.I.R. 1982 S.C. 1126: 1982 Lab.I.C. 181: (1982)1 S.C.C. 505: (1982)1 Lab.L.J. 119: (1982)2 S.C.R. 246,* to contend that since the rules are made on the subject, the Industrial Disputes Act will not be applicable to the present dispute raised by the petitioner. We are of the view that the observations made in the case cited by Shri Rao have been made in connection with the subject matter covered by the rules. They have no application to the present dispute which relates to the violation of the rules made on the subject. Hence the adjudicating machinery under the Industrial Disputes Act will have jurisdiction over the present dispute. In this view of the matter, the appeal has to be allowed which is, accordingly, allowed. We make it clear that this order has no reflection whatsoever on the merits of the dispute. The conciliation officer will proceed with the dispute according to law."

68. Mr.Chandru brought to our notice that at the instance of the Trade Union of the employees, the Central Government has once again referred the dispute raised by them for adjudication to the

Central Government Industrial Tribunal, New Delhi. A specific reference was made in the affidavit filed in support of the W.P.No.18565 of 1991 in paragraph 9 to the said reference. A xerox copy of the order dated 4.3.1991 made by the Central Government was produced before us. It is in the following terms:

> "No.L.17011/107/90-1R-B(II): Whereas the Central Government is of the opinion that an industrial dispute exists between the employers in relation to the management of Life Insurance Corporation of India and their workmen in respect of the matters specified in the schedule hereto annexed;
>
> AND whereas the Central Government considers it desirable to refer the said dispute for adjudication;
>
> Now, therefore, in exercise of the powers conferred by Clause (d) of sub-sec.(1) and sub-sec.(2A) of Sec.10 of the Industrial Disputes Act, 1947 (14 of 1947), the Central Government hereby refers the said dispute for adjudication to the Central Government Industrial Tribunal, New Delhi. The said Tribunal shall give its award within a period of six months.
>
> *The Schedule:* "Whether the action of the management of Life Insurance Corporation of India in not absorbing Badli/temporary and part time workmen employed in the establishment of L.I.C. after 20.5.1985 is justified? If not, to what relief the workmen are entitled?"

69. It is seen from the said copy that the reference is wide enough to cover all the badli/temporary and part time workmen of the L.I.C. throughout the country. Copies of the order have been forwarded to several associations of the employees in different parts of the country as well as several individuals for necessary action. Mr.Singaravelan submitted that when his clients approached the Government for making a reference, their application was turned down and they were not aware of the reference made by the order dated 4.3.1991. According to him, his clients are not parties to the reference and they would prefer to have their rights determined by this Court. We see no substance in his submission. Sec.10(5) of the Industrial Disputes Act enables the appropriate Government to include in a reference at any time after the reference but before the submission of the award, such establishment, group or class of establishments whether or not at the time of such inclusion any dispute exists or is apprehended in that establishment, group or class of establishments, if the Government is of opinion that the dispute is of such a nature that such establishments are likely to be interested in or effected by the dispute. There is no bar to the employees who are represented by Mr.Singaravelan to get themselves included in the reference now pending before the Central Government Industrial Tribunal, New Delhi. It is stated that so far no progress has been made in the reference and the adjudication process has not yet started.

70. It was submitted by Mr.Chandru that the L.I.C. has not so far raised any question as to the competence of the Tribunal to decide the dispute. Counsel appearing for the Corporation disputed that statement. Whatever may be the position, it is for the Tribunal to decide the question of competence also, if raised before it. We have already pointed out that the applicability of the provisions of the Industrial Disputes Act is concluded only to the extent to which the rules covered by Sec.48(2C) of the Life Insurance Corporation Act applied. The latest pronouncement of the Supreme Court also shows that the Tribunals constituted under the Industrial Disputes Act are entitled to consider the claims relating to violation of the rules. Hence, we are not deciding here the question whether the petitioners are entitled to the benefits claimed by them. It is for the tribunal before which a reference is already pending to decide the dispute. Thus, on this question, while holding that the applicability of the Industrial Disputes Act is excluded from the field covered by Sec.48(2C) of the Life Insurance Corporation Act, we direct the parties to agitate their claims before the Central Government Industrial Tribunal, New Delhi, where a reference is already pending.

71. *IX. Unfair labour practice:* The expression "Unfair labour practice" has been defined by Sec.2(ra) of the Industrial Disputes Act as any of practices specified in the Fifth Schedule. Part I of the Fifth Schedule sets out unfair labour practices on the part of the employers and trade unions of employees. Entry 10 is in the following terms:

> "To employ workmen as 'badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen."

Sec.25-T of the said Act prohibits an employer or workmen or a trade union, whether registered

under the Trade Unions Act from committing any unfair labour practice. Sec.25-U of the said Act prescribes the penalty, for commission of unfair labour practices.

72. The burden of song in these writ petitions is that the L.I.C. is guilty of unfair labour practice for quite a long time from the past. Reliance is placed on the observations made by the National Tribunals in the Awards passed in the references made to them. Those observations are wholly irrelevant in this case as we are concerned only with the employment made subsequent to 20.5.1985. The National Tribunals were concerned with the period prior to 20.5.1985. Moreover, the Awards made by the Tribunals are subject matter of appeal pending before the Supreme Court and the question will have to be decided only by that Court finally with regard to the earlier period. At this stage, no reliance can be placed on such observations.

73. We have already set out the relevant facts while tracing the history of the reference. It is seen therefrom that the parties were governed by the interim orders passed by the Tribunals and Court after the reference was made to the National Tribunal, 1985. The order of the Supreme Court was made on 1.3.1989. It is the case of the L.I.C. that the terms of the compromise on the basis of which the Supreme Court passed the order were implemented and employments were given. Thereafter, advertisement was issued calling for applications for Class III and Class IV Posts as prescribed by the Regulations. The advertisement was published on 29.7.1989, which happened to be a Saturday. The first of these writ petitions was filed on 31.7.1989 the very next working day. Obviously, the petitioners were only waiting for the publication of such advertisement to rush to Court and obtain interim orders. An interim order was passed on 2.8.1989. What happened thereafter, has already been set out in this judgment. It was seen therefrom that the interim orders were being passed off and on by this Court and they had to be obeyed by the L.I.C. In fact, they had to face a proceeding for contempt on the ground that they had disobeyed one such order. In such a situation, there is considerable force in the arguments advanced by learned SeniorCounsel for the L.I.C. that the charge against the L.I.C. that it has indulged in unfair labour practice is unsustainable. It is rightly pointed out by learned senior counsel that parties cannot be made to suffer for obeying orders of court. No material whatever has been placed before us in support of the serious allegation made by the petitioners that the L.I.C. is guilty of unfair labour practice after 20.5.1985. We hold that the said allegation has not been proved.

74. However, we add that if in the reference pending before the Central Government Industrial Tribunal the employees want to establish that the L.I.C. is guilty of unfair labour practice after 20.5.1985, it is open to them to raise the necessary plea and adduce evidence in support thereof. It will be a matter in that event to be decided by the Tribunal. In so far as these writ petitions are concerned, the claim with which the petitioners came to this Court that the L.I.C. is guilty of unfair labour practice has not been proved.

75. *X. Constitutionality of Sec.2(oo)(bb) of the Industrial Disputes Act*: The sub-section was introduced by Act 49 of 1984. Sec.2(oo) of the Industrial Disputes Act defined 'retrenchment'. The section as it stood before the Amendment Act read thus:

> " "retrenchment" means the termination by the employer of the service of a workmen for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include--
> (a) voluntary retirement of the workman; or
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
> (c) termination of the service of a workman on the ground of conciliation officer."

By the Amendment Act, sub-clause (bb) reading thus was introduced:

> "(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or."

76. When reliance was placed by the L.I.C. on sub-clause (bb) to refute the contention of the petitioners that they have been retrenched from service, some of the petitioners decided to challenge the constitutionality of the sub-clause and filed writ petitions therefor. Such petitioners are represented by Mr.Singaravelan, Advocate. In his

opening argument, he did not advance any contention in this regard. Mr.Chandru, who appeared for the other petitioners, made it clear that he was not challenging the validity of the sub-clause in these proceedings. After Senior Counsel for the L.I.C. concluded his arguments in reply, Mr.Singaravelan sought to contend that the sub-clause is unconstitutional. According to him, it violates the provisions of Arts.14 and 16 of the Constitution of India and is contrary to the Directive Principles of State Policy contained in Part IV of the Constitution of India. It was submitted that the objects and reasons of the Amendment Act 49 of 1984 did not reveal any purpose for the insertion of Sub-clause (bb). According to him, the sub-clause defeats substantial rights made available to the petitioners by Sec.25-H and the other provisions of the Industrial Disputes Act. We do not find any substance in the arguments advanced. The competence of the legislature to amend the definition of the expression "retrenchment" is not called in question. When the Industrial Disputes Act was passed in 1947, there was no definition for the said expression in the Act. Nor did the predecessor Act viz., Trade Disputes Act, 1929 contain any definition. Clause (oo) was inserted by Act 43 of 1953 with effect from 24.10.1953. In *Hariprasad v. A.D.Divolkar, A.I.R. 1957 S.C. 121: 1957 S.C.J. 83: 1957 S.C.R. 121: 1957 S.C.A. 57,* the Constitution Bench of the Supreme Court held that the definition introduced by Clause (oo) had no wider meaning that the ordinary accepted connection of the word. The relevant passage is as follows:

> "(19). For the reasons given above, we hold, contrary to the view expressed by the Bombay High Court, that retrenchment as defined in Sec.2(oo) and as used in Sec.25-F has no wider meaning than the ordinary, accepted connotation of the word: it means the *discharge of surplus labour or staff* by the employer for any reasons whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and *bona fide* closure of business as in the case of Shri Dinesh Mills Ltd., or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the Railway Company."

77. In *The State Bank of India v. Sundara Money, A.I.R. 1976 S.C. 1111,* a three Judge Bench of the Supreme Court held that as per the definition of the term "retrenchment", termination of the service of workman, whatever be the reason, would amount to retrenchment unless it falls under the category of punishment by way of disciplinary action or in any of the excluded clauses (a), (b) and (c). The Bench did not make any reference to the judgment of the five Judge Constitution Bench in *Hariprasad's case, A.I.R. 1957 S C. 121),* or the accepted connotation of the term. However, the view taken in *Sundara Money's case, A.I.R. 1976 S.C. 1111,* was accepted by the later Rulings of the Supreme Court.

78. In the Statement of Objects and Reasons for the Amendment Act 49 of 1984 it is stated that "difficulties have arisen in the interpretation of the expression "retrenchment" and, therefore, it is proposed to exclude from the definition "termination of service" of a workman as a result of non-renewal of contract of employment on its expiry and termination of contract in accordance with the provisions thereof". Thus, sub-clause (bb) was introduced in the definition clause.

79. It has been repeatedly held by the apex court that the legislature is entitled by exercise of its powers within the limits prescribed by the Constitution to remove the basis of a decision rendered by a competent Court, thereby rendering that decision ineffective. Vide *Municipal Corporation of City of Ahmedabad v. The New Shrock Spinning and Weaving Company Ltd., A.I.R. 1970 S.C. 1292.* The distinction between a legislative act and a judicial act was brought out in the judgment in *I.N.Saksena v. State of U.P., A.I.R. 1976 S.C. 2250,* in the following passages:

> "21. The distinction between a 'legislative' act and a 'judicial' act is well known, though in some specific instances the line which separates one category from the other may not be easily discernible. Adjudication of the rights of the parties according to law enacted by the legislature is a judicial function. In the performance of this function, the court interprets and gives effect to the intent and mandate of the legislature as embodied in the statute. On the other hand, it is for the legislature to lay down the law, prescribing norms of conduct which will govern parties and transactions and to require the court to give effect to that law.

22. While, in view of this distinction between legislative and judicial functions, the legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Arts.245 and 246 of the Constitution render a judicial decision ineffective by exacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray, C.J. in *Indira Gandhi v. Raj Narain, A.I.R. 1975 S.C. 2299: 1975 S.C.C. (Supp.) 1,* the rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power.

23. *Hari Singh v. Military Estate Officer, A.I.R. 1972 S.C. 2205: (1973)1 S.C.R. 515,* a Bench of seven learned Judges of this Court laid down that the validity of a validating law is to be judged by two tests. Firstly, whether the legislature possesses competence over the subject-matter, and, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law. To these we may add a third. Whether it is consistent with the provisions of Part III of the Constitution."

80. The three tests prescribed in the above ruling are satisfied in the present case. Nothing was urged before us to show how the amendment offends the provisions of Part III of the Constitution of India. There is no question of the sub-clauses being invalid on the ground that it runs counter to the provisions of Secs.25-F, 25-G and 25-H of the Industrial Disputes Act. The expression "retrenchment" used in those sections must be understood only in the way in which it is defined in Sec.2(oo) of the Act. We have no hesitation in holding that sub-clause (bb) of Sec.2(oo) of the Industrial Disputes Act is valid and constitutional.

81. *XI. Are the petitioners retrenched employees?:* We have already held that the L.I.C. (Staff) Regulation are valid and applicable to the petitioners. We have also referred to the fact that the petitioner were appointed temporarily under Regn.8. We have held that the provisions of the Industrial Disputes Act are excluded to the extent covered by the Regulations. It follows automatically that the petitioners who are governed by Regn.8 cannot claim to have been retrenched as defined by the Industrial Disputes Act. They cannot invoke the provisions relating to retrenched employees. It was argued that the work for which the petitioners were recruited continued to exist and the termination of service at the expiry of the contractual periods was nothing but retrenchment as defined by sec.2(oo) of the Industrial Disputes Act. Reliance was placed on some decisions including one of this Court in *K.Rajandran v. Director. P.& H. Corpn. of India Ltd., New Delhi, 1992 Lab.I.C. 909,* which turned on the interpretation of Sec.2(cc) after the introduction of sub-clause (bb). We do not wish to express our views on the correctness of the view taken in these rulings. They have no application in this case, as the petitioners are governed by Regulation 8 of the Life Insurance Corporation of India (Staff) Regulations. Hence, we hold that the petitioners are not retrenched employees.

82. By way of summing up, our conclusions are as follows:

(1) The Life Insurance Corporation (Staff) Regulations, 1960 are valid and they are applicable to the petitioners.

(2) The provisions of the Industrial Disputes Act are not applicable to the petitioners with reference to matters covered by Sec.48(2C) of the L.I.C. Act.

(3) It is not proved that L.I.C. is guilty of unfair labour practice. It is open to the petitioners to raise the plea and prove it before the Central Government Industrial Tribunal, New Delhi, where a reference is already pending.

(4) Sec.2(oo)(bb) of the Industrial Disputes Act is constitutionally valid.

(5) The petitioners are not retrenched employees as they are governed by Regn.8 of the L.I.C. of India (Staff) Regulations.

83. Counsel for the petitioners submitted that as an interim measure, orders should be passed by this Court enabling the petitioners to continue in service till they obtain appropriate interim orders from the Central Government Industrial Tribunal, New Delhi. We are not inclined, on the facts and circumstances of this case, to pass any such

order. We have already pointed out that the first of these writ petitions was filed on the very next working day after the L.I.C. published an advertisement calling for applications. At that time, the petitioners therein had not put in a total service of even 200 days. In fact, only a few of them had been in service for over 150 days, but less than 200 days and that too, in different periods and not continuous. Most of them had worked only for less than 90 days. The petitioners cannot take advantage of the period during which they had been in service pursuant to the interim orders of this Court and claim that they should be allowed to continue in service till they move the Industrial Tribunal. Even as early as on 29.11.1990, the judgment in W.P.No.4907 of 1990 rendered by one of us had pointed out that the remedy of the employees was to take appropriate steps under the Industrial Disputes Act. Yet, the employees' association continued to file writ petition after writ petition in this Court taking their chances before different learned Judges who were in charge of writ petitions at different times. A reference has been made to the Central Government Industrial Tribunal in March, 1991. If the employees were interested, they could have approached the Tribunal long back and obtained appropriate directions. After the Division Bench heard arguments in detail and reserved judgment on 6.9.1991, a spate of writ petitions has been filed and invariably reliance is placed upon the fact that the petitioners therein had worked for long number of days, over and above the requisite period of 240 days. But, obviously, they were able to be in service because of the interim orders of this Court. In such a situation, we see no warrant to grant any relief as an interim measure, while we have taken the view that the merits of the claim made by the petitioners are to be decided only by the Industrial Tribunal. Hence, we refuse to pass orders as prayed for by the petitioners.

84. In the result, the writ petitions are dismissed. There will be no order as to costs.

V.K. ---- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Lakshmanan, J.*

C.S.No.936 of 1989 *12th May, 1992.*

Dr.Kamala Dakshinamurthi and others ...*Plaintiffs*

v.

Board of Trustees, Srinagar Colony, Madras represented by its Executive Trustee and others ...*Respondents.*

(A) Civil Procedure Code (V of 1908), O.1, Rule 8 - Notice issued by Board of Trustees for allotment of plots to different persons - Persons if acquire common interest by virtue of such notice - If suit in representative capacity can be instituted to enforce their individual rights.

(B) Specific Relief Act (XLVII of 1963), Sec.39 - Notice issued by Board of Trustees for allotment of plots to persons and calling on them to deposit necessary amounts - Persons who had acted in pursuance of the notice, if can compel specific performance of allotment.

Held:- O.1, Rule 8, C.P.C. is to benefit the other persons who have the same interest as that of the plaintiffs in the suit. The Plaintiffs and the other applicants have mentioned in the plaint that they are having a common interest in the sense all of them have interest in the matter of allotment of plot pursuant to the notice dated 9.9.1982. They acquired common interest by virtue of that notice. Hence, the suit is maintainable under O.1, Rule 8, C.P.C. *[Para 17]*

In pursuance of the notice dated 9.9.1982 calling for application for allotment of plot and also asking the applicants to deposit earnest money of Rs.15,000 per ground initially defendants 1 to 6 have made a representation that in the event of the conditions mentioned in the notice being complied with, the defendants should act in accordance with the notice *i.e.*, allotment of the plots in the manner set out in the said notice. It is not the case of the defendants that the plaintiffs and other applicants have contravened any of the conditions and that the defendants cannot be compelled to act in accordance with the said notice. It will be pertinent to note that even after the said notice, the matter was kept pending for nearly six years

and only in the year 1988 *i.e.* on 26.5.1988, under Ex.P-8 the defendants called upon the plaintiffs to pay an additional sum of Rs.35,000 for each of the applicants to meet the improvement charges. By Ex.P-8, dated 26.5.1988, the defendants sent a circular that on payment of improvement charges, the Corporation of Madras would be in a position to give sanction and after such payment, the trustees would be in a position to act in accordance with the notice dated 9.9.1982. Having held out that the plots will be allotted to the plaintiffs and other applicants in the manner contained in the said notice and having collected an initial deposit of Rs.15,000 and further advance of Rs.35,000, it is no longer open to defendants 1 to 6 to contend that they are not bound to act in accordance with the notice dated 9.9.1982 since that notice was issued without any commitment on the part of the Board of Trustees. Under Sec.39 of the Specific Relief Act, the plaintiffs are entitled to compel performance of the act by defendants 1 to 6 by reason of the notice dated 9.9.1982 and direct them to prevent breach of the obligation on their part. The plaintiffs have acquired legal right with reference to the property in the manner set out in the notice dated 9.9.1982. In other words, the applicants who had acted in pursuance of the notice have acquired the legal right by virtue of which they reasonably believed that the Board of Trustees would conduct an auction or allot plots in the manner set out in the notice so that they would be in a position to acquire. The plaintiffs have also suffered a detriment by reason of the fact that in the hope that they would be in a position to get plots, the plaintiffs and other applicants have not made any efforts to acquire any land elsewhere in the City at the same price before the escalation of the land price. Under these circumstances on the principle of promissory estoppel, defendants 1 to 6 are estopped from contending that they would not act in accordance with the circular dated 9.9.1982 and that the plaintiffs have not acquired any legal right. *[Paras 19, 20 and 22]*

Cases referred to:

Sankiah v. Vadakasi, 1980 T.L.N.J. 86; Harris v. Nickeson, (1873) L.R. 8 Q.B. 286; The Gujarat State Financial Corporation v. M/s. Lotus Hotels (P) Ltd., A.I.R. 1983 S.C. 848: (1983)3 S.C.C. 379: (1983)2 Com.L.J. 202: (1983)2 S.C. W.R. 144; Tapti Oil Industries v. State of Maharashtra, A.I.R. 1984 Bom. 161 (F.B.).

B.T.Seshadri, for Plaintiffs.

V.S.Subramanian, for *S.Subramanian* and *R.Sashidaran*, for Defendant Nos.1 to 6.

The Court delivered the following

JUDGMENT:- Plaintiffs 1 to 3 have filed the above suit in a representative capacity after obtaining necessary permission from this Court under O.1, Rule 8 of the Code of Civil Procedure. In Appln. No.2219 of 1989, this Court granted permission to the 3rd applicant *viz.*, the 3rd plaintiff to prosecute the suit on behalf the applicants and also those applicants who are jointly interested in the relief, whose names have been mentioned in the plaint. The order has been passed on 3.5.1989 and this Court directed notice by way of publication in one issue of Malai Malar. Accordingly, publication has been effected. Thereafter, the plaint has been presented.

2. The 1st defendant is the Board of Trustees of Srinagar Colony represented by its Executive Trustee R.Butchi. Defendants 2 to 6 are the trustees and the 7th defendant is the Corporation of Madras represented by its Commissioner.

3. The 1st defendant Board of Trustees is a body constituted under a decree dated 18.7.1969 in C.S.No.10 of 1964 for the purpose of taking over and dealing with the vacant land in the said colony. The decree vested the vacant land in the 1st defendant and authorised the Board to sell the lands and utilise the sale proceeds for the amenities intended for the common benefit of the colony. Among the lands vested, about 20 grounds of land described in the schedule to the plaint. The 1st defendant already obtained the sanction of the lay-out in L.A.No.29 of 1957 and the Commissioner and Secretary, Housing and Urban Development Department, by G.O.Ms.No.997, dated 19.11.1981, has allowed the appeal of the Executive Trustee of Srinagar Colony for conversion of the portion of the land measuring 20 grounds 615 sq.ft. in the approved layout No.29 of 1957 in T.S.Nos.92/2C and 92/3 of Venkatapuram village, reserved for public purpose under 10% reservation, into house sites. In view of the fact that the Government have already permitted conversion of the land into house-sites, the Board of Trustees by their communication dated 9.9.1982 issued notice calling for applications from the persons *bona fide* in need of house site and to allot the plots to them. It was stated in that communication that the Board of Trustees have prepared a sketch or layout for 20

grounds of plot of land at their disposal into 16 plots and that it was proposed to allot them among those found eligible by casting lots or by public auction. The Board of Trustees have called for from the applicants Rs.15,000 per ground as deposit, which would be adjusted towards the cost of plot which would be ultimately allotted to them. The notice further stated that if it is decided to sell in public auction, it may not be necessary to pay any price in advance and if any other method is decided, the price will be fixed taking into account the market value, ignoring the abnormal value collected by the real estate speculators.

4. Originally, there were about 40 applicants who had applied for allotment of plots and also paid deposit. Subsequently, in view of the delay, many of the applicants withdrew their applications and only 15 were remaining including the plaintiffs herein. In May, 1988, a circular was issued by the 1st defendant by which the applicants were informed that the 7th defendant is insisting on payment of improvement charges *i.e.*, the cost of laying roads, drainage, etc., in advance before approving the plan and that the amount has to be collected from the persons who will be allotted plots. It was stated that it has, therefore, become necessary to finalise the allotment. Subsequently, a meeting was held. In that meeting, the applicants were requested to contribute Rs.35,000 each to make the sum of Rs.8,00,000 as demanded by the 7th defendant towards improvement charges. It was also stated that the minimum price per plot would be Rs.1.5 lakhs. On this basis, a circular dated 26.5.1988 was issued. The plaintiffs and other applicants have paid Rs.35,000 each as additional advance. The 3rd plaintiff has paid only Rs.25,000. Inspite of the fact that additional advance was paid, since nothing further happened, the plaintiffs caused a notice to be issued to the defendants calling upon the trustees to act in accordance with the circular dated 9.9.1982. The Board of Trustees sent a reply stating that there has been no concluded contract and the plots are offered for sale and not for the purpose of improving the locality but for different consideration and that the offer was also subject to the terms and conditions mentioned therein and unless those terms and conditions are fulfilled, the question of sale does not at all arise. It was also stated that since the contract is not possible, it was decided to return the amount due to the persons who have deposited. The 1st defendant returned the amounts.

5. The plaintiffs sent a rejoinder refusing to accept the cheques and they sent back the cheques to the 1st defendant. Inasmuch as the 1st defendant failed to act in accordance with the notice dated 9.9.1982, the suit was filed by the plaintiffs and other applicants for a mandatory injunction directing defendants 1 to 6 to take action pursuant to the notice dated 9.9.1982 for allotment of plots and also for a permanent injunction restraining defendants 1 to 6 from dealing with the plots in any manner whatsoever except in accordance with the circular dated 9.9.1982.

[Paras 6 to 15 omitted - Ed.]

16. *Issue Nos.1 and 3:-* These two issues can be taken up together. It was contended on behalf of defendants 1 to 6 that each one of the several parties will have his or their own individual rights and the transaction in question, as will be seen from the plaint, is based on offer and acceptance, *i.e.*, on the basis of the contract. In such a situation, by any stretch of imagination, O.1, Rule 8 of the Code of Civil Procedure cannot apply and in fact, on the basis of the alleged contract, an individual suit for specific performance can only lie if the plaintiffs are so advised. Mr.V.S.Subramaniam, learned counsel for the defendants further contended that an action on the basis of an alleged offer or proposal cannot be instituted as representative one and on this ground alone, this suit will have to be dismissed. It was reiterated that atleast each one of the individual applicants will have his or her own cause of action and the same cannot be attempted to be claimed in a representative capacity.

17. I am unable to agree with the contention raised by defendants 1 to 6 on these two issues. Under O.1, Rule 8 of the Code of Civil Procedure it is provided as follows:

> "One person may sue or defend on behalf of all in same interest. Where there are numerous persons having the same interest in one suit, one or more of such persons may, *with the permission of the court,* sue or be sued, or may defend such suit, on behalf of, or for the benefit of all persons so interested."

Sub-rule (2) is as follows:

> "The court shall in every case, where a permission or direction is given under sub-rule (1) at plaintiff's expense, give notice of the institution of the suit to all persons so interested,

either by personal service, or where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement as the court in each case may direct."

This provision is to benefit the other persons who have the same interest as that of the plaintiffs in the suit. The plaintiffs and the other applicants have mentioned in the plaint that they are having a common interest, in the sense, all of them have interest in the matter of allotment of plot pursuant to the notice dated 9.9.1982. They acquired common interest by virtue of that notice. Hence, I am of the view, that the suit is maintainable under O.1, Rule 8, C.P.C.

18. In this case, as already stated, permission of the Court was sought before the institution of the suit in Application No.2219 of 1989, which was granted on 3.5.1989. This Court directed notice by way of publication in one issue of Malai Malar, which has already been made and it has also been filed. Under these circumstances, there is nothing wrong in the institution of the suit in a representative capacity. Since this Court has granted permission, there is no question of the defendants contending after the institution of the suit, that the suit is not maintainable under O.1, Rule 8 of the Code of Civil Procedure. In this connection, the decision cited by Mr.B.T.Seshadri, learned counsel for the plaintiffs, reported in *Sankiah v. Vadakasi, 1980 T.N.L.J. 86*, can be usefully referred to. At page 90 it is clearly stated as follows:

"It is not the concern of the defendants whether the persons whom the plaintiffs seek to represent see eye to eye with the plaintiffs in the matter of conduct of the suit."

I am of the view that the defendants have no *locus standi* to say that the plaintiffs are not competent to represent the others whom they seek to represent. Therefore, the contention of defendants 1 to 6, based on the ground that the suit is not maintainable under O.1, Rule 8 of the Code of Civil Procedure since the plaintiffs have no interest in common, is not sustainable. Hence, I answer Issue Nos.1 and 3 in favour of the plaintiffs and hold that the suit as framed is maintainable and that the suit filed in a representative capacity is also maintainable and not as alleged otherwise by defendants 1 to 6.

19. *Issue Nos.2 and 4:-* These two issues can be answered together. In pursuance of the notice dated 9.9.1982 calling for applications for allotment of plot and also asking the applicants to deposit earnest money of Rs.15,000 per ground initially defendants 1 to 6 have made a representation that in the event of the conditions mentioned in the notice being complied with, the defendants would act in accordance with the notice *i.e.*, allotment of plots in the manner set out in the said notice. It is not the case of the defendants that the plaintiffs and other applicants have contravened any of the conditions and that the defendants cannot be compelled to act in accordance with the said notice. It will be pertinent to note that even after the said notice, the matter was kept pending for nearly six years and only in the year 1988 *i.e.* on 26.5.1988, under Ex.P-8, the defendants called upon the plaintiffs to pay an additional sum of Rs.35,000 for each of the applicants to meet the improvement charges.

20. The notice calling for applications, which is sought to be enforced, is marked as Ex.P-2. By Ex.P-8, dated 26.5.1988, the defendants sent a circular that on payment of improvement charges, the Corporation of Madras would be in a position to give sanction and after such payment, the trustees would be in a position to act in accordance with the notice dated 9.9.1982. Having held out that the plots will be allotted to the plaintiffs and other applicants in the manner contained in the said notice and having collected an initial deposit of Rs.15,000 and further advance of Rs.35,000, it is no longer open to defendants 1 to 6 to contend that they are not bound to act in accordance with the notice dated 9.9.1982 since that notice was issued without any commitment on the part of the Board of Trustees. So far, the 7th defendant has not issued sanction of the layout nor did it impose any condition with reference to the sanction except payment of improvement charges. The Board of Trustees have miserably failed to fulfil their obligations in regard to payment of improvement charges and there has been a serious dereliction of duty on their part and they cannot take advantage of their own mistake. In fact, by Ex.D-9 letter dated 22.8.1988, the 7th defendant demanded a sum of Rs.9,65,700 as tentative improvement charges and they have given the calculation. The Board of Trustees had with them on the date of Ex.D-9 more than Rs.10 lakhs having collected from all the applicants, not only by way of initial deposit but also additional deposit. In

view of this, the Board of Trustees, who have failed to discharge the obligation enjoined on them, cannot contend that they are not bound to act in accordance with the notice dated 9.9.1982.

21. It is also false to allege that the 7th defendant has demanded an exorbitant amount. In fact, D.W.1 in his cross-examination has clearly stated that the 7th defendant has changed the improvement charges from Rs.6.3 lakhs to Rs.8.5 lakhs. He has also stated that Rs.8.5 lakhs was demanded in 1986 and because of this, Ex.P-8 circular was issued. Therefore, it is argued on behalf of the plaintiffs that the defendants are estopped from contending that the plaintiffs have no right to insist on the defendants to act on the basis of the circular dated 9.9.1982. The plaintiffs are not asking for the allotment of plots straightaway. There is an obligation on the part of defendants 1 to 6 by reason of the representation contained in the notice dated 9.9.1982 and to prevent breach of that obligation, it has become necessary to compel performance of certain acts which the court is capable of enforcing.

22. Under Sec.39 of the Specific Relief Act, the plaintiffs are entitled to compel performance of the act by defendants 1 to 6 by reason of the notice dated 9.9.1982 and direct them to prevent breach of the obligation on their part. The Plaintiffs have acquired legal right with reference to the property in the manner set out in the notice dated 9.9.1982. In other words, the applicants who had acted in pursuance of the notice have acquired the legal right by virtue of which they reasonably believed that the Board of Trustees would conduct an auction or allot plots in the manner set out in the notice so that they would be in a position to acquire. The plaintiffs have also suffered a detriment by reason of the fact that in the hope that they would be in a position to get plots, the plaintiffs and other applicants have not made any efforts to acquire any land elsewhere in the City at the same price before the escalation of the land price. Under these circumstances, on the principle of promissory estoppel, defendants 1 to 6 are estopped from contending that they would not act in accordance with the circular dated 9.9.1982 and that the plaintiffs have not acquired any legal right.

23. It is contended by Mr.V.S.Subramanian, learned counsel appearing for defendants 1 to 6, that the advertisement of an auction is merely an intimation of intention to sell, and therefore, in the absence of fraud, the intending purchasers who attend the auction have no right of auction if the property is not put up for sale. He also contended that even when the property is put up, it may be withdrawn before the fall of the hammer. He further urged that in this case, no question of any fraud had been pleaded or proved and therefore, the question of fraud need not be considered and the announcement of the sale by auction or by lots will at best be only an invitation to offer. He has also invited my attention to certain passages from Halsbury's Laws of England, IV Edition, Volume II, paragraph 233 and Volume IX, paragraph 231. He further submits that in this particular case, only offers had been invited and it is admitted that the offers given by the plaintiffs or similar persons had not been accepted and consequently, no contract has come into being, which is capable of being enforced in any Court of Law. My attention was also drawn to the decision reported in *Harris v. Nickeson, (1873) L.R. 8 Q.B. 286.* In that case, the defendant, an auctioneer, advertised in the London papers and distributed catalogues to the effect that certain brewing material plants and office furnitures would be sold by him at Bury St. on a certain day. The conditions were the usual conditions, the first being, the highest bidder to be buyer. The plaintiff therein, a commission broker in London, had a commission to purchase at the sale of the office furniture advertised to be sold. He went to Bury St., St.Edmunds, attended the sale and purchased certain lots. Those described as office furniture were not put up for sale but withdrawn. The plaintiff brought an action to recover 2 pounds 12s 6d for two days loss of time and on these facts, the Judge gave judgment for the plaintiff but at the request of the defendants, gave him leave to appeal and the appellate Court had categorically held that the trial Judge was wrong and that there is no offer and that the plaintiff is not entitled to any damages. In the said circumstances, it is submitted, that the notice inviting offers cannot be one that could be treated to give right to a legal right of offer and acceptance, since the same is merely a notice inviting offers and the offer has been given in this case but that offer had admittedly not been accepted. It is well known that only the offer is accepted and it would ripen into contract. Till it ripens into a contract, there cannot be any cause of action. On this ground also, the plaintiff's claim cannot succeed.

24. On the question of promissory estoppel, it was argued on behalf of defendants 1 to 6 that the question of promissory estoppel cannot arise in view of the fact that even at the outset there is no contract that has come into existence. Further, it was argued that the 3rd plaintiff as P.W.1 alone has given evidence and that the other two plaintiffs have not chosen to give evidence about their case pleaded in the plaint. Therefore, it was submitted, the question of estoppel, in the circumstances, cannot arise. I am unable to give my seal of approval for the contentions raised by the learned counsel for defendants 1 to 6. As stated above, and as rightly urged by Mr.B.T.Seshadri, the circular dated 26.5.1988 under Ex.P-8 clearly states that on payment of the improvement charges, the 7th defendant would be in a position to give sanction and after such payment, the trustees would be in a position to act in accordance with the notice dated 9.9.1982. Defendants 1 to 6 having held out that the plots will be allotted to the plaintiffs and other applicants in the manner contained in the said notice and having collected initial deposit of Rs.15,000 and further advance of Rs.35,000 from each applicant, it is no longer open to them to contend that they are not bound to act in accordance with the notice dated 9.9.1982 since that notice was issued without any commitment on the part of the Board of Trustees. In my view, defendants 1 to 6 are estopped from contending that the plaintiffs have no right to insist on defendants 1 to 6 to act on the basis of the circular dated 26.5.1988. The plaintiffs are not asking for allotment of plots straightaway. But, there is an obligation on the part of defendants 1 to 6 by reason of the representation contained in the notice, and in order to prevent breach of that obligation, it has become necessary to perform certain acts, which this Court is capable of enforcing. The two decisions cited by Mr.B.T.Seshadri can very well be noticed in appreciating his contention on the question of promissory estoppel. The first decision is reported in *The Gujarat State Financial Corporation v. M/s. Lotus Hotels (P) Ltd., A.I.R. 1983 S.C. 848: (1983)3 S.C.C. 379: (1983)2 Com.L.J. 202: (1983)2 S.C.W.R. 144* and the second decision is reported in *Tapti Oil Industries v. State of Maharashtra, A.I.R. 1984 Bom. 161 (F.B.).*

25. *The Gujarat State Financial Corporation v. M/s.Lotus Hotels (P.) Ltd., A.I.R. 1983 S.C. 848: (1983)3 S.C.C. 379: (1983)2 Com.L.J. 202: (1983)2 S.C.W.R. 144,* was a case filed by the Gujarat State Financial Corporation against M/s.Lotus Hotels Private Limited. The said Corporation, was an instrumentality devised to provide medium and long term credit to industrial concerns, *inter alia*, Hotel Industry. M/s.Lotus Hotels Private Limited is a Private Limited Company incorporated mainly to carry on the business of hotel, restaurant, cafe, etc. The said company proposed to set up a 4-Star Hotel under the name and style of Lotus Hotels. The promoter, after acquiring land where the proposed 4 Star Hotel was to be set up at Baroda, approached the Corporation for a loan of Rs.30 lakhs. The Corporation sanctioned a loan of Rs.29.93 lakhs on certain terms and conditions. The company wrote a letter to the Corporation accepting the terms and conditions on which the Corporation agreed to advance the loan. As a part of the deal, the company had to create an equitable mortgage in favour of the Corporation for securing the loan. The trouble erupted when in October, 1978, two pseudonymous letters purporting to have been written by Ramanlal V.Patel and Chandrakant Pandya, addressed to the Chief Minister of Gujarat State and Chairman, Industrial Development Bank of India, Bombay, respectively, were received making serious allegations against the promoter of the hotel about his character and credit worthiness and also pointing out that he was facing several prosecutions in various Courts on account of his nefarious activities. Acting on this letter, the I.D.B.I., who was approached for refinancing the loan, addressed certain enquiries to the office of the Corporation and then started an enquiry which led to the delay in processing the promised loan. Ultimately, by letter dated 13.2.1979, the I.D.B.I., informed the Corporation that in view of the pending police enquiry against the promoter of the hotel, the application for refinancing is treated as closed leaving an option to the Corporation to resubmit the application on receipt of satisfactory report from the concerned authorities in regard to the pending enquiry against the main promoter. By that time, the promised equitable mortgage by the company was created in favour of the Corporation. All other documents required to be executed by the company in favour of the Corporation enabling it to receive the loan were also executed. However, the Corporation did not disburse the loan in terms of the agreement entered into

between the parties. Ultimately, after protracted correspondence, the Board of the Corporation at its meeting held on 20.4.1979 resolved not to disburse the loan to the company and the President conveyed the information of the decision to the company. The company moved a petition under Art.226 of the Constitution in the High Court of Gujarat at Ahmedabad. A learned single Judge issued a *mandamus* directing the Corporation to disburse the promised loan to the company forthwith in accordance with its letter of offer dated 24.7.1978, followed by the agreement dated 1.2.1979. The Corporation preferred an appeal. A Division Bench of the Gujarat High Court, after hearing the appeal, agreed with the conclusion reached by the learned single Judge and dismissed the appeal. Then the Corporation filed the present appeal before the Supreme Court. Before the Supreme Court it was urged on behalf of the Corporation that the sanctioning of the loan by the Corporation in favour of the company was conditional upon the I.D.B.I. undertaking to refinance the loan and as I.D.B.I. declined to refinance the loan, the Corporation cannot be compelled by a mandamus to grant the loan. It was also incidentally urged that the dispute raised between the parties is in the realm of contract and at best the Corporation can be charged with breach of contract for which the remedy is by way of damages or any other remedy available to the company for breach of contract; but, in any case, a writ of *mandamus* cannot be issued compelling the Corporation to perform its part of the contract. The Supreme Court rejected both the contentions and held as follows:

> "It is too late in the day to contend that the instrumentality of the State which would be 'other authority' under Art.12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract. It was not disputed that the Gujarat State Financial Corporation which is set up under Sec.3 is an instrumentality of the State and would be 'other authority' under Art.12 of the Constitution. By its letter of offer and the subsequent agreement the appellant Corporation entered into a solemn agreement in performance of its statutory duty to advance the loan of Rs.30 lakhs to the respondent-company. Acting on the solemn undertaking, the respondent proceeded to undertake and execute the project of setting up a 4 Star Hotel. The agreement to advance the loan was entered into in performance of the statutory duty cast on the Corporation by the statute under which it was created and set up. On its solemn promise evidenced by the aforementioned two documents, the respondent incurred expenses, suffered liabilities to set up a hotel. Presumably, if the loan was not forthcoming, the respondent may not have undertaken such a huge project. Acting on the promise of the appellant evidenced by documents, the respondent proceeded to suffer further liabilities to implement and execute the project. In the backdrop of this incontrovertible fact situation, the principle of promissory estoppel would come into play."

The Supreme Court has also held that the principle of promissory estoppel would certainly estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the company. The Supreme Court further held that the company acting upon the solemn promise made by the Corporation incurred huge expenditure and if the Corporation is held to its promise, the company would be put in a very disadvantageous position and therefore, the principle of promissory estoppel can be invoked in this case. The Supreme Court has also referred to its earlier decisions reported in *A.I.R. 1979 S.C. 621* and *A.I.R. 1980 S.C. 1285.*

26. To the same effect there is another Full Bench decision of the Bombay High Court reported in *Tapti Oil Industries v. State of Maharashtra, A.I.R. 1984 Bom. 161.* In that case, reference was made to the judgment of the Supreme Court where the meaning of the word "detriment" has been considered. It has been held that in order to invoke the doctrine of promissory estoppel, it is not necessary for the promisee to show that he suffered detriment as a result of acting in reliance on the promise. But it was pointed out that if by detriment was meant injustice to the promisee, which would result if the promisor were to recede from his promise, then the detriment would certainly come in as a necessary ingredient.

27. Applying that ratio, it can be safely taken in our case that the plaintiffs and other applicants have several detriment and if the Board of Trustees are

allowed to recede from their promise, then, definitely, injustice would follow to the plaintiffs and other applicants. The plaintiffs and other applicants who have made initial deposits as early as 1982 and further advance in 1988, cannot be summarily told that the amount can be taken back without interest. This would, in my view, definitely cause injustice. Therefore, on the principle of promissory estoppel, defendants 1 to 6 are estopped from contending that the plaintiffs have no right and that defendants 1 to 6 need not act in accordance with the notice dated 9.9.1982.

[Paras 28 to 30 omitted - Ed.]

31. Defendants 1 to 6 would contend that in the notice dated 9.9.1982, mention has been made that the deposit is being collected without any commitment. This does not mean that the notice is issued and the deposit is collected merely for the purpose of returning it as and when they please. What is meant by "without commitment" in Ex. P-2 is this:

> "There are only 16 plots. There were 40 applicants. The notice stated that all the applicants would not be entitled to allotment and such of the applicants who get it by lots or in public auction alone entitled to allotment. There was no assurance that by payment of deposit, the applicants would be entitled to the plots."

Therefore, none of the contentions of the defendants, in my view is tenable or acceptable by this Court.

[Paras 32 and 33 omitted - Ed.]

34. To sum up, the position is this: Under Issue No.1, I hold that the suit is maintainable. Under Issue No.2, I hold that defendants 1 to 6 are estopped from contending that the plaintiffs have no right to insist on the defendants enforcing the circular dated 9.9.1982. Under Issue No.3 I hold that the suit filed in a representative capacity is maintainable. Under Issue No.4, I hold that the plaintiffs have legal right to enforce the circular as contended in para 6 of the written statement and para 5 of the additional written statement. Under the Additional Issue, I hold that the plaintiffs are entitled to the relief asked for.

35. In the result, the suit is decreed as prayed for and defendants 1 to 6 are directed to remit to the 7th defendant the amount payable towards betterment charges from and out of the earnest money paid by the plaintiffs and other applicants, and conduct an auction so as to enable the plaintiffs and other registered applicants to bid for the plots and to allot the plots to the highest bidder for each plot. There will also be a decree for permanent injunction restraining the 1st defendant from alienating the vacant land measuring about 20 grounds in Srinagar Colony, Saidapet, Madras-15, in any manner other than by allotment of plots as per the circular dated 9.9.1982. The suit as against defendants 1 to 6 is decreed with costs of the plaintiffs payable by the 1st defendant. The suit as against the 7th defendant is dismissed without costs.

B.S. ------ *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.No.1446 of 1980 *26th August, 1991.*

Mariaprakasam ...*Appellant*

v.

Maria Mathalasal (died) and others ...*Respondents.*

(A) Tamil Nadu District Municipalities Act (V of 1920), Secs.3(3), 3(24) and 197 - 'Reconstruction of a building' - Wall of house falling down - Reconstruction of wall if reconstruction of building - Sanction of Municipality for reconstructing wall, if required.

(B) Interpretation of Statutes - Definitions - Application of.

The wall on the western side of the first defendant's house fell down and the first defendant had taken steps to re-erect the wall. He applied for sanction to the Municipality. The plaintiff filed a suit for permanent injunction restraining the first defendant from putting up any house or construction of the suit property without sanction and approval of the site plan from the Nagercoil Municipality. The Municipality, the second defendant in the suit refused to sanction the plan by an order dated 21.7.1978 after the filing of the suit. The trial court held that the first defendant

was not entitled to reconstruct the wall without the sanction of the Municipality. On appeal, the conclusion reversed and it was held that there was no necessity for the first defendant to obtain the sanction of the Municipality for the purport of reconstructing the wall. In second appeal,

Held:- The special definition of the expression 'reconstruction of a building' shall be applied for the purpose of Sec.197. If that definition is applied, the present building will not fall under Sec.197. Clause (a) of Sec.3(24) relates to re-erection wholly or partially of a building after more than one half of its cubical contents has been taken down or burnt down or has fallen down which at one time or not, certainly the case will not be covered by clause (a). Clause (b) relates to any building of which outer wall has been taken down or burnt down or has fallen down to or within ten feet of the ground adjoining the lowest storey of the building and of any frame building which has so far been taken down or has fallen down as to leave only the framework of the lowest storey, Clause (b) will also not be applicable to the present case. Clauses (c) and (d) do not come anywhere in the picture and it relates to place of public worship or any building not originally constructed for human habitation or for public worship, as the case may be, or the conversion into more than one dwelling house of a building originally constructed as one dwelling house only or the conversion of a dwelling house into a factory. The ruling in the *Eluru Municipality represented by the Commissioner v. Gamini Veeramanikyam, (1954)2 M.L.J. 556,* will apply on all fours to the present case. The court has no hesitation to reject the contention put forward by learned counsel for the appellant that a wall abutting a public street irrespective or the height would fall within the definition of building and that if a person wants to construct or reconstruct a wall abutting a public street, he shall obtain prior sanction of the Municipal Authorities under Sec.197.

[Paras 4 and 6]

When there is a specific definition of a particular expression, that definition should be applied unless there is anything repugnant to the context.

[Para 4]

Cases referred to:

- *The Eluru Municipality, represented by the Commissioner v. Gamini Veeramanikyam, (1954)2 M.L.J. 556; Emperor v. B.H. De Souza, I.L.R. (1911)35 Bom. 412; Emperor v. Kalekhan Saradarkhan, I.L.R. 35 Bom. 236; Bandra City Municipality v. D.A.D.Monte, A.I.R. 1923 Bom. 407.*

P.Ananthakrishnan Nair, for Appellant.

K.V.Subramaniam, for Respondent Nos.2 to 8.

The Court delivered the following

JUDGMENT:- The plaintiff is the appellant. The suit is one for permanent injunction restraining the first defendant from putting up any house or construction of the suit property, without sanction and approval of the site plan from the Nagercoil Municipality. The Municipality was the second defendant in the suit. The plaintiff is the owner of the house bearing No.M.M.C.No.26/6A (old No.N.M.C.No.26/3). The wall on the western side of the first defendant's house fell down and the first defendant had taken steps to re-erect the wall. He applied for sanction to the Municipality on 1.12.1977. The suit was filed on 21.12.1977. The Municipality refused to sanction the plan by an order dated 21.7.1978 after the filing of the suit.

2. The trial court held that the first defendant was not entitled to reconstruct the wall without the sanction of the Municipality. On appeal, the learned Judge reversed the conclusion of the trial court and held that there was no necessity for the first defendant to obtain the sanction of the Municipality for the purpose of reconstructing the wall. It is the correctness of the judgment that is challenged by the respondent.

3. The question turns on the interpretation of Secs.3(3), 3(24) and 197 of the Tamil Nadu District Municipalities Act, 1920, (hereinafter referred to as the Act). Learned counsel for the appellant placed reliance on the provisions of Sec.197(1), which reads as follows:

> "If any person intends to construct or reconstruct a building other than a hut, he shall send to the executive authority."

Learned counsel submits that the explanation to the section contains a special definition of the term 'building' for the purpose of Sec.197. According to him, a wall abutting a public street, irrespective of its height would fall within the definition of building and if a person wants to construct or reconstruct a wall abutting a public street, he shall obtain prior sanction of the Municipal Authorities under Sec.197.

4. In order to understand the purpose of the explanation to Sec.197(1), it is necessary to refer to the terms of Sec.3(3), in which a 'building' is defined

as 'including a house, out-house, stable, latrine, shed, hut, wall (other than a boundary wall not exceeding eight feet in height) and any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever." In the definition under Sec.3(3) an exception is made with reference to the boundary walls not exceeding 8 feet in height. In order to cover boundary walls of lesser height also, explanation to Sec.197(1) has been introduced. Under that explanation if the wall abuts a public street, then would fall within the definition of building whatever may be the height thereof. Sec.197(1) will apply only to cases of construction or reconstruction of a building other than a hut. The expression "reconstruction of a building" is specifically defined under Sec.3(24) of the Act, which is as under:

> "Reconstruction" of a building includes:
> (a) the re-erection wholly or partially of a building after more than one-half of its cubical contents has been taken down or burnt down, or has fallen down whether at one time or not;
> (b) the re-erection wholly or partially of any building of which an outer wall has been taken down or burnt down or has fallen down to or within ten feet of the ground adjoining the lowest storey of the building, and of any frame building which has so far been taken down or burnt down or has fallen down as to leave only the framework of the lowest storey;
> (c) the conversion into a dwelling-house or a place of public worship of any building not originally constructed for human habitation or for public worship, as the case may be, or the conversion into more than one dwelling house of a building originally constructed as one dwelling-house only or the conversion of a dwelling house into a factory;
> (d) the re-conversion into a dwelling-house or a place of public worship or a factory of any building which has been discontinued as, or appropriated for any purpose other than, a dwelling-house or a place of public worship or factory as the case may be."

When there is a specific definition of a particular expression, that definition should be applied unless there is anything repugnant to the context. The specific definition of the expression 'reconstruction of a building' shall be applied for the purpose of Sec.197. If that definition is applied, the present building will not fall under Sec.197. Clause (a) of Sec.3(24) relates to re-erection, wholly or partially of a building after more than one half of its cubical contents has been taken down or burnt down, or has fallen down whether at one time or not. Certainly the case will not be covered by clause (a). Clause (b) relates to any building of which an outer wall has been taken down or burnt down or has fallen down to or within ten feet of the ground adjoining the lowest storey of the building, and of any frame building which has so far been taken down or has fallen down as to leave only the framework of the lowest storey. Clause (b) will also not be applicable to the present case. Clauses (c) and (d) do not come anywhere in the picture and it relates to place of public worship or any building not originally constructed for human habitation or for public worship, as the case may be, or the conversion into more than one dwelling house of a building originally constructed as one dwelling house only or the conversion of a dwelling house into a factory.

5. Sec.3(3) and (24) of the Act have been considered by a Division Bench of this Court in *Eluru Municipality represented by the Commissioner v. Gamini Veeramanikyam, (1954) 2 M.L.J. 556.* It is worthwhile to extract the relevant observations of the Division Bench, which set out the law very clearly:

> "Sec.3, Clause (24) defines reconstruction as including the re-erection wholly or partially of a building after more than one-half of its cubical contents has been taken down or burnt down or has fallen down, whether at one time or not. The other portions of the definition are not material for this case. The argument of the appellants' learned counsel was that 'building' according to the definition includes a 'wall' and admittedly there has been a re-erection of some of the walls in the building. It is true that the definition of a 'building' includes a 'wall'; but it must not be overlooked that this definition is subject to the condition "unless there is anything repugnant in the subject or context." It is not as if wherever the work 'building' occurs, the entire definition can be substituted always. In clause 24(b), it is obvious that the word is used as not including a wall, because there is a reference to "an outer wall" of the building. It is, therefore necessary that the definition should be appropriately applied according to the context. In *Emperor v.*

B.H. De Souza, I.L.R. (1911)35 Bom. 412, the question arose on the construction of a similar provision in the District Municipal Act. Under Sec.96 of that Act, before beginning to erect any building, or to alter externally or add to an existing building, or re-construct any project-ing portion of any building, the person intend-ing to build, alter or add, should give the Municipality notice in writing, and if any one began or made any building or alteration with-out giving such notice, he was liable to be punished with fine. one of the side walls of a house had fallen down and the owner re-built it upon its foundation without getting the permission of the Municipality. He was there-upon charged under the above section for having erected a building without the permission of the Municipality. There was a difference of opinion between Chandavarkar, J., and Hea-ton, J., on the question whether the accused committed any offence, and there was a refer-ence to a third Judge, Sir Basil Scott, C.J. who held, agreeing with Heaton, J., that the accused had committed no offence. The contention of the Municipal Council in the case has based upon the definition of "building" which included "walls". It was held, however by a majority of the learned Judges that re-con-struction of a small wall in the building did not constitute the erection of a building. Scott, C.J. observed: "Whether the reconstruction of a wall whatever importance forming part of a house necessarily the 'erection of a building' depends upon whether the interpretation clause, Sec.3(7), is to be taken as substituting impliedly for the word ('building' wherever it occurs in the Act not merely all erections fall-ing within the ordinary comprehension of the term 'building' but also all other things included within the definition. It is recognised in England to be a rule with regard to the effect of interpretation-clauses of a comprehensive nature such as we have here that they are not to be taken as strictly defining what the meaning of a word must be under the circumstances, but merely declaring what things may be compre-hended within the term where the circum-stances require that they should". The learned Chief Justice distinguished an earlier case of the same court in *Emperor v. Kalekban Sara-darkhan, I.L.R. 35 Bom. 236,* as being based on the particular facts of that case. We respect-fully agree with the above observations of Scott, C.J. Another Decision of the same court in *Bandra City Municipality v. D.A.D.Monte, A.I.R. 1923 Bom. 407,* was brought to our notice, but it contains no discussion whatever of the points. Nor is there any reference in the judgment to the earlier decision referred to above. Follow-ing the observations of Scott, C.J. in *Emperor v. B.H. De Souza, I.L.R. (1911)35 Bom. 412,* we hold agreeing with Subba Rao, J., that the mere demolition and reconstruction of the wall on new foundation would not amount to reconstruction of a building. The reference in clause (a) of Sec.3(24) to "one-half of its cubi-cal contents" also supports our conclusion."

6. The above ruling will apply on all fours to the present case. The lower appellate court has also relied on the Judgment and has held against the plaintiff. I have no hesitation to reject the conten-tion put forward by learned counsel for the appel-lant. Learned counsel contends that in the case before the Division Bench, there was no wall abutting the street and the walls were inside the house. That fact does not make any difference in so far as the principles are concerned. In the case before the Division Bench, the building could not have existed without those walls. Inspite of that, the Division Bench held that the re-erection of the wall would not amount to re-erection of the build-ing. Hence, the distinction, sought to be made by learned counsel has no substance and is rejected.

7. In the result, the second appeal fails and it is dismissed, but there will be no order as to costs.

B.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Srinivasan, J.*

C.R.P.Nos.1608, 1625 of 1985 and C.R.P.Nos.478 and 479 of 1988, C.M.P.No.14705 of 1991 respectively *8th April, 1992.*

M.Radhakrishna Rao ...*Petitioner*

v.

A.B.Ahmed Basha and another ..*Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960 as amended by Act XXIII of 1973), Sec.4(a) - 'Market value of site in which building is constructed' - Building having more than one storey and more than one tenant in each storey - Calculation and apportionment of - Mode of.

As per the ruling of the Full Bench in *Lodha v. Senganathan, (1989)1 M.L.J. 213,* in calculating the market value of the site in which the building is constructed, the plinth area of the building one half thereof has to be taken into account. There is no difficulty in applying that formula, if it is a case of one building and one tenant. Complications arises when there is more than one storey in the building and more than one tenant in each storey, as in the present case. In fact, with regard to the second question referred to the Full Bench, as to the method of apportionment, the Full Bench held that the matter should be decided with reference to the terms and conditions of the demise in each case. It was observed that the test prescribed by them should be applied to the facts of each case. The Court is of the view that the market value of the site on which the building, is constructed has to be ascertained in the first instance on the basis of the section and the proviso as interpreted by the Full Bench. Then, it has to be apportioned among the tenants on the basis of the number of portions of tenants into which the building is divided. Sec.2(2) of the Act defines a 'building' as a building or hut or part of a building or hut let or to be let separately. In the case of dividing a building into several portions and letting them out to different tenants, each portion has to be taken as a 'building' as defined by the Act, for the purposes of Sec.4 of the Act 'building' is that portion which is occupied by the tenant in question. One tenant cannot be mulcted with the liability for market value of the site on which the building is constructed taken as a whole. Necessarily, the market value of the site in which the building is constructed has to be distributed and apportioned among the tenants. If it is taken floorwise, that will lead to an artificiality, in the case of there being more tenants in each floor. If it is taken on the basis of the plinth area of each of the portions, that will also lead to an artificiality in the case of more storeys than one. In both cases, undue advantage will be gained by the landlord. He cannot be entitled to charge each tenant occupying only a small portion of the building with fair rent calculated on the basis of the market value of the plinth area of the entire building + one half thereof. The most equitable way of construing the section and applying the formula evolved by the Full Bench is to distribute or apportion the value of the site occupied by the building as a whole one half thereof equally among the tenants. *[Para 20]*

Cases referred to:

A.C.Charities v. Aushadhalaya, (1968)2 M.L.J. 406; Rainbow Electricity Supply Corporation v. Chenchuramiah, (1972)2 M.L.J. 446; Bombay Tyres International Ltd. v. Express Newspapers (P) Ltd., (1987)2 M L.J. 191; I.A.Emberumanar v. Raghava, 1987 T.L.N.J. 307; Savani Transports (P) Ltd. v. R.Jamal Mohammed, (1989)1 L.W. 172; Lodha v. Ranganathan, (1989)1 M.L.J. 213; K.Venkataramiah v. Seetharama Reddy, (1964)1 S.C.J. 37: A.I.R. 1963 S.C. 1526; Samant Singh v. Janki Singh, A.I.R. 1967 S.C. 341; Nagindass v. Balpatram, A.I.R. 1974 S.C. 471.

Petitions under Sec.25 of the Tamil Nadu Buildings Lease and Rent Control Act 18 of 1960 as amended by Act 23 of 1973, praying the High Court to revise the orders of the VII Judge, Court of Small Causes, Madras (appellate authority), dated 19.11.1984 and passed in R.C.A.Nos.1213 of 1983, 1214 of 1983, 56 of 1984 and 1213 of 1983 respectively etc.

S.Raghavan, for Petitioner.

P.L.Narayanan for *P.M.Jummakhan, M.M.Abdul Razack* and *Prem Nazirkhan,* for Respondents.

The Court made the following

ORDER: These matters arise out of two petitions filed by the landlord, who is the petitioner in C.R.P.Nos.1608 and 1625 of 1985, for fixing of fair rent under Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 as amended by Act XXIII of 1973. One of the petitions, *viz.,*

R.C.O.P.No.3115 of 1982 relates to the two flats in the ground floor of Door No.631, Thiruvottiyur High Road, Tondiarpet, Madras, occupied by A.B.Ahmed Basha, who is the respondent in C.R.P.No.1608 of 1985 and petitioner in C.R.P.No.478 and 479 of 1988. The other petition, *viz.*, R.C.O.P.No.3116 of 1982 relates to two flats in the first floor of the same building occupied by Manoharlal Sablok, respondent in C.R.P.No.1625 of 1985. C.R.P.No.1608 of 1985, 478 of 1988 and 479 of 1988 form one group as they pertain to one tenant *viz.*, Ahmed Basha, occupying two flats in the ground floor. C.R.P.No.1625 of 1985 and C.M.P.No.14705 of 1991 go together and they will be dealt with as a separate group.

2. Ahmed Basha was paying a rent of Rs.265 per mensem under the contract of tenancy. In the petition for fixation of fair rent, the landlord claimed Rs.1,931 per mensem. The Rent Controller fixed Rs.635 per mensem as fair rent by order dated 26.3.1983. There were two appeals, one by the landlord and another by the tenant, numbered as R.C.A.Nos.1213 of 1983 and 56 of 1984 respectively. They were disposed of by order dated 19.11.1984 by the appellate authority, who fixed the fair rent at Rs.890 per mensem.

3. Manoharlal Sablok was paying a rent of Rs.235 per mensem under the contract of tenancy and the landlord claimed Rs.1,488 per mensem as fair rent. The Rent Controller fixed Rs.556 per mensem. There were two appeals, R.C.A.Nos.1214 of 1983 and 55 of 1984 by the landlord and tenant respectively. The Appellate Authority fixed Rs.820 as the fair rent.

4. These four revision petitions were filed, two by the landlord and two by the ground floor tenant, Ahmed Basha. The first floor tenant has not filed any revision petition, though he has now filed a petition for admission of certain documents as additional evidence in order to challenge one of the findings given by the Courts below against him. Though all the revision petitions had been presented in this Court in April, 1985, the revision petitions filed by the landlord were numbered and taken on file in April, 1985 itself, while the revision petitions filed by the tenant were not numbered till February, 1988. They were taken on file only on 15.2.1988. But, even before that, the revision petitions filed by the landlord came up for hearing before Sivasubramaniam, J. The learned Judge found it impossible to decide the question of fixation of fair rent solely on the basis of P.W.D. rates in view of the peculiar facts of the case. Both counsel conceded before him that the matter had to be decided afresh by the appellate authority or the Rent Controller as additional evidence might be required. Both counsels agreed that a finding could be called for from the appellate authority regarding the cost of construction. Accordingly, the learned Judge passed an order on 11.9.1987 calling for findings from the appellate authority. The relevant passage in his order reads thus:

> ".....Both the learned counsels agree that a finding may be called for from the appellate authority regarding the cost of construction of the petition building after comparing the nature of the building for which P.W.D. has prescribed the rates and specifications available for such building with the P.W.D. and the type of construction in so far as the petition-building is concerned. Therefore, the appellate authority is directed to consider the question of cost of construction of the petition building afresh taking note of the rates prescribed by P.W.D., the nature and type of construction relating to which P.W.D. rates have been prescribed, the nature and type of the petition building with special reference to the thickness of the walls, height of the walls, windows etc., after comparing the nature of the building involved in the specifications of the P.W.D. and the petition building, the appellate authority can decide as to the quantum of fair rent which can be fixed for the petition-building. It is open to the parties to adduce evidence, oral and documentary, if necessary. The appellate authority is directed to finish the enquiry and submit a report to this Court within a month from the date of receipt of a copy of this order. if it is found necessary, it is open to the appellate authority to call for further particulars from the Public Works Department to enable him to fix the fair rent."

5. Thereafter, the appellate authority recorded evidence and heard arguments. He has submitted his findings, according to which, the fair rent for the ground floor portion occupied by Ahmed Basha is Rs.1,140 per mensem and the fair rent for the first floor portion occupied by Manoharlal Sablok is Rs.985 per mensem. The landlord examined a Junior Engineer of P.W.D. as his witness P.W.2. The tenants examined a private Consulting

Engineer as R.W.3. The report of P.W.2 is marked as Ex.P-10 and the report of R.W.3 is marked as Ex.R-8. After the submission of the findings to this Court, the matters were posted before me and counsel on both sides argued at length.

6. Sec.4 of the Tamil Nadu Buildings (Lease and Rent Control) Act provides for fixation of fair rent. Under sub-sec.(2), "the fair rent for any residential building shall be nine per cent gross return per annum on the total cost of such building". In this case, there is no dispute that the building is a residential one. Under sub-sec.(4) thereof, the total cost of the building shall consist of (a) market value of the site in which the building is constructed, as on the date of application for fixation of fair rent, (b) the cost of construction of the building as on the date of application for fixation of fair rent, and (c) the cost of provision of any one or more of the amenities specified in Schedule 1, as on the date of application for fixation of fair rent. There are two provisos to the sub-section. According to the first proviso, while calculating the market value of the site in which the building is constructed, the Controller shall take into account only that portion of the site on which the building is constructed and of a portion up to fifty per cent thereof of the vacant land, if any, appurtenant to such building. The excess portion of the vacant land shall be treated as amenity. Under the second proviso, the cost of provision of amenities specified in Schedule 1 shall not exceed, in the case of any residential building, fifteen per cent of the cost of the site in which the building is constructed and the cost of construction of the building as determined under the section. Sub-sec.(5)(a) provides that the cost of construction of the building including cost of internal water-supply, sanitary and electrical installations shall be determined with due regard to the rates adopted for the purpose of estimation by the Public Works Department of the Government for the area concerned, and in appropriate cases, the Controller may allow or disallow an amount not exceeding 30 per cent of the cost of construction, having regard to the nature of construction of the building. Sub-sec.(5)(b) provides for deduction of depreciation from the cost of construction at the rates specified in Schedule 2 to the Act. Schedule 1 to the Act contains a list of amenities referred to in sub-sec.(4). Schedule 2 to the Act prescribes the rates of depreciation per annum for different types of buildings.

7. The section has been the subject of judicial interpretation in this Court. In *A.C.Charities v. M/s.S.Aushadhalaya, (1968)2 M.L.J. 406,* Ramaprasada Rao, J. considered the meaning of the word 'site' with reference to a building having more than one floor. He held that in the case of such buildings, the principle ought to be one of apportionment in accordance with the number of storeys. In so far as the ground floor is concerned, he interpreted the word 'site' as it is ordinarily understood as that on which the ground floor stands. With reference to the first floor, second floor or the nth floors, he held that it would mean that portion of the building on which the respective flat or storey was built upon or imposed. But, the learned Judge proceeded to observe as follows:

> "Having thus far considered as the meaning of the word 'site', the question still remains as to how best to implement the express words of the statute provided for in Sec.4(2)(b)(ii) or Sec.4(3)(b)(ii) of the Act. The Act makes it obligatory that to arrive at the total cost, the market value of that portion of the site on which the residential or non-residential building is constructed, has to be taken into consideration. Therefore, if a building consists of more than one storey, how is the market value of that portion of the site in each case to be evaluated?
>
> In *Namasivaya Chettiar v. Appuswamy Iyer, C.R.P.No.486 of 1964,* Anantanarayanan, J. (as he then was) observed as follows:
>
> "But since, for the purpose of the Act, the actual plinth area upon which the construction concerned stands, has to be taken into account and a strict interpretation of this will mean that the plinth area for the first floor, as distinguished from the ground floor, must be assessed as 'nil' value, it appears to me that some such expediency as that actually adopted in the case is inevitable."
>
> "The expediency referred to by the learned Judge is the formula adopted by the Court below which is to the following effect; the fair rent is sought to be fixed with reference to the first floor of the building, and for purpose of computation of such fair rent, the court below has adopted a formula of taking the plinth area of the first floor as half the actual area upon

which the construction was erected. In *Vasantha Watch Co. v. Saraswathi Time Equipment, C.R.P.No.583 of 1964,* the same rule was adopted by the learned Judge. In this case also, the following observations are apposite:

"I am unable to hold that the courts below were in error in taking the area of the floor for computation purposes as half of the plinth area; otherwise, and if the letter of the rules has to be adhered to, there would be no floor area at all for the simple reason that this is the first floor of the building, and not the ground floor."

"I respectfully agree with the principles adopted by the learned Judge. I am also of the view that in the case of buildings having more than one floor the principle ought to be one of apportionment in accordance with the number of storeys. If there are two storeys, the market value of the land for the first floor will be half. If there are more than two storeys, it will be proportionately distributed in accordance with the number of storeys in the building."

8. In *Rainbow Electric Supply Corporation v. Chenchuramiah, (1972)2 M.L.J. 446,* it was held that the site value in the case of a building having more than one floor must be proportionately distributed in accordance with the number of storeys in the building. Reliance was placed on the judgment of Ramaprasada Rao J. in *A.C.Charities' case, (1968)2 M.L.J. 406.*

9. In *Bombay Tyres International Ltd. v. Express Newspapers (P) Ltd., (1987)2 M.L.J. 191,* Chandurkar, C.J. held that in the case of fixation of fair rent, judicial notice must be taken of the fact that cost of construction and cost of materials which have to be used for construction of a building including the fittings for water supply, sanitary fittings as well as for making electrical installations have always been escalating and are considerably high and there has to be a realistic approach in the matter of estimating the cost of construction and the cost of making amenities available. The same learned Judge in *I.A.Emberumanar v. Raghava, 1987 T.L.N.J. 307,* held that if the landlord failed to give positive evidence of the cost of providing amenities, the Rent Controller would be justified in ignoring the cost of such amenities. The learned Judge observed that if material documents such as plans, measurements and notes prepared by the Engineers were not produced before Court, the Rent Controller was entitled to draw an adverse inference, unless an acceptable explanation was given for non-production of the same, or unless proper acceptable evidence was adduced with regard to matters which would have been proved by the production of such documents.

10. In *Savani Transports (P) Ltd. v. R.Jamal Mohammed, (1989)1 L.W. 172,* Nainar Sundaram, J. held that the determination of cost of construction shall be done with due regard to the rates adopted for the purpose of estimation by the Public Works Department and when the statute prescribes the manner in which it had to be done, the Court was bound to do it in that manner. It was held in that case that merely because the fair rent to be determined in accordance with the principles contained in the statute would exceed the estimation of fair rent done by the landlord in his petition, the Authorities should not shirk their statutory obligations to fix the fair rent as per the said principles. It was also held that proportionate enhancement had to be made taking note of the passage of time.

11. There was a conflict of opinions with regard to "the extent of the site" to be taken into account for calculating the market value of the site in which the building is constructed for the purpose of the Section. The matter was referred to a Full Bench in *Lodha v. Ranganathan, (1989)1 M.L.J. 213.* It was held that an extent upto 50% of the site on which the building was constructed had to be served out of the vacant land if any, appurtenant to such building and the market value of that 50% must be added on to the market value of that portion of the site on which the building was constructed and the rest of the portion of the vacant land had to be treated as amenity. With reference to the question of apportionment, where the building is occupied by different tenants floor-wise, the Full Bench answered it by saying that the scope of terms and conditions of letting had to be found out in each case. It was observed thus:

"...The real test would be how one party intended to give and how the other party intended to take the demise and the subject matter of the demise. If there is a demise of any land appurtenant to building, certainly the test, as countenanced by us, while answering the first question, will have to be applied. If there is no demise of any land, appurtenant to building, then there is no question of applying the test."

12. In *Raitan Private Ltd. v. L.Krishnamoorthy, C.R.P.Nos.708, 709 and 2698 to 2791 of 1985,* V.Ramaswami, J. took into account the basic amenities while fixing the cost of construction of the building and refused to make a further provision additionally for such amenities. On the facts, he found that the P.W.D. rate was Rs.79 per sq.ft. and taking into account the basic amenities, he fixed the cost of construction at the rate of Rs.100 per sq.ft. When it was contended that certain percentage should be added after the total cost of construction was arrived at for the cost of amenities like water supply, electricity and drainage, he rejected the said contention.

13. Bearing in mind the provisions of the Act and the principles settled in the above rulings, I shall consider the facts in these cases. The contentions raised by both the tenants are the same excepting that the tenant of the first floor *viz.*, Manoharlal Sablok raises an additional contention that he is in occupation of only one portion in the first floor as a tenant and he is not a tenant with reference to another portion. It is to substantiate that contention, he filed C.M.P.No.14705 of 1991 for admission of certain documents as additional evidence. I will first advert to the question whether Mahoharlal Sablok is a tenant with reference to two flats in the first floor or only one flat. The authorities have concurrently negatived this contention and upheld the claim of the landlord. In paragraph 2 of the counter statement in R.C.O.P.No.3116 of 1982, the plea is raised in the following terms:

> "The respondent submits that the application is filed in respect of the two portions when the respondent is in occupation of only one portion. The other portion is occupied by his daughter and not by the respondent. Therefore the respondent is a tenant only in respect of one portion in the property for which a monthly rent of Rs.135 is now being paid. Hence the present petition filed by the petitioner for fixing of fair rent for two portions is not at all maintainable in law and it is liable to be dismissed in this short ground alone."

The tenant gave evidence as R.W.2. He admitted having filed the suit W.P.No.4281 of 1981 along with Ahmed Basha and another against the vendor of the present landlord for injunction restraining him from cutting off electricity supply to the ground floor and first floor. He admitted that he had not mentioned in the said plaint that he was a tenant of only one portion and his daughter was a tenant of another portion. There was also a petition by the tenant under Sec.9 of the Act against his previous landlord and the present landlord for deposit of rent *viz.*, H.R.C.4054 of 1981. Admittedly, the tenant averred in that petition that he was a tenant of two portions in the first floor. The previous landlord filed H.R.C.No.1499 of 1981 for eviction of the tenant from the two portions in the first floor specifically stating that he was a tenant of both the portions. The present landlord was impleaded in that petition as second petitioner later after his purchase. The petition for eviction was dismissed by order dated 9.2.1982 on the ground that there was no wilful default in payment of rent. The order of dismissal is marked as Ex.P-6 in the present proceedings. The contention of the tenant that he was a tenant of only one portion of the first floor and the petition for eviction was not maintainable, was rejected. The Controller found that he was a tenant of both the petitions relying upon his statements in the earlier suit O.S.No.4281 of 1980 and the petition H.R.C.No.4054 of 1981. There is no explanation by the tenant of the admissions made by him in the two earlier proceedings. The Rent Controller held that the plea was clearly an after thought and rejected the contention of the tenant. On appeal that was affirmed by the appellate authority. In the appeal before the appellate authority, the finding of the Rent Controller was not canvassed at all. In paragraph 11 of the order of the appellate authority it is stated thus:

> "The said finding is not canvassed in this appeal and as it has become final."

There is no revision petition by Manoharlal Sablok in this Court. Hence, it is not open to him to raise the question in these revision petitions. The application for filing documents as additional evidence is, therefore, not maintainable at all. Even assuming that it is open to him to canvass the same, there is no explanation at all by him as to why he did not produce these documents either before the Rent Controller or before the appellate authority. There is no explanation also as to why he failed to canvass the question before the appellate authority. A vague averment is made in the affidavit that the documents were not readily available before him when the matter was being heard by the Rent Controller as they had been

mislaid. It is added that "at that time he was facing untold domestic hardship." No details are furnished and even at present, the so called domestic hardship remains untold in the sense that the tenant has not chosen to explain what it is.

14. Learned counsel for the tenant relied on the judgment of the Supreme Court in *K Venkataramiah v. Seetharama Reddy, (1964)1 S.C.J. 37: A.I.R. 1963 S.C. 1526.* It was held in that case that the appellate Court has power to allow additional evidence not only if it requires such evidence to enable it pronounce judgment but also for any other substantial cause. The Apex Court was only laying down the principles to be borne in mind under O.41, Rule 27 of the Code of Civil Procedure. On the facts of this case, it has not been made out by the tenant that additional evidence should be allowed to be adduced. Learned counsel also cited *Basant Singh v. Janki Singh, A.I.R. 1967 S.C. 341,* and *Nagindas v. Balpatram, A.I.R. 1974 S.C. 471,* for the proposition that admissions made by a party can be explained and the party can show them to be not true. When the tenant has not even chosen to challenge the finding before the appellate authority or filed a revision petition in this Court, questioning the correctness of the orders of the courts below on that aspect of the matter, there is no question of his seeking to explain the admissions made by him earlier. The matter is no longer in issue and the rulings of the Supreme Court are of no avail to him in this case. In the circumstances, I have no hesitation whatever to reject the application filed by the tenant for admission of documents as additional evidence. C.M.P.No.14705 of 1991 is dismissed.

15. *I. Type of building:* Schedule II to the Act, which prescribes rates of depreciation, classifies buildings into four. The first type relates to buildings built in lime mortar and in which teak has been used throughout. It is in evidence that the building is constructed with cement mortar and teak wood had been used. The case of the tenants is that teak wood has not been used and country wood alone has been used. R.W.3 has in the chief-examination deposed to that effect. But, in the cross-examination he has categorically stated that teak wood has been used and he has tested the wood by making an opening. It is contended by learned counsel for the tenants that there is a wrong recording of the deposition and there was no admission on the part of R.W.3 that teak wood has been used. R.W.3 is an educated man. He is a qualified Civil Engineer and he has 38 years' experience, according to his report, in the construction field. He has signed the deposition recorded by the court. If there was any mistake in the recording, he ought to have pointed it out to the court and got the deposition corrected. That not having been done, it is not open to counsel to raise a plea in the revisional Court that there was wrong recording of the deposition. Counsel should have gone through the depositions before arguing the matter in the lower appellate court and he could have easily pointed out the mistake if there was any to the authority who recorded the evidence. On the other hand, the appellate authority in his report has placed reliance on the said deposition of R.W.3 and held that the building is type 1.

16. *II. Age of the building:* There is no dispute as to the age of the building, either before the appellate authority or before me. It has been fixed as 21 years.

17. *III. Depreciation:* As the building is type 1, the rate of depreciation is 1% under Schedule II and the formula prescribed in Schedule II should be applied.

18. *IV. Cost of construction inclusive of basic amenities:* After this Court called for findings, the landlord has examined a Junior Engineer of P.W.D. as P.W.3 and marked his report as Ex.P-10. The tenants have examined a private consulting engineer as R.W.3 and marked his report as Ex.R-8. The appellate authority has found that the rates fixed by P.W.D. are Rs.57 per sq.ft. for ground floor, Rs.52.50 per sq.ft. for first floor terraced portions and Rs.37.50 per sq.ft. for A.C. sheet portions, though wrongly mentioned as Rs.42.50 per sq.ft. in another place. The Authority has fixed the cost of construction at Rs.80, Rs.70 and Rs.50 per sq.ft. respectively for ground floor, first floor terraced portion and first floor A.C. sheet portion. The Authority has observed that it has taken into account the height and thickness of the walls and windows in the petition mentioned building. Excepting the thickness of the wall, there is no difference between a building taken by the P.W.D. for fixing the rates for construction and the petition building. P.W.3 deposes that normally the load bearing wall in a model building will be of 9" thickness. In fact, he has added that it may vary from 9 inches to 1' - 1 1/2. The petition building is having 1' - 3% thick walls. The height of the walls

is the same as in a P.W.D. building *i.e.* 10'. No speciality in windows or any other part of the structure has been brought out in evidence. In the absence of specific evidence by the landlord as to the cost of materials used for the building the P.W.D. rates based on control prices of cement, steel etc., should be adopted. There is no basis for accepting the contention of counsel for the landlord that cement and steel were purchased in open market and the rates prevailing in open market should have been adopted. It is in evidence that there was control for cement and steel from 1961 to 1990. Hence, there is no warrant for assuming that the building was constructed with cement and steel purchased at higher rates in open market. The landlord ought to have examined his vendor to prove the cost of construction but he has failed to do so. There is also no evidence as to the cost of internal water supply, sanitary and electrical installations. Learned counsel for the landlord submits that the building is situated about 100 feet" away from the main road and the length of electric wires, drainage pipes and water pipes should be borne in mind. The landlord has not let in any positive evidence regarding the same. In the circumstances, I apply the method adopted by V.Ramaswami, J. in C.R.P.Nos.708, 709 and 2698 to 2701 of 1985 (referred to earlier) and fix the consolidated rates of Rs.80, Rs.70 and Rs.50 per sq.ft. for ground floor, 1st floor terraced portion and 1st floor A.C. Sheet portion respectively inclusive of cost of basic amenities. Hence, there cannot be a separate or additional allowance of 10% for basic amenities as has been done by the appellate authority. Reliance is placed by the landlord on Ex.P-9, a notice issued by one of the tenants on 7.8.1984 that the buildings on the land were worth Rs.4,00,000. The averment in the notice cannot be torn out of context and treated as proof of the cost of construction. It has been rightly ignored by the authorities below.

19. *V. Land value:* The landlord has claimed at the rate of Rs.1,00,000 per ground. On the other hand, the tenants contend that it should be worked out at Rs.15,000 per ground. The landlord relied on Ex.P-5, a sale deed relating to another property situated at a distance of half a furlong away from the petition premises. The Rent Controller relied on Ex.R-1, the sale deed under which the landlord purchased the petition property on 1.7.1981 from its previous owner. The total consideration is found to be Rs.2,50,000. The subject matter of conveyance comprises a total area of 4 grounds and 1,862 sq.ft. of land and as per the document the building area is 1,655 sq.ft. Taking into account the value of the building at the rate provided by R.W.1 in Ex.R-2, the Rent Controller fixed the value of the land at Rs.25,000 per ground. On appeal, the appellate authority increased it to Rs.50,000 per ground relying on a sentence in the deposition of R.W.1 that he ascertained the value of the land in the area to be Rs.60,000 per ground. In the present report containing the findings the appellate authority has stated that the value of the land fixed at Rs.60,000 was not disputed before him in the course of arguments. This Court called for findings with reference to the cost of construction, having regard to the nature and type of construction and the P.W.D. rates. With regard to the value of the land, this Court did not direct the appellate authority to consider the question, though one of the directions given is to decide the quantum of fair rent. That will not, however, prevent the parties agitating the question of value of the land before me. In fact, counsel on both sides argued the question. According to learned counsel for the landlord, the value should be fixed on the basis of Ex.P-5, dated 1.4.1982. He submits that the petitions for fair rent were filed on 7.4.1982 and the said document ought not to have been rejected by the Courts below. On the other hand, it is argued by learned counsel for the tenants that Ex.P-5 relates to land situated far away from the petition premises and when there is a document proving the value of the petition premises itself, no reliance can be placed on other documents. It is also argued that the expression used in the section is "market value of the site in which the building is constructed". According to learned counsel, if direct evidence is available to prove the market value of the said site, no resort can be had to documents pertaining to other sites and drawing an inference therefrom. No doubt, there is considerable force in the contention of learned counsel for the tenants. But judicial notice has to be taken of the fact that prices have been increasing at galloping rates since 1980. The petitions for fixation of fair rent were filed one year after the purchase of the property by the landlord. Even if the value of the land at the time of his purchase should be taken to be Rs.25,000 per ground, there is nothing wrong in holding that it was Rs.60,000

per ground on the date of applications. Moreover, the evidence of R.W.1 is very clear that he made enquiries and ascertained the value to be Rs.60,000 per ground. Hence, I do not find any justification to interfere with that finding.

20. *VI. Market value of the site in which the building is constructed:* As per the ruling of the Full Bench in *Lodha v. Senganathan, (1989)1 M.L.J. 213,* for calculating the market value of the site in which the building is constructed, the plinth area of the building one half thereof has to be taken into account. There is no difficulty in applying that formula, if it is a case of one building and one tenant. Complications arise when there is more than one storey in the building and more than one tenant in each storey, as in the present case. In fact, with regard to the second question referred to the Full Bench, as to the method of apportionment, the Full Bench held that the matter should be decided with reference to the terms and conditions of the demise in each case. It was observed that to test prescribed by them should be applied to the facts of each case. I am of the view that the market value of the site on which the building is constructed has to be ascertained in the first instance on the basis of the section and the proviso as interpreted by the Full Bench. Then it has to be apportioned among the tenants on the basis of the number of portions of tenements into which the building is divided. Sec.2(2) of the Act defines a 'building' as a building or hut or part of a building or hut let or to be let separately. In the case of dividing a building into several portions and letting them out to different tenants, each portion has to be taken as a 'building' as defined by the Act. For the purposes of Sec.4 of the Act 'building' is that portion which is occupied by the tenant in question. One tenant cannot be mulcted with the liability for market value of the site on which the building is constructed taken as a whole. Necessarily, the market value of the site in which the building is constructed has to be distributed and apportioned among the tenants. If it is taken floorwise, that will lead to an artificiality, in the case of there being more tenants in each floor. If it is taken on the basis of the plinth area of each of the portions, that will also lead to an artificiality in the case of more storeys than one. In both cases, undue advantage will be gained by the landlord. He cannot be entitled to charge each tenant occupying only a small portion of the building with fair rent calculated on the basis of the market value of the plinth area of the entire building + one half thereof. In my opinion, the most equitable way of construing the section and applying the formula evolved by the Full Bench is to distribute or apportion the value of the site occupied by the building as a whole one half thereof equally among the tenements.

21. In the present case, it is not in dispute that each floor consists of three flats. In the petitions for fixation of fair rent, the landlord described the premises occupied by the tenants as two flats in ground floor and two flats in first floor respectively. It is also not in dispute that the third flat in each floor is under the control of the landlord and it is also being let out to tenants by him. Thus, there are six flats in the building. The area of the site on which the building is actually constructed is roughly 2,300 sq.ft. This fact is culled out from the plan filed by the landlord and marked as Ex. P-7 and the plan attached to the decree in S.A.No.453 of 1983., marked as Ex.P-8. One half thereof is 1,150 sq.ft. making a total of 3,450 sq.ft. as the area of 'the site in which the building is constructed'. The market value of the said extent of 3,450 sq.ft. is Rs.86,250 at the rate of Rs.60,000 per ground. This has to be apportioned and distributed among the six flats. The tenant in the ground floor is occupying two flats and the tenant in the first floor is occupying two flats. Hence, 1/3rd of the above value (2/6th) should be taken into account for calculating the market value of the site on which the building of each of them is constructed. It is shown in Ex.P-7 that the total area of the land is 5,000 sq.ft. Deducting the area of the site in which the building is constructed as worked out above, the balance is 1,550 sq.ft. That has to be treated as amenity under Schedule I. Hence, it is held that the value of the site in which the building for each tenant is constructed is Rs.28,750. The finding under this heading by the Authorities below is erroneous. The authorities, who decided the matter earlier, did not have the advantage of the judgment of the Full Bench. They calculated the ares of the site in which the building is constructed in a peculiar manner which is wholly unacceptable. Unfortunately, the appellate authority who has now returned a finding as directed by this Court has simply adopted the basis found in the earlier orders. He has not applied the test prescribed by the Full Bench and calculated the market value of

the site in which the building is constructed.

22. *VII. Schedule I amenity:* The appellate authority has awarded 5% on the footing that there is an over-head tank, electric motor and pumpset and vacant space. They will fall under items 10, 11 and 15. In so far as items 10 and 11 are concerned, it is in evidence that the well has been closed and no water is lifted to the overhead tank. Hence the landlord cannot claim any allowance for the value of the two items. As regards item 15, I have found the excess extent of the vacant land to be 1,550 sq.ft. That has to be apportioned and distributed among the six flats. Each tenant occupying two flats in the ground floor and first floor respectively will be liable for 1/3rd of the said extent. That comes to 517 sq.ft. as rounded off.

23. The contention of learned counsel for the landlord is that the Appellant Authority is in error in fixing the value of the amenities under Schedule 1 on a percentage basis. It is rightly pointed out by him that the section requires the cost of provision of any one or more of the amenities specified in Schedule 1 as on the date of application for fixing of fair rent to be ascertained and the proviso fixes only a ceiling of 15% on the cost of site + cost of construction as determined under the section. Hence the proper method will be to work out the cost of the provisions of such of the Schedule 1 amenities as are available to the tenant and if the cost is equal to or exceeds 15% of the cost of site and cost of construction, the max'mum amount that can be taken into account for calculation of the fair rent is the said 15%. If it is less than the said 15%, then the actual cost should be taken into account. In the present case, the only Schedule I amenity that is available to the tenants is the excess vacant land referred to in sub-sec.(4), the extent thereof being 517 sq.ft. for each of the tenants herein. The value of the said extent has to be calculated at the rate of Rs.60,000 per ground, as I have already fixed the market value of the land. Thus, the value of 517 sq.ft. will be Rs.12,925 with respect to each tenant. If this amount exceeds 15% of the cost of site + cost of construction with respect to each of the tenants, what is to be taken into account is only the said 15%. The cost of site + cost of construction in the present case will be as follows:

Ground floor tenant:

Cost of site in which the building is constructed	:	Rs. 28,750
Cost of construction Rs.79,457.55 Rounded off to	:	Rs. 79,458
Total		Rs.1,08,208
15% thereof		Rs. 16,231.20
As the value of Schedule I amenity as worked out earlier is less than 15% of cost of site + cost of construction, the actual value should be taken into account *viz.*		Rs. 12,925

First floor tenant:

Cost of site	:	Rs. 28,750
Cost of construction : Rs.62,895.87 Rounded off to	:	Rs. 62,896
Total	:	Rs. 91,645
15% thereof	:	Rs. 13,746.90
Again, the actual cost of Schedule I amenity is less than 15%. Hence, the actual value should be taken into account *viz.*	:	Rs. 12,925

24. In the result, the fair rent for the ground floor tenant is worked out as follows:

A. Cost of Construction:

(i) Plinth area : 1239 sq.ft.		
(ii) Rate per sq.ft. Rs.80 cost		Rs. 99,120.00
Less		
Depreciation at the rate of 1% per annum for 21 years	:	Rs. 19,662.45

Final value of the building	:	Rs. 79,457.55
Rounded off to	:	Rs. 79,458
5. Cost of the land	:	Rs. 28,750
Total		Rs.1,08,208
C. Cost of Schedule amenities		Rs. 12,925
Total		Rs.1,21,133
As it is a residential building annual rent at 9% of Rs.1,21,133	:	Rs. 10,901.97
Monthly rent: (rounded off)	:	Rs. 908.50
		Rs. 909.00

25. The fair rent for the first floor tenant is worked out as follows:

A. Cost of construction:		
(i) Plinth area : 1048 sq.ft. of terraced portion, cost at the rate of Rs.70 per sq.ft.		Rs. 73,360
(ii) 102 sq.ft. of A.C. Sheet roof portion: Cost at the rate of Rs.50 per sq.ft.		Rs. 5,100
		Rs. 78,460.00
Less		
Depreciation at the rate of 1% per annum for 21 years	:	Rs. 15,564.13
Final value of the building	:	Rs. 62,895.87
B. Cost of land	:	Rs. 28,750.00
Total	:	Rs. 91,645.87
C. Cost of Schedule I amenities	:	Rs. 12,925.00
Total	:	Rs.1,04,570.87
As it is a residential building, annual rent at 9% of Rs.1,04,570.87	:	Rs. 9,411.38
Monthly Rent	:	Rs. 784.28
Rounded off to	:	Rs. 784

26. The fair rent with reference to each tenant is fixed as above and the revision petitions are ordered accordingly. C.M.P.No.14705 of 1991 is dismissed. The parties will bear their respective costs.

B.S. ---- *Revision petition ordered, miscellaneous petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Bellie, J.*

S.A.No.537 of 1987 *25th February, 1992.*

Sriramulu Naidu and others ...*Appellants*
v.
Yusuf Sahib and others ...*Respondents.*

(A) Civil Procedure Code (V of 1908), Sec.100 - Concurrent findings of fact - Interference in second appeal.

The trial court has considered elaborately the evidence let in and then it has come to the conclusion that the agreement to reconvey must be true. This finding has been concurred with by the appellate court. Thus both the courts below have given a concurrent finding and that finding is a finding of fact and that cannot be interfered with in the second appeal. *[Para 4]*

(B) Limitation Act (XXXVI of 1963), Sch.I, Art.54 - Agreement to reconvey property after 1.9.1975 - Right of plaintiff purchaser arises only from 2.9.1975 - No outer date fixed for reconveyance - Limitation - When starts.

Taking the case of an agreement of particular date wherein the seller agrees to sell his property but no date is fixed, plainly the second part of column (3) in Art.54 only applies. *i.e.* the time for limitation runs only from the date of notice that performance is refused. When the defendants in this case have stated in the agreement that they would reconvey after 1.9.1975, the right of the plaintiff-purchasers arises after that date *i.e.* from 2.9.1975 and no outer date having been fixed for performance, here too, the second part of col.3 only would apply. So limitation runs from the date when the plaintiff has notice that performance is refused. *[Para 12]*

Cases referred to:

Ramzan v. Mrs.Hussaini, A.I.R. 1990 S.C. 529, Muniswami Gounder v. B.M Shanmugha Gounder, A.I.R. 1950 Mad. 820; Utchegowda v. H.M.Basaviar, A.I.R. 1954 Mys. 29; Jiut Ram v. Jagannath Ram, A.I.R. 1956 Pat.489.

K.Chandramouli, Senior Counsel, for Appellants.
V.Srinivasan, for Respondents.

The Court delivered the following

JUDGMENT: The defendants against whom the suit has been decreed for specific performance of an agreement to sell are the appellants.

2. The plaintiffs' case is that they are the heirs of one Abdul Razaak. He owned the suit properties and on 1.9.1958 he sold the same for a sum of Rs.2,000 to the two defendants who are father and son. They on the same day *i.e.*, on 1.9.1958 executed an agreement to re-convey the property to Abdul Razaak after 1.9.1975. Abdul Razaak died. His heirs-plaintiffs, on 19.6.1979 issued a notice to the defendants calling upon them to execute a sale deed but they sent a reply raising false contentions. The plaintiffs have been always ready and willing to perform their part of the contract, but the defendants evaded. Therefore the suit.

3. The defendants in their written statement denied that they executed any agreement to reconvey the property to Abdul Razaak. They further contended that the suit is barred by limitation.

4. The trial court on consideration of the evidence believed the case of the plaintiffs that the defendants executed Ex.A-1 agreement to reconvey. It also held that the plaintiffs were ready and wiling to perform their part of the contract. It further held that the suit is not barred by limitation as contended by the defendants. On these findings the trial court decreed the suit as prayed for.

5. Now the defendants appeal and the appellate court concurred with the findings of the trial court and dismissed the appeal.

6. Now in the second appeal Mr.K.Chandramouli, learned counsel for the appellants/defendants contends that the findings of the courts below that Ex.A-1 was executed by the defendants and it is true and valid is erroneous. He further contends that clearly the suit is barred by limitation, but the courts below wrongly held to the contrary.

7. As regards the first point raised by the learned counsel a reading of the judgments shows that the trial court has considered elaborately the evidence let in in this regard and then it has come to the conclusion that Ex A-1 agreement to reconvey must be true. This finding has been concurred with by the appellate court. Thus both the courts below have given a concurrent finding and that finding is a finding of fact and that cannot be interfered with in the second appeal. The learned counsel would however submit that the first appellate court has simply stated the finding of the appellate court and there is absolutely no application of its mind. I do not agree. The first appellate court has stated

that on comparison of the admitted signatures of the defendants in other documents with the signatures in Ex.A-1 clearly above that the signatures in Ex.A-1 must be that of the defendants. It has further stated that the person who has written Ex.B-1 only has written Ex.A-1 also. Therefore, there is no substance in the submission of the learned counsel for the appellants defendants that there was no application of mind by the appellate court on the point in question. Hence there is no merit in the first submission raised by the learned counsel.

8. As to the point of limitation, the reconveyance agreement Ex.A-1 is dated 1.9.1958. A reading of the agreement shows that the property was sold by Abdul Razaak for a sum of Rs.2,000. This property was under mortgage to one Alamelu Ammal for a sum of Rs.1,400. The agreement reads that the defendants should redeem the mortgage by payment of the said sum of Rs.1,400 and take possession of the land and from that date they would enjoy the same till 1.9.1975, and thereafter if Abdul Razaak would pay the defendants Rs.2,000 and bring a draft sale deed they would without hesitation come before the Registrar and execute a sale deed. Therefore it was agreed that the defendants shall be in possession and enjoyment of the property till 1.9.1975 and thereafter on payment of Rs.2,000 to them they would execute a sale deed.

9. It is not in dispute that the relevant Article that applies to this case in the Limitation Act is Art.54, according to which the period of limitation for suit for specific performance of contract in three years and it begins from the date fixed for the performance or, if no such date is fixed, when the plaintiff had notice that performance is refused. According to Mr.Chandramouli, learned counsel for the appellants-defendants, in this case the date is fixed for performance and therefore the limitation shall be computed from that date. But according to the Courts below no date is fixed and therefore the time will begin to run only from the date when the plaintiff has notice that performance is refused, and the plaintiff has notice of refusal of performance only on 27.6.1979 when the defendants sent a reply to the notice of the plaintiffs repudiating the plaintiff's claim.

10. Now a reading of the agreement would show that no specific date has been fixed for performance. Mr.Chandramouli would however contend that no specific date by calendar need be fixed, and it would be sufficient if a definite date can be arrived at as the date of performance of the agreement with reference to the other particulars in the agreement and on the events that are to take place as per the agreement. In this connection the learned counsel cited a number of decisions. I agree with this submission.

11. The learned counsel then proceeds that as per the agreement the defendants agreed to execute a sale deed after 1.9.1975 and they are bound by that and therefore 2.9.1975 must be taken to be the date of performance of the agreement. I find it difficult to agree. When the defendants agree to execute a sale deed after 1.9.1975 it cannot be taken to mean by any stretch of reasoning that 2.9.1975 must be held to be the date fixed for Performance of it within the meaning of Art.54. No particular date as any outer date for performance by the defendants is stated. It is simply stated to the effect that subsequent to 1.9.1975 the defendants should execute the sale deed. The right of the plaintiffs-purchasers for reconveyance arises only after 1.9.1975.

12. Now take the case of an agreement of a particular date wherein the seller agrees to sell his property but no date is fixed, In such a case plainly the second part of column.3 in Art.54 only applies. *i.e.* the time for limitation runs only from the date of notice that performance is refused. When the defendants in this case have stated in the agreement that they would reconvey after 1.9.1975, the right of the plaintiff-purchasers arises after that date *i.e.* from 2.9.1975 and no other date having been fixed for performance, here too, the second part of Col.3 only would apply.

13. Mr.Chandramouli would in support of his contention, rely as *Ramzan v. Mrs.Hussaini, A.I.R. 1990 S.C. 529.* In that case the defendant-seller under the contract agreed to execute a deed of sale on the day the purchaser redeemed a mortgage to which the property was subjected to. It is held that the Limitation had started to run from the date when the mortgage was redeemed and the case was covered by the first part of coln.3 of Art.54 and not the second part. There is no difficulty to say that in that case a definite date was fixed *i.e.*, the date of redemption of the mortgage. Hence that decision will not be of any help to the appellants-defendants.

14. The learned counsel relied on the decision of

the Madras High Court in *Muniswami Gounder (Died) and another v. B.M.Shanmugha Goundar and others, A.I.R. 1950 Mad. 820,* in which case the relevant portion of the suit agreement reads as follows:

"As regards the balance of Rs.2,400 since a suit has been pending concerning the same property, I shall receive it before the Sub-Registrar upon executing a sale deed the moment the suit is disposed of."

It was held that the parties contemplated a date which may be ascertained with relevance to an event certain to happen and therefore part 15 of coln.3 of Art.54 would apply. This decision also, I do not think, will be of assistance to the appellants-defendants.

15. Yet another decision cited by Mr.Chandramouli is by a single Judge of Mysore High Court in *Utchegowda v. H.M.Basaviar, A.I.R. 1954 Mys. 29.* In that case according to the agreement the sale had to be executed after the 'Saguvali chit' was given to the defendant. The defendant got the Saguvali chit and got possession of the property more than three years prior to the date on which the suit was filed. It was held that the suit was barred by time and the first part of Art.113 would apply. Here clearly the parties for specific performance agreed to the happening of a certain event, and rightly that event having happened it was held that suit filed beyond three years from the period was barred by limitation.

16. In a decision of Patna High Court in *Jiut Ram and others v. Jagannath Ram and another, A.I.R. 1956 Pat.489,* cited by Mr.V.Srinivasan, learned counsel appearing for the respondents-plaintiffs, as per the terms of a moshdanama deed executed on 30.7.1929 the executant agreed to reconvey property to the plaintiffs on payment of a certain sum after expiry of 12 years but within 18 years from the date of execution. The suit was filed on 30.7.1947 for specific performance. The trial court held that the suit was premature meaning that the suit had been filed one day before 18 years. The High Court held that;

"The word 'within' used in the document showed that on refusal to accept the money by the executant after the expiry of 12 years but within 6 years from the expiry thereof, the claimants, the plaintiffs in the suit for specific performance, had the right to pay off and on refusal to accept the payment the cause of action accorded to the plaintiffs."

From the above discussions of the matter it appears to me that in the present case the limitation runs from the date when the plaintiff has notice that performance is refused. Hence the findings of the trial court on the point of limitation is correct.

17. In the result, I find no merit in the second appeal. Accordingly it is dismissed with costs.

B.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction]

Present:- *Swamidurai, J.*

W.P.No.455 of 1991 and W.M.P.No.16127 of 1991
3rd February, 1992.

P.Subbaraj and others ...*Petitioners*

v.

State of Tamil Nadu represented by Commissioner and Secretary to Government Housing & Urban Development Department and others ...*Respondents.*

Land Acquisition Act (I of 1894), Sec.4(1) - Notification under - Vague - Publication of substance of notification not made in locality immediately - Declaration under Sec.6 not passed within one year of notification - Effect - Acquisition proceedings if vitiated.

Even the files do not show that there is any clarity in the notification. In view of the ratio of the Supreme Court followed by this Court in *Thiruvaleeswarar Temple, Nerkundram v. The State of Tamil Nadu, (1990)1 M.L.J. 149,* the notification under Sec.4(1) of the Act is not in accordance with law. The publication of the substance of the notification was not published in the locality immediately. The declaration under Sec.6 of the Act was passed within the period as laid down under the Act. Therefore the respondents have not passed the declaration under Sec.6 of the Act till now even though the notification under Sec.4(1) was published on 11.6.1975. In this view, the impugned Government order of the first respondent, is

therefore, quashed. *[Para 7]*

Cases referred to:

Thiruvaleeswarar Temple, Nerkundram v. The State of Tamil Nadu, (1990)1 M.L.J. 142; State of Tamil Nadu v. A.Mohammed Yousuf, (1991)3 S.C.C. 347; Gokak Patel Volkart Ltd. v. Collector of Central Excise, Belgaum, A.I.R. 1987 S.C. 1161; Sree Vengeeswarar Alagar Perumal Devasthanam v. State of Tamil Nadu, (1984)2 M.L.J. 427; The Special Deputy Collector (L.A.) v. Kuppa Gounder, 1985 W.L.R. 694; Thiruvaleeswarar Temple, Nerkundram v. The State of Tamil Nadu, (1990)1 M.L.J. 149.

Petition under Art.226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorarified* calling for the records in G.O.Rt.No.124, Housing Department, dated 8.5.1975, published in the Tamil Nadu Government Gazette on 11.6.1975 on the file of the first respondent herein and quash the notification issued under Sec.4(1) of the Land Acquisition Act in respect of the land of the petitioners herein bearing survey Nos.94, part 95,96/28, 96/213, 98/1, 98/2, 103/1, 103/2 and 105 measuring in all 5.57 acres in Nerkundram Village, Saidapet Taluk, Chengalpet District, etc.

David Thiyagaraj, for Petitioners.

Mrs.Kalaiselvi, Government Advocate, for Respondents.

The Court made the following

ORDER: This writ petition is filed for issue of a writ of *certiorari* to quash the Government Order Rt. No.124, Housing Department, dated 8.5.1975, published in the Tamil Nadu Government Gazette on 11.6.1975, of the file of the first respondent and also the Notification issued under Sec.4(1) of the Land Acquisition Act in respect of the land of the petitioners bearing survey Nos.94, part 95, 96/2A, 96/2B, 98/1, 92/2, 103/1, 103/2 and 105 measuring in all 5.57 acres in Nerkundram Village, Saidapet Taluk, Chengalpet District etc.

2. The petitioners have raised the following grounds: (i) The Notification under Sec.4(1) of the Land Acquisition Act, hereinafter referred to as the Act, was published in the Tamil Nadu Government Gazette on 11.6.1975 and the substance of the notification published in the Tamil Nadu Government Gazette was not published in the village Panchayat office and other convenient places. According to Rule 1 of the rules framed under Sec.55(1) of the Act, the substance of the notification published in the Government Gazette should have been published in the village and the village panchayat etc. immediately after publication of the notification in the official gazette. The petitioners are deprived of the fundamental right to put forth their objections within the statutory time limit laid down in sub-sec.(1) of Sec.5-A of the Act and under Rule 1 of the rules framed under Sec.55(1) of the Act and the failure on the part of the respondents to comply with the abovesaid provisions of the rules and the Act is fatal and consequently, the acquisition proceedings are illegal and this point has been decided in W.A.Nos.987 of 1984, 1065 and 1066 of 1984 and also reported in *Thiruvaleeswarar Temple, Nerkundram v. The State of Tamil Nadu and another, (1990)1 M.L.J. 142.*

(ii) In W.P.No.2734 of 1983 filed by the late father of the petitioners herein, this Court has granted interim stay on 25.3.1983 upto 18.4.1983. There was no stay subsequently of the Land Acquisition proceedings. Ultimately the stay petition was dismissed on 12.2.1987 and the writ petition was allowed on 21.1.1988 leaving Sec.4(1) Notification of the Act intact. As per the amended Act 68 of 1984 in Sec.11(1) the Award should have been passed within two years from the date of Sec.6 declaration and the declaration under Sec.6 was published prior to 24.9.1984. The award should have been passed by the respondents on or before 23.9.1986. But the Award has not been passed within two years. It has been well decided in *1988 L.A.C.C. 711, Gokak Patel Volkart Ltd. v. Collector of Central Excise, Belgaum, A.I.R. 1987 S.C. 1161* and *(1989)2 All India Law Reporter 276.*

(iii) If the fresh declaration is now issued after the stipulated period as contemplated under the Amended Act in the year 1990 and the Award is passed in the year 1991, the petitioners will be given compensation only with the reference to market value as in 1975 which would be considerably low and meagre. In *Sree Vengeeswarar Alagar Perumal Devasthanam v. State of, Tamil Nadu, (1984)2 M.L.J. 427,* this Court has held that an award purported to be passed after a period of 20 years from the notification under Sec.4(1) of the Act will be mockery of the rights of the citizen because the valuation would be very meagre as such as the value of the land itself has gone down heavily and that there is a continuous and

exorbitant uptrend in the value of the landed property. The notification under Sec.4(1) of the Act was kept pending from 11.6.1975 onwards.

(iv) There is violation of Rule 3(b) of the rules. On the date of enquiry on 9.11.1990, the second respondent was not present during enquiry. The enquiry was fixed on 16.5.1990 under Rule 3(B) and the petitioners had submitted their objections. The remarks of the requisition department have not been communicated to the petitioners and the enquiry was not a detailed enquiry and so, the enquiry is against the principles laid down under Rule 3(b) and (c) of the Rules.

(v) Further enquiry cannot be held by the second respondent since he becomes *functus officio* as the declaration under Sec.6 has not been made within one year as per the amended Act and hence the notification under Sec.4(1) is invalid.

(vi) The acquisition for independent Corporation though owned by the Government, should be by invoking Part VII of the Land Acquisition Act and in this case, the acquisition proceedings resorted to under Part II of the Act is unsustainable. This Court quashed the declaration under Sec.6 of the Act on 21.1.1988. Despite that till now they have not taken any action pursuant to the notification under Sec.4(1) of the Act and there was no detailed enquiry under Sec.5(a) of the Act. It is more than 14 years since Notification under Sec.4(1) of the Act was passed for the alleged purpose of housing scheme. A Division Bench of this Court has held in *The Special Deputy Collector (L.A.) v. Kuppa Gounder, 1985 W.L.R. 694,* as follows:

> "The award enquiry was sought to be held more than fourteen years after the notification under Sec.4(1). The delay is inordinate and it will be wholly unjust to the first respondent in each appeal to receive the compensation at rates passed to the market condition prevailing in 1964."

The same view has also been expressed in *1990 L.A.C.C. 613.*

(vii) The notification issued under Sec.4(1) of the Act in respect of the lands situate in Koyambedu and Nerkundram Village published in the official gazette on 1.11.1975 was for the purpose of the Kalaignar Karunanidhi Nagar Extension Scheme and the declaration and direction made under Sec.6 of the Act published in the official gazette on 29.9.1978 and 9.6.1978 was for the purpose stated in the notification under Sec.4(1) of the Act. The declaration under Sec.6 of the Act evidences that the land is needed for a public purpose. The Government approved in G.O.Ms.No.125 Housing Department date 20.1.1978, acquisition of the lands in Koyambedu and Nerkundram Village and and Secs.3(c) and 7 Notification of the Act published in the Government Gazette on 28.11.1979 for Block Nos.III to IX of Nerkundram Village was at the instance of the Madras Metropolitan Development Authority as it has required the lands for their textile market etc., which lands had earlier been notified and declared as required for the Tamil Nadu Housing Board on 1.9.1975, 11.6.1975, 29.9.1978 and 9.6.1978. Hence, the order of the Government directing the proposed acquisition in favour of the Madras Metropolitan Development Authority for a different purpose and for the use of different requisitioning body, is improper.

(viii) The petitioners filed W.P.No.16127 of 1991 for leave to raise additional grounds to the writ petition which runs as follows:

> "The petitioner states that in the Gazette notification published in 4(1) Notification and Sec.6 declaration relating to the petitioner's land does not clearly mention what is the public purpose and whose purpose of the land is required has not been stated. It has been stated clear in *Thiruvaleeswarar Temple, Nerkundram v. The State of Tamil Nadu, (1990) 1 M.L.J. 149,* that the 4(1) Notification is vague in nature and not descriptive. 4(1) notification has to be quashed."

After hearing the learned Government Pleader, this writ miscellaneous petition is allowed.

4. The respondents have not filed any counter affidavit to this writ petition and the files were produced by the learned Government Pleader at the time of hearing and the files were perused.

5. Learned counsel for the petitioners submitted that the Notification under Sec.4(1) of the Act was published in the Official Gazette on 11.6.1975 that the declaration under Sec.6 of the Act was published on 9.6.1978 and that the declaration under Sec.6 of the Act was quashed on 21.1.1988 in respect of the lands in question in W.P.Nos.2733, 2734 and 2735 of 1983. According to the petitioners, the publication of the substance of the notification itself is very vague and it does not reveal the actual purpose and according to the Housing Board Act, the scheme has not been formulated as

reported in *State of Tamil Nadu and another v. A.Mohammed Yousuf and others, (1991)3 S.C. 347, (S.L.P.No.3790 of 1991)*. The other ground raised by the learned counsel for the petitioners is that Notification under Sec.4(1) of the Act was published on 11.6.1975 and the declaration under Sec.6 of the Act was published on 9.6.1978 and that the declaration under Sec.6 of the Act was quashed in W.P.No.2734 of 1983 on 21.1.1988. Construing the period of three years from Sec.4(1) notification *i.e.* from 11.6.1975, the declaration under Sec.6 of the Act ought to have been passed from the date of quashing Sec.6 declaration *i.e.* from 21.1.1988. On 23.1.1988 Sec.6 Declaration had to be published as reported in *A.S.Naidu and others v. State of Tamil Nadu, S.L.P.No.11353/55 of 1988.*

6. Learned counsel for the petitioners relied upon the judgment of this Court dated 8.10.1991 in W.P.No.3693 of 1985 etc. batch. The learned Judge (Govindasamy, J.) has considered all the grounds which are similarly raised in this writ petition and ultimately held that the notification under Sec.4(1) of the Act suffers from the vices of vagueness, lack of particulars etc. In that view, the abovesaid batch of writ petitions were allowed.

7. Learned Government Pleader could not support the Notification under Sec.4(1) of the Act issued by the respondents in respect of the lands in question and even the files do not show that there is any clarity in the notification in view of the ratio of the Supreme Court followed by this Court in the abovesaid batch of writ petitions. In this view, I find that the notification under Sec.4(1) of the Act is not in accordance with law, that the publication of the substance of the notification was not published in the locality immediately, and that the declaration under Sec.6 of the Act was not passed within the period as laid down under the Act. Therefore, the respondents have not passed the declaration under Sec.6 of the Act till now even though the notification under Sec.4(1) of the Act was published on 11.6.1975. In this view, the impugned Government order of the first respondent is therefore, quashed and the writ petition is allowed. In the circumstances, there is no order as to costs.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

C.R.P.No.1442 of 1988 *6th April, 1992.*

V.K.P.Sethupathy Chettiar ...*Petitioner*

v.

A.Chinna Veeran and another ...*Respondents.*

(A) Civil Procedure Code (V of 1908), Sec.64 and O.21, Rule 98(2) - Property attached in execution proceedings - Tenant of judgment-debtor after attachment - If can resist auction purchaser's claim for delivery of possession.

(B) Civil Procedure Code (V of 1908), Sec.64 and O.21, Rules 95, 98 and 103 - Petition for delivery of possession and for removal of obstruction - Common order passed by trial court - Revision petition against, if will lie.

The auction purchaser filed an application E.A.No.576 of 1985 for delivery of possession under O.21, Rule 95, C.P.C. There was obstruction at the instance of the second respondent and hence he filed E.A.No.23 of 1986 for removal of obstruction. The executing Court disposed of both the petitions by a common order. Though there was no evidence, it held that the second respondent was a tenant under the judgment-debtor from about December, 1984 and that he was entitled to continue in possession as such. The petitions were dismissed. In a revision petition filed against the common order;

Held:- Even assuming that the second respondent entered the premises as a tenant sometime in November, 1984, that will not help him to obstruct the proceedings for delivery at the instance of the auction purchaser. There are two provisions in the Code of Civil Procedure which negative the claim of the second respondent. Sec.64 of the Code of Civil Procedure is to the effect that when an attachment is made, any private transfer or delivery of property attached or of any interest therein and any payment to the judgment-debtors of any debt etc. contrary to such attachment shall be void as against all claims enforceable against the attachment. The section would cover not merely transfer of title but also delivery of possession subsequent to the attachment. In the present case assuming that the second respondent became a

tenant in November, 1984, that is undoubtedly after the attachment in the execution proceedings and the auction-purchaser's claim and the auction. Purchaser's claim which is enforceable under the attachment cannot be resisted by the second respondent. *[Para 6]*

The other provision is found in O.21, R.98, C.P.C. In the present case, admittedly, the second respondent became a transferee in the sense that he became a lessee of the petition property during the pendency of the execution proceedings. Hence he cannot resist the delivery of possession at the instance of the auction purchaser. It has been held in several cases that provisions of O.21, Rule 98 are independent of Sec.52 of the Transfer of Property Act and if the terms of the rule are fulfilled, there can be no answer to a petition for delivery of possession at the instance of a transferee pending suit or pending the execution proceedings. Hence the second respondent cannot resist the petition for delivery of possession at the instance of the auction purchaser. *[Para 6 and 7]*

No doubt, Rule 103 of O.21 provides that any adjudication under Rule 98 or Rule 100 shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it was a decree. It is true that the order made in E.A.No.23 of 1986 is an appealable one and the appeal would lie to the District Court and not to this Court. But that will not enable the second respondent to defeat this revision petition under Sec.115, C.P.C. This revision petition is against the common order made by the executing court not only in the application for removal of obstruction but also in the application filed by the auction purchaser for delivery of possession. In fact, the certified copy of the decretal order filed along with the memorandum of grounds shows that it is the order made in E.A.No.576 of 1985 dismissing the petition for delivery of possession filed by the auction purchaser. This revision petition is, therefore, maintainable under Sec.115, C.P.C. as there is no provision for appeal against the order on an application for delivery of possession under O.21, Rule 95, C.P.C. The application in E.A.No.23 of 1986 is only for removal of obstruction. That is a part of the proceedings in E.A.No.576 of 1985 for delivery of possession. It is like an interlocutory application in a suit or other proceeding. An order passed in an interlocutory application can be challenged in a proceeding against the order in the main proceeding. Just like that, in this case, the order in the main proceeding is in E.A.No.576 of 1985 dismissing the application for delivery of possession. In this revision petition the order in E.A.No.23 of 1986 can very well be challenged by the revision petitioner. Even otherwise, this Court is entitled under Sec.115, C.P.C. to exercise its power of revision against an order found to be unjust and without jurisdiction. The court below has passed an unjust order without taking note of the provisions of Sec.64, C.P.C. and O.21, Rule 98, C.P.C. It can be said that the order of the Court below is *per incuriam*. Since the executing court has passed an invalid order, this Court can exercise its *suo motu* power under Sec.115, C.P.C. and declare the said order as invalid besides setting aside the same for record purposes. Hence this revision is allowed. *[Paras 8, 10 and 11]*

Petition under Sec.115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Periyakulam, dated 2.9.1987 and made in E.A.No.23 of 1986 in E.A.No.576 of 1985 in E.P.No.154 of 1984 in O.S.No.181 of 1983.

P.Kulandaivadivelu, for Petitioner

R.Subramaniam, for Respondents.

The Court made the following

ORDER: This revision petition is filed by the Court auction purchaser, who was obstructed when he tried to take delivery of possession pursuant to his purchase. The execution petition in W.P.No.154 of 1984 was filed by the decree-holder. The petitioner herein filed E.A.No.576 of 1985 for delivery of possession under O.21, Rule 95, C.P.C. There was obstruction at the instance of the second respondent and E.A.No.23 of 1986 was filed for removal of obstruction by the petitioner herein. The executing Court disposed of the petitions for delivery of possession and removal of obstruction together by a common order. Taking the view that the second respondent herein is a tenant under the judgment-debtor from about December, 1984 and that he is entitled to continue in possession as such, the court dismissed the petitions filed by the auction purchaser. Aggrieved by the said order the auction purchaser has preferred this revision petition. In the preamble of the memorandum of grounds it is stated as follows:

> "On enquiry the executing court, namely the Subordinate Judge, Periakulam dismissed the petition and the petition for delivery of possession in F.A.No.576 of 1985 by a common order.

dated 2.9.1987. The learned Judge has no jurisdiction in law to dismiss those petitions and questioning the correctness of the said order, the present revision petition is filed on the following among other grounds."

Thus, the auction purchaser purported to file this revision petition against both the orders passed by the Subordinate Judge, Periakulam.

2. An objection is taken by the second respondent that the revision petition is not maintainable inasmuch as an appeal lies against the order dismissing the application for removal of obstruction. According to learned counsel, appeal would lie only in the District Court and not in this Court. It is also contended that there cannot be one revision against two orders and the present revision petition is not maintainable. It is further argued that as there is no appeal against the order dismissing the application for removal of obstruction it is not open to the auction purchaser to seek an order for delivery of possession in this revision petition and, therefore, it is not sustainable.

3. Before considering the technical objections raised by learned counsel for the second respondent it is necessary to refer to the following facts: The auction sale was held on 18.2.1985. The petitioner purchased the property for a sum of Rs.20,010. It was confirmed on 17.10.1985. He filed the petition for delivery of possession on 5.12.1985. The executing court passed an order on that day directing delivery by 20.12.1985. It was obstructed by the second respondent. He filed an objection even on 20.12.1985. Thereafter the petitioner filed an application for removal of obstruction on 22.1.1986.

4. The second respondent has given evidence in this proceeding. In his chief-examination he has stated that he has been residing as tenant of the petition premises for about 1 1/2 years. The deposition was given on 4.4.1986. Calculating backwards it may take him to November, 1984. He has produced certain electricity bills to show that he had been paying the consumption charges as tenant of the premises. They are marked as Ex.B-6 series. He has admitted that the receipts stand in the name of the judgment-debtor's father, who died twenty years previously. The receipts bear the dates 15.5.1985, 16.9.1985, 16.11.1985 and 17.12.1985. Though he has denied the suggestion that he has obtained the receipts from the judgment-debtor and produced them, it is quite obvious that he did not make the payments himself. Ex.B-8 is a receipt for payment of house-tax. It bears the date 8.2.1986 *i.e.*, after the filing of the obstruction petition. That will not help him. Ex. B-7 is a letter purported to have been written by one Arunachalam Chettiar to the petition premises addressed to the second respondent herein. The letter bears the date 16.12.1985. Even assuming it it be genuine, that will not help the second respondent in any manner as it will only show that he was in the premises in December, 1985. That will not prove his tenancy from November, 1984. He has not produced any document of tenancy. It is in evidence that he was occupying another premises in the same street and it was later attached by a creditor. That order was passed on 20.9.1985. There is nothing on record to show that he entered the premises in November, 1984 as claimed by him.

5. The court below has taken the view that he was in the petition premises for about 1 1/2 years prior to the obstruction. There is not justification for that finding. The finding is clearly perverse as there is no acceptable evidence on record to prove the same. As pointed out already, there is no document to show his occupation of the premises prior to December, 1985.

6. Even assuming that the second respondent entered the premises as a tenant sometime in November, 1984, that will not help him to obstruct the proceedings for delivery at the instance of the auction purchaser. There are two provisions in the Code of Civil Procedure which negative the claim of the second respondent. Sec.64 of the Code of Civil Procedure is to the effect that when an attachment is made, any private transfer or delivery of property attached or of any interest therein and any payment to the judgment-debtor of any debt etc., contrary to such attachment shall be void as against all claims enforceable under the attachment. The section would cover not merely transfer of title but also delivery of possession subsequent to the attachment. In the present case assuming that the second respondent became a tenant in November, 1984, that is undoubtedly after the attachment in the execution proceedings and the auction-purchaser's claim which is enforceable under the attachment cannot be resisted by the second respondent. He cannot claim any better right to be in possession as against the auction purchaser. His claim is void as against the auction purchaser.

7. The other provision is found in O.21, Rule 98,

C.P.C. sub-rule (2) provides that if the court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property. In the present case, admittedly, the second respondent became a transferee in the sense that he became a lessee of the petition property during the pendency of the execution proceedings. Hence he cannot resist the delivery of possession at the instance of the auction purchaser. It has been held in several cases that provisions of O.21, Rule 98 are independent of Sec.52 of the Transfer of Property Act and if the terms of the rule are fulfilled, there can be no answer to a petition for delivery of possession at the instance of a transferee pending suit or pending the execution proceedings. Hence the second respondent cannot resist the petition for delivery of possession at the instance of the auction purchaser.

8. Now, I will consider the technical objections raised by learned counsel for the second respondent. No doubt, Rule 103 of O.21 provides that any adjudication under Rule 98 or Rule 100 shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree. Learned counsel for the second respondent is correct in submitting that the order made in E.A.No.23 of 1986 is an appealable one and the appeal would lie to the District Court and not to this Court. But, that will not enable the second respondent to defeat this revision petition under Sec.115, C.P.C. As pointed out earlier this revision petition is against the common order made by the executing court not only in the application for removal of obstruction but also in the application filed by the auction purchaser for delivery of possession. In fact, the certified copy of the decretal order filed along with the memorandum of grounds shows that it is the order made in E.A.No.576 of 1985 dismissing the petition for delivery of possession filed by the auction purchaser. This revision petition is, therefore, maintainable, under Sec.115, C.P.C. as there is no provision for appeal against the order on an application for delivery of possession under O.21, Rule 95, C.P.C.

9. There is no substance in the contention that this revision is not maintainable, because, it is directed against two orders. Even assuming that there should have been a separate appeal against the order under O.21, Rule 98, C.P.C., the revision petition as against E.A.No.576 of 1985 is still maintainable. As pointed out, the certified copy of the order produced along with the revision petition is only the order in E.A.No.576 of 1985 and though in the preamble the petitioner has mentioned both the orders, he has produced only the certified copy of the order in E.A.No.576 of 1985. Hence this revision petition is maintainable in law.

10. The next contention that the order under O.21, Rule 98, C.P.C., having become final, it is not open to the revision petitioner to seek delivery of possession is without substance. The application in E.A.No.23 of 1986 is only for removal of obstruction. That is a part of the proceedings in E.A.No.576 of 1985 for delivery of possession. It is like an interlocutory application in a suit or other proceeding. An order passed in an interlocutory application can be challenged in a proceeding against the order in the main proceeding. Just like that, in this case, the order in the main proceeding is in E.A.No.576 of 1985 dismissing the application for delivery of possession. In this revision petition the order in E.A.No.23 of 1986 can very well be challenged by the revision petitioner. That he has done, in the memorandum of grounds and therefore, there is no bar to the hearing of the revision petition.

11. Even otherwise, this Court is entitled under Sec.115, C.P.C. to exercise its power of revision against an order found to be unjust and without jurisdiction. The court below has passed an unjust order without taking note of the provisions of Sec.64, C.P.C. and O.21, Rule 98, C.P.C. It can be said that the order of the Court below is *per incuriam*. Since the executing court has passed an invalid order, this Court can exercise its *suo motu* power under Sec.115, C.P.C. and declare the said order as invalid besides setting aside the same for record purposes. Hence this revision is allowed. The order made by the Subordinate Judge, Periakulam in E.A.No.23 of 1986 is set aside. The said application is allowed. The order made in in E.A.No.576 of 1985 is set aside and that application is also allowed. The executing court is directed to deliver possession after removing obstruction caused by the second respondent. Delivery of possession shall be effected on or before 30.6.1992. The parties will bear their

respective costs, in this revision petition.

B.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: *Lakshmanan, J.*

Appln. Nos.348 of 1989 and 224 of 1989
12th May, 1992.

Partners of Satyanarayana & Company ...*Appellants*

v.

The Official Assignee, High Court, Madras and others ...*Respondents.*

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960) - Lease deed entered into for four years from 1.1.1987 - Clause in deed empowering landlord to take proceedings to evict tenant on stated grounds during currency of the lease - Landlord determining tenancy from 1.2.1989 - Tenancy if contractual or statutory on and from 1.2.1989.

Admittedly under the lease deed entered into on 18.3.1987 the lease is for a period of four years from 1.1.1987 to 31.12.1990. The lease is subject to Clause 17 which empowered the landlord to take proceedings for evicting the tenant on the happening of the events set out in the said clause even during the currency of the lease. It is also not in dispute that the landlord determined the tenancy in effect from 31.1.1989 and called upon the insolvents\tenants to surrender vacant possession on 1.2.1989. It is thereafter that the landlord had filed an eviction petition before the Court of Small Causes at Madras under Sec.10(2)(iii) of the Act XVIII of 1960. Therefore the landlord has exercised his powers under Clause 17 of the registered lease deed dated 18.3.1987 and has called upon the insolvents to surrender vacant possession. Thus on and from 1.2.1989 the tenancy has to be a contractual one and the insolvents have become a statutory tenant entitled to the protection of Tamil Nadu Act (XVIII of 1960). *[Para 8]*

(B) Presidency Towns Insolvency Act (III of 1909), Sec.17 - 'Property' under - Statutory tenancy under Tamil Nadu Buildings (Lease and Rent Control) Act, if property - If vests in Official Assignee on the tenant being adjudicated insolvent.

A statutory tenancy under the Tamil Nadu Buildings (Lease and Rent Control) Act is not property within the meaning of Sec.17 of the Presidency Towns Insolvency Act so as to vest in the Official Assignee. There is no scope for bringing in the Official Assignee within the ambit of the definition of a tenant. Therefore, the Official Assignee on whom the properties of the insolvents would vest under Sec.17 of the Presidency Towns Insolvency Act cannot become a tenant as defined in Sec.2(8) of the Tamil Nadu Act XVIII of 1960 as amended. The insolvent's right of occupation is only statutory under the provisions of Rent Control Act and is not property which can vest in the Official Assignee. *[Para 9]*

Cases referred to:

Sutton v. Dorf, (1932)2 K.B. 304; Mohana Ranghiah Chetty v. Official Assignee, Madras, (1965)1 M.L.J. 221; Viswanatha Chettiar v. Official Assignee, Madras, 89 L.W. 557.

R.Krishnaswamy, for Applicant.

T.P.Parameswaran, Official Assignee, for Respondent No.1.

T.Ramakrishna, for Respondent Nos.3 and 4.

P.K.Sivasubramaniam, for the Present Tenant.

The Court made the following

ORDER: Application No.348 of 1989 was filed by the petitioners in Insolvency Petition No.9 of 1989, who were adjudicated as insolvents on their own petition to direct the Official Assignee to deliver the key of the shop to them so as to enable them to resume their business in No.30/2, Godown Street, Madras-1.

2. Application No.224 of 1989 was filed by B.Vedachalam who is the owner of the premises No.30/2, Godown Street, Madras to direct the Official Assignee to remove the movables that are available in the premises and deliver vacant possession of the above premises occupied by the first and second respondents (insolvents/tenants) the applicants in Application No.224 of 1989. The short facts are:

Mr.B.Vedachalam is the owner of the premises No.30/2, Godown Street, Madras-1. The petitioners in Application No.348 of 1989 and in Insolvency Petition No.9 of 1989 are the partners of M/s.Satyanarayana and Company. They were carrying on the business in the above premises. They

were adjudicated as insolvents on their own petition by an order of this Court dated 3.2.1989. They are brothers. They were carrying on wholesale business in textile goods. Their case is that as they have been adjudicated as insolvents their tenancy will not cease and that therefore they are entitled to possession of the shop and the key with the Official Assignee be delivered to them. The landlord Vedachalam has filed a petition for eviction against them in R.C.O.P.No.326 of 1989 on the file of Small Causes Court, Madras.

3. Mr.R.Krishnaswamy, learned counsel appearing for the insolvents/tenants submits that the landlord Vedachalam gave notice according to the terms of the agreement under which the lease had to exist for a period of ten years from 1.1.1981 to 31.12.1990 and had already taken action in accordance with the provisions of Tamil Nadu Buildings (Lease and Rent Control) Act, which fact has not been disputed by the learned counsel for the landlord. But according to him, notwithstanding the notice or the institution of the action in the Court of the Rent Controller for eviction of the appellants/tenants, the tenancy is still continued under the agreement as a fixed term tenancy and thus a contractual tenancy.

4. As stated above, B.Vedachalam, the landlord filed Application No.224 of 1989 for delivery of possession of the said premises back to him, while the tenants filed Application No.348 of 1989 for directing the Official Assignee to deliver the key of the premises to enable them to resume their business.

5. Abdul Hadi, J. however, passed an order on 10.11.1989, rejecting the application taken out by the tenants on the ground that on the determination of insolvency in the main Insolvency Petition No.9 of 1989 by order dated 3.2.1989, the properties belonging to them including their leasehold vested with the Official Assignee. Learned single Judge accordingly rejected Appln. No.348 of 1989. In Appln. No.224 of 1989, however, he took note of the stand of the Official Assignee that accrual of unnecessary rental liability would be avoided if the premises could be handed over to the landlord and allowed the said Application directing the Official Assignee to hand over possession of the abovesaid premises to the landlord Vedachalam. Both the two applications were disposed of by Abdul Hadi, J. by a common order. Only one Appeal had been preferred under Sec.15 of the Letters Patent against the order of the learned single Judge. Learned Judges of the Division Bench overruled the objections that have been raised on behalf of the respondents in O.S.A.No.361 of 1989 and permitted the appellant to prosecute the appeal before them filed against the common order. The question that was raised before the Division Bench of this Court was whether the leasehold was a property that on adjudication of the petitioners in the Insolvency Petition vested with the Official Assignee. Abdul Hadi, J. has said that it was a property that vested with the Official Assignee, a finding which had been seriously challenged before the Division Bench. The Division Bench after hearing both parties, has however felt that there has been a serious error in the judgment because after noticing the fact that the tenancy had already been determined by a notice and action to evict the tenant had already been initiated, there were circumstances to bring the case of the appellants within the ambit of the principles of law as stated in the judgment of the learned single Judge. The Division Bench felt that this particular aspect of the case was never brought to the notice of the learned single Judge. Any determination of this will primarily be a determination of an issue of fact and that its consequence will be substantial as in the case of a contractual tenancy, the appellants/tenants may not be allowed to plead that there is no property right in the leasehold that could vest with the Official Assignee in the case of the tenancy already determined as alleged and action brought in the court, it would be necessary to find out whether the appellants had become statutory tenants and that if they had become statutory tenants, whether the Official Assignee could take possession of the leasehold right. Holding so, the Division Bench allowed the appeal and set aside the Judgment of the learned single Judge and remitted back the above two applications for rehearing and disposal in accordance with law. The Division Bench has also held that it will be required in any event to be examined whether any restitution can be granted to a tenant against the landlord. After remand, the matter came up before me and I have heard the arguments of Mr.R.Krishnaswamy the learned counsel appearing on behalf of the tenants and Mr.T.Ramakrishna, learned counsel appearing for the legal representatives of the landlord and the learned Official Assignee.

6. The only point that arises for determination in the above two applications is 'whether the petitioners (insolvents) in the main Insolvency Petition (*viz.*, A.Pandurangan and A.Hari, partners of M/s.Satyanarayana and Company) had become the statutory tenants and if so whether the Official Assignee can take possession of the leasehold right. Before I proceed to deal with the matter on merits, it is useful to refer certain clauses in the lease deed that has been entered into between the landlord Vedachalam and the tenants A.Pandurangan and A.Hari, partners of M/s.Satyanarayana and Company. The lease deed was entered into at Madras on 18.3.1987. The lease deed was registered as document No.153 of 1987 on 19.3.1987 before the Sub Registrar, Madras. The lessees were carrying on business under the name and style of M/s.Satyanarayana and Company. They requested the lessor to extend the lease for a further period of four years from 1.1.1987 to 31.12.1990 and the lessor has also agreed to grant the lease of the portions mentioned in the schedule to the lessees subject to certain terms and conditions. The salient features of the terms and conditions which are relevant for the purpose of this case are 1. The portion was let out for non-residential purpose, 2. The tenancy is a monthly one calculated according to English calendar month, 4. The monthly rent for the said portion is at the rate of Rs.500 per month. 5. The rent is due and payable on or before the 5th day of the succeeding English Calendar month for which the rent has become due and payable and 5. The lease is for a period of four years with effect from 1.1.1987 i.e., from 1.1.1987 to 31.12.1990. Clause 17 of the Agreement provides that if the tenants fail to surrender vacant possession at the expiry of the period mentioned therein or if they fail and neglect to pay rents for the three consecutive months or if they contravene the covenants contained in Clauses 9 to 13 the lessor is entitled to take necessary proceedings to evict the lessees without any notice and recover the costs and expenses from the lessee.

7. Prior to the institution of the eviction proceedings in R.C.O.P.No.326 of 1989, before the Small Causes Court, Madras Mr.P.Murugaiyan Advocate for the landlord issued a notice on 4.12.1988 to the tenants *viz.*, 1.A.Pandurangan and 2. Sri A.Hari, partners of M/s.Satvanarayana and Company. In paragraph 2 of the said notice it is stated as under:

> "...The tenancy is a monthly one calculated according to the English calendar month."

It is further stated in the said notice:

> "Even though the said lease deed prescribed a period of lease for four years ending with 31.12.1990 my client for the foregoing reasons terminate your tenancy ending with 31.1.1989 an call upon you to surrender vacant possession on 1.2.1989."

8. Before the Rent Controller, Madras R.C.O.P.No.326 of 1989 under Sec.10(2)(iii) of the Act 18 of 1960 as amended by Act 23 of 1973 was filed against the tenants. In paragraphs 3 and 6, it is stated as follows:

> "The petitioner states that the respondent abovenamed are tenants under him in respect of a shop portion in ground floor of premises bearing Door No.30/2, Godown Street, George Town, Madras-1, as partnership firm under the name and style of Sri Satyanarayana and Company, on a monthly rent of Rs.500 electricity charges extra. The tenancy is a monthly one calculated according to the English Calendar month."
>
> ...The petitioner further submits that on account of the cause of waste committed by the respondents as aforesaid the petitioner has no other option to terminate the tenancy of the respondents ending with 31.1.1989 and call upon them to surrender vacant possession on 1.2.1989, by his Advocate's notice dated 4.12.1988."

It is seen from the lease deed, notice issued prior to the filing of R.C.O.P. and the petition filed by the landlord for eviction that even though the lease period was extended for a period of favour years from 1.2.1987 to 31.12.1990, the tenancy was treated as a monthly one calculated according to English Calendar month. Hence it is for this Court to see whether the tenancy in question is a contractual tenancy for a fixed term or a monthly tenancy as has been understood by the landlord. It is an admitted fact that the landlord has initiated proceedings before the Rent Controller against the tenants treating him as a statutory tenant for eviction on the grounds mentioned therein. Even before the institution of the Rent Control Proceedings, the landlord had given notice according to the terms of the agreement under which the lease period had to exist for a period of ten years

from 1.1.1981 to 31.12.1990 and already taken action in accordance with the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act which fact has also not been disputed by the learned counsel for the landlord. But according to him, notwithstanding the notice or the institution of the action in the Court of the Rent Controller for eviction of the tenants, the tenancy is still continued under the agreement as a fixed term tenancy and thus a contractual tenancy. It is also for this Court to decide whether the leasehold was a property and that on adjudication of the tenants as insolvents vested with the Official Assignee. Admittedly under the lease deed entered into on 18.3.1987 which was registered as Document No.153 of 1987 on 19.3.1987 the lease is for a period of four years from 1.1.1987 to 31.12.1990. The lease is subject to Clause 17 which empowered the landlord to take proceedings for evicting the tenant on the happening of the events set out in the said clause, even during the currency of the lease. It is also not in dispute that the landlord determined the tenancy with effect from 31.1.1989 and called upon the insolvents-tenants to surrender vacant possession on 1.2.1989. It is thereafter the landlord had filed R.C.O.P.No.326 of 1989 before the Court of Small Causes at Madras under Sec.10(2)(iii) of the Act XVIII of 1960. Therefore, the landlord has exercised his powers under Clause 17 of the registered lease deed dated 18.3.1987 and has called upon the insolvents to surrender vacant possession. Thus on and from 1.2.1989 the insolvents/tenants tenancy has ceased to be a contractual one and the insolvents have become a statutory tenant entitled to the protection of Tamil Nadu Act 18 of 1960.

9. In the light of the above facts it has to be determined whether the right of occupation of the insolvent is proper or not within the meaning of Sec.17 of the Presidency Towns Insolvency Act, 1909. After bestowing my serious attention on this question it is my firm view that a statutory tenancy under the Tamil Nadu Lease and Rent Control Act is not property within the meaning of Sec.17 of the Presidency Towns Insolvency Act so as to vest in the Official Assignee. The expression 'tenant' is found in Sec.2(8) of the Tamil Nadu Act 18 of 1960 and it runs thus:

> "Tenant means any person by whom or on whose account rent is payable for a building and includes the surviving spouse, or any son, or daughter, or the legal representative of a deceased tenant who had been living with the tenant in the building as a member of the tenant's family up to the death of the tenant and a person continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart stand or slaughter house or of rents for shops has been farmed out or leased by a Municipal Council for District Board or the Corporation of Madras."

There is no scope for bringing in the Official Assignee within the ambit of the definition of a 'tenant'. Therefore, the Official Assignee on whom the properties of the insolvents would vest under Sec.17 of the Presidency Towns Insolvency Act cannot become a tenant, as defined in Act 18 of 1960 as amended.

10. The insolvent's right of occupation is only statutory under the provisions of Rent Control Act and is not property which can vest in the Official Assignee.

11. In this connection, it is necessary to refer to the dictum in *Sutton v. Dorf, (1932) 2 K.B. 304*, wherein it has been held that where the insolvent is in possession under statutory tenancy that right does not vest in the Official Assignee. The above proposition of law is also referred to and adopted by Williams on Bankruptcy 19th Edition, page 389, where he states:

> "Statutory tenancy under the Rent Restriction Act was held not to be the property of the statutory tenant within the meaning of Sec.167 and therefore did not pass to his trustee and could not be disclaimed."

Similarly in Halsbury's Law of England, IV Edition, paragraph 591 at page 474 it is stated as follows:

> "A statutory tenant has no interest to assign or transmit by Will or to his trustee in bankruptcy."

Likewise Woodfall on landlord and tenant 27th Edition, page 1560, para 2762, it is stated as follows:

> "A statutory tenancy cannot be disposed of by Will and does not vest in the tenants personal representatives nor in his trustee in Bankruptcy. The fact of bankruptcy will not therefore affect the bankrupt's personal right to

continue living in the house as statutory tenant."

12. I can also usefully refer to the decision of this Court in the case of *Mohana Ranghiah Chetty v. Official Assignee, Madras; (1965)1 M.L.J. 221*, which was quoted with approval in the case of *Viswanatha Chettiar v. Official Assignee, Madras, 89 L.W. 557*, by a Division Bench of this Court consisting of Veeraswamy, C.J., and Natarajan, J. as they then were.

13. Therefore, I am of the view that the possession of the premises must be restored to the insolvents by the Official Assignee forthwith. However, it will be open to the landlord to take proceedings under the Rent Control Act for eviction of the insolvents/tenants in accordance with law.

14. As a necessary corollary it has to be held that Thangavelu who was inducted into possession during the pendency of O.S.A.No.361 of 1989 on the file of this Court and who was heard by me through his counsel Mr.P.K.Sivasubramaniam who also filed an affidavit, dated 30.3.1992 after receipt of notice from counsel for insolvents in these petitions should forthwith surrender possession to the Official Assignee who in turn shall hand over possession of the premises forthwith to the insolvents. If the insolvents desire to carry on the business in the premises in question they shall do so in accordance with the provisions of the Presidency Towns Insolvency Act.

15. In the result, Appln. No.348 of 1989 filed by the insolvents is allowed and Appln. No.224 of 1989 filed by the original landlord and continued by his legal representatives shall stand dismissed. No costs in both the applications.

B.S. ---- *Applications disposed of.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Srinivasan, J.*

S.A.No.2177 of 1981 and Memo of Cross Objections *1st October, 1991.*

Duraiswami and others ...*Appellants*

v.

Munisami and others ...*Respondents.*

(A) Civil Procedure Code (V of 1908), O.22, Rule 4 - Suit for declaration of title of plaintiffs and recovery of possession - Plaintiffs praying for single decree against all the defendants - Lower appellate court dismissing suit in toto - One respondent dying and his legal representatives not brought on record - Appeal against that respondent abated - Appeal whether abates as against the other respondents also.

The first respondent died about five years back. His legal representatives are not brought on record. The other respondents are not his legal representatives. Consequently, the appeal has abated as against the first respondent. The suit is one for declaration of title of the plaintiffs and recovery of possession. The plaintiffs prayed for a single decree against all the defendants. While the trial court declared the title of the plaintiffs, the lower appellate court dismissed the suit in toto. As the appeal has abated as against the first respondent, it has necessarily to abate as against the other respondents also as there cannot be a decree for dismissal of the suit as against the first respondent and a conflicting decree declaring the title of the plaintiffs as against the other respondents. Hence, the appeal could not be proceeded with and the entire appeal has to be dismissed as abated.

[Para 2]

(B) Civil Procedure Code (V of 1908), Sec.11 - Transfer of Property Act (IV of 1882), Sec.53-A - Trial court passing decree declaring that plaintiffs were in possession of suit property in part performances of agreement - No appeal filed decree - Decree, if operates as res judicata in any suit by defendant for recovery of possession.

Once the court declares the possession of one party and grants permanent injunction restraining the other party from interfering with such possession on the ground that the party was

entitled to be in possession under Sec.53-A of the Transfer of Property Act, it is not open to the defendant in that suit to file a separate suit and claim recovery of possession. *[Para 6]*

T.V.Ramanujam, for Appellants.

Ms.S.Mala, for Respondents.

The Court delivered the following

JUDGMENT:- This appeal has to be dismissed on two grounds. The first is that the first respondent, who was the first defendant in the suit, is dead and the appeal has abated not only against him but also against the other respondents. Secondly, there is no merit in the appeal.

2. According to the learned counsel for the second respondent, the first respondent died about five years back. His legal representatives are not brought on record. The other respondents are not his legal representatives. Consequently, the appeal has abated as against the first respondent. The suit is one for declaration of title of the plaintiffs and recovery of possession. The plaintiffs prayed for a single decree against all the defendants. While the trial court declared the title of the plaintiffs, the lower appellate court dismissed the suit in toto. As the appeal has abated as against the first respondent, it has necessarily to abate as against the other respondents also as there cannot be a decree for dismissal of the suit as against the first respondent and a conflicting decree declaring the title of the plaintiffs as against the other respondents. Hence the appeal could not be proceeded with and the entire appeal has to be dismissed as abated.

3. Learned counsel for the appellants points out that information about the death of the first respondent was given to him by the second respondent's counsel only yesterday and he is not in a position to say anything about the correctness of the information. Hence, I proceed to dispose of the appeal on merits also.

4. Admittedly, there was a suit by the respondents in O.S.No.348 of 1972 on the file of the District Munsif, Chengalpattu against the appellants with regard to the same property. That was a suit for specific performance of a contract dated 5.9.1956. The District Munsif held that the relief of Specific performance could not be granted to the plaintiffs therein as it was barred by limitation. However, he held that the plaintiffs therein were in possession in part performance of the agreement under Sec.53-A of the Transfer of Property Act and such possession was entitled to be protected by court. Ultimately, he gave a decree that the plaintiffs therein were entitled to a declaration of their possession of the suit properties and their possession had to be protected. He gave also consequential permanent injunction as prayed for by the plaintiffs therein. The plaintiffs herein did not file any appeal and challenge the decree in O.S.No.349 of 1972.

5. In the present suit, the plaintiffs have chosen to ignore the effect of the decree in O.S.No.348 of 1972 and prayed for declaration of their title and for recovery of possession. The trial court, while declaring their title, negatived the other prayers made by the plaintiffs. On appeal, the lower appellate court has rightly dismissed the entire suit.

6. There can be no doubt whatever that the decree in O.S.No.348 of 1982 bars the present suit on the principle of *res judicata.* Once the court declares the possession of one party and grants permanent injunction restraining the other party from interfering with such possession on the ground that the party was entitled to be in possession under Sec.53-A of the Transfer of Property Act, it is not open to the defendant in that suit to file a separate suit and claim recovery of possession.

7. Learned counsel for the plaintiffs vehemently contended that in the earlier proceeding Sec.53-A of the Transfer of Property Act was not properly construed and the decree therein was not valid. Such a contention is not available to the plaintiffs in the present proceeding. Even if the decree in the earlier suit is erroneous in law, it is still binding on the plaintiffs herein. It will undoubtedly be *res judicata* in the present proceedings. The plaintiffs, having failed to file an appeal against the decree in O.S.No.348 of 1972 and allowed it to become final, are not entitled to maintain the present suit for declaration of their title and for recovery of possession. The lower appellate court is perfectly justified in dismissing the suit. There is no ground whatever to interfere with the judgment and decree of the court below.

8. The defendants have filed a memorandum of cross objections. The courts below have negatived the claim of prescriptions of title by adverse possession made by the defendants. The earlier suit, O.S.No.348 of 1972 was disposed of on 4.4.1974. The present suit was filed on 31.8.1974. Hence, there is no question of the defendants prescribing title by adverse possession. If a period of twelve years had elapsed after the decree in the earlier

suit, it might have been possible for the defendants to contend that they had prescribed title by adverse possession after the dismissal of the earlier suit. But that is not the case here. The courts below are right in negativing the claim of prescriptive title.

9. In the result, both the second appeal and the memorandum of Cross-objections fail and are dismissed. Both parties will bear their respective costs.

B.S. ---- *Appeal and memo of cross objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Mishra* and *Swamidurai, JJ.*

O.S.A.No.200 of 1991 *18th February, 1992.*

D.Nityanandam and another ..*Appellants*

v.

M.D.S.Habeen Aysha and others. ..*Respondents.*

(A) Civil Procedure Code (V of 1908), O.16, Rule 19, Proviso - Scope and object of.

Whenever courts have found that the evidence of a particular witness is material for the determination of a question of fact and his attendance in court cannot be enforced because of the restriction imposed by the provisions of O.16, Rule 19, C.P.C., the courts have invariably ordered for examination of such a witness on commission. There is a proviso added to Rule 19 of O.16 which empowers the court to direct any person to attend the court as a witness even though such a witness resides beyond the local limits of the court, provided the transport by air is available between the places, that is to say the place where the court house is situate and the place where the witness resides and the witness is paid a fair by air. The object of the proviso to Rule 19 of O.16 is that if a witness is residing at a place which is connected with the place of court house by air, the court may, instead of issuing a commission direct in appropriate cases that summons be issued for attendance of the witness in person on his being paid fare by air. However, such an order cannot be passed mechanically in each and every case and before resorting to this provision, the court must make sure that the applicant is affluent enough to afford payment of fare by air. Otherwise it may result in undue hardship and even miscarriage of justice in many a case. *[Para 8]*

(B) Civil Procedure Code (V of 1908), O.16, Rule 19 and O.26, Rule 4. - Examination of witness by commission - When can be ordered - Considerations for.

The general rule is and this should not be lost sight of or blurred that the evidence of a witness is an action, be he or she a party or not should be given in public court and tested by cross-examination. Inability to attend court on grounds of sickness, or infirmity or detriment to the public service would justify the issue of a commission. The court has got a discretion to relax the rule of attendance in court whether the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the court. This discretion may be exercised even if a person happens to be no other than the defendant. There can, of course, be no rule of law demarcating the boundaries and the areas of the discretion to be exercised in these matters. What can, however, be stated is that the court of nisi prices must act judicially having regard to all the circumstances of the case, the desirability of the physical presence of the witness in court to enable it to observe his or her demeanour and the not unusual fact that convenience and economy of expenses for the application may involve his opponent in great inconvenience and considerable expense. *[Para 11]*

Cases referred to:

Filmstan Private Ltd. v. Bhagwandas Santprakash, A.I.R. 1971 S.C. 61; M.A.H.Farook v. Kalikirshnaraju, (1974)2 M.L.J. 46; Subramaniam Chettiar, In re, (1954)1 M.L.J. 449; A.R.Lakshmana Chettiar v. Vadivelu Ambalam, (1967)1 M.L.J. 252: 80 L.W. 148; Viswantha Chetty v. Somasundaram Chetty alias *Nagappa Chetty, 46 M.L.J. 131; Amina Bivi v. K.M.Raja Mohammed, 91 L.W. 629; Lakshmana Chettiar v. Vadivelu Ambalam, 80 L.W. 148; Ramakrishna Julvani v. Hardcastle and Company, (1962)2 M.L.J. 490: A.I.R. 1963 Mad. 103; Mrs.Sunita Jagmohan Verma v. Jagmohan Verma, A.I.R. 1985 Delhi 1; Jagannath Sastry v. Sarathambal Ammal, A.I.R. 1923 Mad. 321; Oruganati Ranganayakiamma v. Madhuri Lakshminarasamma, A.I.R. 1979 A.P. 8.*

Appeal under Clause 15 of the Letters Patent against the order of Lakshmanan, J., dated 3.11.1991

and made in the exercise of the Original Civil Jurisdiction of the High Court in A.No.2386 of 1991 in C.S.No.500 of 1988.

K.Venkataraman, for Appellant.

S.A.Rajan, for Respondent Nos.1 to 3.

The Judgment of the Court was delivered by

P.S.Mishra, J.:- The defendants 1 and 2 in C.S.No.500 of 1988, who were respondents in Application No.2386 of 1991, have preferred this appeal against an order, appointing Advocate Commissioner to record the oral evidence of one Balasubramaniam, the husband of the 3rd defendant, in the suit and the third defendant herself. It is not in dispute that the 1st defendant/appellant is the husband of the 2nd defendant/appellant and the 3rd defendant/respondent is the sister of the 2nd respondent. The 3rd defendant sold the property bearing No.3, Sixth St., Gopalapuram, Madras to the plaintiff/respondents 1 to 3 herein, under a registered deed. According to the plaintiffs/respondents, the 3rd defendant delivered vacant possession of the upstairs portion of the house property, at the time of purchase and when they (plaintiffs/respondents) demanded vacant possession from the respondents 1 and 2, of the portion in their occupation, they stated that they would vacate the same but they did not comply. Without going into other details, however, it seems that the 1st appellant herein filed O.S.No.3454 of 1988 on the file of the 12th Assistant Judge, City Civil Court, Madras, seeking a relief of permanent injunction, restraining the plaintiffs/respondents from disturbing their possession. The plaintiffs/respondents, however, filed a suit for declaration and recovery of possession. In the suit filed on behalf of the plaintiff/respondents the 3rd defendant/respondent filed a written statement, saying that she had no defence to the suit and no objection for the relief asked for by the plaintiffs/respondents and that the suit may be decreed as prayed for, by the plaintiffs/respondents. The written statement has been signed and verified at Singapore on 9.7.1991.

2. It is not necessary for the purpose of this appeal to refer to the controversy and issues in the suit and the respective stand of the parties. All that is necessary, however, is to take notice of the fact that the plaintiffs/respondents decided to call for the 3rd defendant/respondent and her husband, as witnesses, to depose on their behalf and since according to them, the 3rd defendant/respondent and her husband lived in Singapore, they applied for a commission to issue to record their deposition. The grounds on which the commission was sought for are set forth in the affidavit filed in the trial. It is to the effect that--

(1) The 3rd defendant/respondent has not challenged the plaintiffs/respondents' right to the property;

(2) The first and second defendants/appellants are squatting on the property by putting forth prevaricating defences;

(3) The appellants herein have challenged the execution of the sale deed. Thus it is necessary to prove the due execution of the sale deed.

(4) The sale deed was attested by one K.R.Prakash, son of K.R.Balan who was residing upstairs of the suit property. He has vacated and gone away. He is thus not available to depose.

(5) The husband of the 3rd defendant/respondent Balasubramaniam is the other attesting witness. His evidence is necessary.

After saying as above, it is said on behalf of the plaintiffs/respondents that when contacted on telephone on two occasions, both the 3rd defendant/respondent and her husband Balasubramaniam, expressed their willingness to depose on behalf of the plaintiffs/respondents, but they represented that while the 3rd defendant was unable to move about, suffering with arthiritis, the husband of the third defendant Balasubramaniam, was suffering with acute blood pressure and both of them were under constant medical attendance, and therefore, they desired, that if their evidence was required, they should be examined on appointment of a commissioner by this Court.

3. We shall advert to the principles and provisions of law a little later. At this stage we may notice that the appellants contested the appointment of an advocate commissioner for the purpose of recording the deposition of the 3rd defendant/respondent as well as her husband Balasubramaniam and stated that the plaintiffs/respondents had not furnished any information with regard to the telephone talk and that they had not produced any medical certificate to support their allegations, that both the 3rd defendant/respondent as well as her husband Balasubramaniam were suffering from ailment as alleged. The main objection, however, was on the ground that the implication of examination of the 3rd defendant in the suit was a matter of grave concern and this Court should not allow

a party to take advantage of a course, which ordinarily should be avoided list, and the demeanour of the witnesses has to be observed by the court. The learned trial Judge has further recorded that it is not in dispute that the 3rd defendant/respondent and her husband are relevant witnesses and they are residing outside the jurisdiction of this Court, beyond the territory of the country. He has on that basis proceeded to examine the contentions, to say as follows:

> "It is well settled that the plaintiffs having filed the suit in a forum of his choice or in a forum where the suit had necessarily to be instituted cannot except in circumstances of bodily infirmity or other disabling factors, avoid giving evidence in court. A defendant however, is in a slightly better position. If he is a resident in a far off place, quite a long way from the jurisdiction of the court, he can pray for the issue of a commission to examine him as witness. In this case, the defendants are the residents out of the jurisdiction of this Court. To compel them to come over here at great expense to attend the trial, or give up their case, would be oppressive and unfair and in my opinion it would be wrong to apply to the case of a defendant, the principles that are applicable to the case of a plaintiff asking for a commission to examine himself. In my opinion, the petitioners have made out a case for the issue of commission. It is said that by examining the third defendant and her husband at Singapore the opportunity for cross examining the witness before this Court is lost and that no prejudice would be caused to the third defendant and her husband Balasubramaniam by coming to India and give evidence before this Court, which will also give an opportunity to watch the demeanour of the witnesses. It is also stated that the medical certificates have not been produced by the parties who are to be examined in commission. I do not feel any doubt about the acceptance of the statement made by the plaintiffs when they say that the third defendant is unable to move about, suffering from Arthiritis and that the husband of the third defendant, *viz.*, Balasubramaniam, is suffering from acute blood pressure, that they are unable to move about and that they are under constant medical attendance. Therefore both of them have represented to the plaintiffs that they have no objection for them to be examined on appointment of a commission by this Court. It is also stated in unequivocal term that they are ready to bear the entire cost of the commission as it is necessary for them to prove the due execution of the document through the evidence of the attesting witness Mr.Balasubramaniam and about the execution of the sale deed by the third defendant. In reply to the arguments of learned counsel for the defendants 1 and 2, Mr.S.A.Rajan, learned counsel for the applicants submitted that his clients are willing to bear the expenses of the counsel for the respondents 1 and 2 also who can cross examine the witnesses at Singapore. It is further represented by the petitioners that since the defendants 1 to 2 have challenged the execution of the sale deed, it has become necessary for them to prove the due execution of the sale deed and as per the provisions of the Evidence Act. The sale deed was attested by Mr.P.Prakash, who was residing in the upstairs portion of the suit property. He was unable to be examined as one of the attesting witnesses since his where-abouts are not known. Hence, the petitioners have filed the present application to examine the third defendant and her husband on commission."

Having stated as above, the learned trial Judge has ordered as follows:

> "Hence I have no hesitation in exercising my judicial discretion in favour of the petitioners. Though the general rule is that the evidence of a witness should be given in a open court and decided by cross examination, the court has got every discretion to relax the Rule in the circumstances specified in the affidavit. The nature of sickness and infirmity has been alleged in the affidavit filed in support of the present application. Taking into account of the character and gravity of the sickness and the risk, I order issue of commission. The opposite party is entitled to cross examine the witnesses, while the third defendant and her husband Mr.Balasubramaniam are being examined on commission at Singapore at the expenses of the petitioners/plaintiffs."

4. Certain developments that followed the impugned order make a disturbing reading of the mind of the parties in dispute. The impugned order was passed on 31.10.1991 and a copy of the

order was made ready on 4.12.1991. In the meanwhile however, a warrant had been given to the learned advocate-commissioner to proceed with the commission work. The learned Advocate-commissioner moved the trial court for the extension of time to file the report (the original time fixed by the court being 2.12.1991). The commissioner sent a letter on 28.11.1991 to the counsel for the appellants which the latter received on 29.11.1991 and in that letter only he informed the learned counsel for the appellants that he had fixed 4th to 6th December, 1991, as date for the examination of two witnesses. It appears from the facts stated in one of the counter affidavit on record that when the learned counsel for the appellants wanted to contact the advocate-commissioner on 4.12.1991 he learnt that the latter had already left for Singapore.

5. It is further stated in the counter affidavit as follows:

> "After receiving the certified copy of the order an Application No.2386 of 1991 on 5.12.1991 and the counsel prepared the grounds of appeal on 5.12.1991 for the purpose of lodging the same into the Hon'ble Court. My counsel received a telegram on 6.12.1991 at about 10.30 A.M. from the Commissioner at Singapore stating that he will be waiting at Singapore till 8th December, 1991, for cross examination of the witness by my counsel. Immediately my counsel sent a cable to the commissioner stating that I had not received the passport to proceed to Singapore and also stated that I have filed an appeal against the order passed in Application No.2386 of 1991 and requested the Commissioner to adjourn the proceedings at Singapore. My counsel prayed in the Hon'ble Court for granting urgent Lunch Motion to move the appeal on 9.12.1991. On 10.12.1991 the appeal was posted and stay was granted by the Hon'ble Court in C.M.P.No.16360 of 1991. The appeal could not be moved on 9.12.1991 since there was no Division Bench sitting on that date to hear the appeal. Immediately after the stay was granted by the Hon'ble Court I sent a telegram to the commissioner to his Singapore address where he was staying as per his letter dated 28.11.1991.

I state that the Commissioner had already completed the examination of the witness without giving any opportunity to my counsel to cross examine the witnesses and thereby the examination of witness was only a formality."

It appears from the material papers available on record with regard to this appeal that the learned advocate-commissioner sent a cable addressed to the learned counsel for the appellant that he had expected the learned counsel's arrival in Singapore on 4.12.1991 and that he himself would be in Singapore till 8.12.1991 and that the learned counsel for the appellants could come to Singapore and cross examine the witnesses. This was replied to as follows:

> "Your cable unable to proceed to Singapore Eight December, 1991. Party not received passport to accompany me. Filed appeal the appointment of Commissioner-Pray adjournment."

It is said that the advocate commissioner's telegram was received by the learned counsel for the appellants on 6.12.1991 and on the same day a reply telegram was sent. The instant appeal was however posted for admission on 10.12.1991. It seems that the appeal was filed before this Court on 6.12.1991 and listed for admission on 10.12.1991 on which date it was admitted and this Court in C.M.P.No.16360 of 1991 ordered as follows:

> "1. That notice do issue to the respondents herein to show cause why this petition should not be complied with; and
>
> 2. That the operation of the order passed in Application No.2386 of 1991 in C.S.No.500 of 1988 dated 31.10.1991 on the file of Original Side, High Court, Madras be and hereby is stayed pending further orders on this petition."

6. The Advocate-Commissioner has submitted a report on 17.12.1991 and stated as follows:

> "I got the warrant and order copy only on 25.11.1991, on mentioning in the presence of both the advocates His Lordship Mr.Justice Lakshmanan extended the period till 31.12.1991 by his order dated 26.11.1991. On 26th November, I made a request to the Assistant Registrar, Original Side, High Court, Madras to handover certain documents in the suit which I took possession for use and return after the commission work is completed. On the day *i.e.* 26.11.1991, I gave intimation to the counsel for plaintiffs as well as defendants informing them that the witnesses will be examined for 4th December, 1991 at 9.00 a.m. to 6th December,

1991 requesting their co-operation. At the instance of the counsel for defendant, I postponed the commencement from 4th to 5th December, 1991.

I left Madras on 4th December and reached Singapore on the 5th day of December. I was present at the press No.25, Peach Garden, Singapore 1543 at 9.00 a.m. the place where the examination was to be conducted. The plaintiffs' advocate Mr.S.A.Rajan and Mr.N.D.Sathak Ansari, plaintiff's (1st husband also reached there to take part in the proceeding, counsel for defendants 1 and 2 Mr.K.Venkataraman did not turn up, nor his clients. I caused a telegram to be given to Mr.K.Venkataraman, counsel for defendants 1 and 2 on 5th December, 1991 informing him of my arrival at Singapore and asking him to go over to Singapore to send interrogation so that I can put them to the witnesses and get the answers. I have not got any reply. After waiting for an hour I started the commission works. Administration of Oath was done by me and then I started recording evidence of the 3rd defendant Mrs.B.Saraswathi. The recording was continued on 6th also. After completion of her evidence in chief, I obtained her Singapore on each page and I signed in the last page. Third defendant's husband Mr.R.Balasubramaniam was also examined on 6th. After the formalities were over, I recorded his evidence in my hand-writing and I signed in the last page after obtaining his signature on each page."

7. An innocent act of a party in moving the court in a given situation to appoint an advocate-commissioner to record deposition of a witness or even a party can never be viewed as an act interfering with the due course of justice and if the discretion is exercised by the Court of Law, to order for examination of a witness on commission, possibly no exception can be taken. The Code of Civil Procedure has envisaged a scheme under O.16 for summoning of a witness and the attendance of such witness. The court may depart from the procedure prescribed therein under the situation as noticed in Rule 16, O.16, C.P.C. Rule 19 thereof further proceeds to state that--

"No one shall be ordered to attend in person to give evidence unless he resides--

(a) Within the local limits of the court's ordinary original jurisdiction; or,

(b) without such limits but at a place less that one hundred or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and place where the court is situate less than 9 (5 hundred kilometres) distance from the court house:

Provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fare by air, he may be ordered to attend in person."

Coming however as to parties own evidence in a proceeding, Rules 20 and 21 of O.16, are relevant; They read as follows:

"20. *Consequence of refusal of party to give evidence when called on by court:* Where any party to a suit present in court refuses, without lawful excuse, when required by the court, to give evidence or to produce any document then and there in his possession or power the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

21. *Rule as to witnesses to apply to parties summoned:* Where any party to a suit is required to give evidence or to produce a document the provisions as to witness shall apply to him so far as they are applicable."

21. *Rules in case of parties appearing as witnesses:-* (Madras Amendment).

When a party to a suit is required by any other party thereto to give evidence or to produce document, the provisions as to witnesses shall apply to him as applicable.

21.(2) When a party to a suit gives evidence on his own behalf the court may, in its discretion permit him to include as costs in the suit a sum of money equal to the amount-payable for travelling and other expenses to other witnesses in the case of similar standing."

From the above we shall presently notice that it enabled the plaintiffs/respondents to suggest that the 3rd defendant/respondent although a party, is summoned as a witness of another party and those rules that are applied to witnesses have to be applied and not the rules which are applied to a party to a suit when such a party decides or declines to depose as a witness, O.26 of the Code of Civil Procedure deals with cases in which court may issue commission to examine witness; O.26, Rule 1, C.P C. reads as follows:

"Any court may in any suit issue a commission

for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the court or who is from sickness of infirmity unable to attend it;

Provided that a commission for examination on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks it necessary so to do.

Explanation: The court may for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person without calling the medical practitioner as a witness."

We are not concerned with the question whether the court has got power to issue a commission for the examination of a person, who resides within the local limits and the jurisdiction of the court, Rule 4 of O.26, C.P.C., however enumerates persons for whose examination, commission may issue: Rule 4 of O.26, C.P.C. reads as follows:

"4. *Persons for whose examination commission may issue:* (1) Any court may in any suit issue a commission for the examination or interrogatories or otherwise of-(a) any person resident beyond the local limits of its jurisdiction;

(b) any person who is about to leave such limits before the date on which he is required to be examined in court; and

(c) any person in the service of the Government who cannot, in the opinion of the court, attend without detriment to the public service:

Provided that where, under Rule 19 of O.16, a person cannot be ordered to attend a court in person, a commission shall be issue for his examination if his evidence is considered necessary in the interest of justice;

Provided further that a commission for examination of such person on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks it necessary so to do.

(2) Such commission may be issued to any court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the court issuing the Commission may appoint.

(3) The court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate court."

The two orders noticed by us, as above, fall under incidental proceedings as indicated in Part III of the Code of Civil Procedure, particularly Sec.75. Sec.75, C.P.C. states that subject to such conditions and limitations as may be prescribed the court may issue a commission to examine any person; to make a local investigation; to examine or adjust accounts or to make a partition; to hold a scientific, technical or expert investigation..... This power, as appearing from the language in Sec.75, C.P.C. and the various rules in O.16 and O.26 of the Code, is discretionary.

In *Filmstan Private Ltd., Bombay v. Bhagwandas Santprakash, A.I.R. 1971 S.C. 61,* the Supreme Court has observed as follows:

"Admittedly the witnesses sought to be examined at Kabul are relevant witnesses. All of them are living outside the jurisdiction of the court and hence they are not amenable to the process of the court. It was said on behalf of the appellant that one of the witnesses sought to be examined is an agent of the 1st defendant and therefore that defendant could have produced him in court for examination. As regards the other witnesses, it was said that the facts that they were expected to depose could have been established by other evidence. We have no doubt that these facts must have been considered by the learned single Judge. The order under appeal is essentially a discretionary order. We do not think that a case is made out for interfering with the discretion of the learned trial Judge. The fact that the witnesses examined on commission cannot be effectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with the discretion of the learned trial Judge."

The discretion as envisaged in this behalf is indubitably a judicial discretion. The exercise of judicial discretion is always guided by well settled principles of law. The learned trial judge has taken notice of such principles and has rightly stated as noticed by us earlier that the court has to exercise its discretion judiciously and "there is a difference between party witness and third party witness although in the Code of Civil Procedure, there is no distinction drawn as regards this point, between the plaintiff, the defendant and the

witness, yet as a rule of prudence this rule has been applied. Normally a party would not be allowed to be examined on commission. It would not be unusual privilege to exempt the party from attendance in court merely because he was living beyond the limits of jurisdiction and permitting him or her to be examined on commission."

We need not labour to locate the precedents in this behalf but it will be useful to refer to a few of the pronouncements of the courts. In *M.A.H.Farook v. Kalikirshnaraju, (1974)2 M.L.J. 46,* a learned single Judge of this Court dealt with a case in which the defendant made an application to examine himself on commission before the District Munsif. The District Munsif declined to accept his case that there would be any danger to the person of himself and that of his advocate if they visited Pondicherry in connection with the examination of the petitioner on commission. Nevertheless, he expressed the view that having regard to the status of the petitioner, the respondent's advocate might not be quite free to cross-examine the petitioner at Pondicherry as well as he could do in the court at Ramanathapuram. Relying upon the decision of this Court in *Subramaniam Chettiar, In re., (1954)1 M.L.J. 449* and *A.R.Lakshmana Chettiar v. Vadivelu Ambalam, (1967)1 M.L.J. 252,* the learned District Munsif rejected the argument advanced on behalf of the petitioner that demeanour of the witness is not of much importance. He expressed the view that the petitioner could not claim the exemption under Sec.133 of the C.P.C., except in cases in which he is sued in his official capacity for anything done in discharge of his duties as the Chief Minister of Pondicherry and has observed in his order that the inconvenience and expenses that the respondent would be put to, if the petitioner had to be examined on commission at Pondicherry could not be overlooked. The learned single Judge, upon that has said--

> "The petitioner is the fourth defendant in the suit and as such he could not have chosen the jurisdiction of the lower court. The court should deal with an application of a defendant to examine himself as a witness on commission as distinguished from an application by the plaintiff vide *Viswantha Chetty v. Somasundaram Chetty alias Nagappa Chetty, 46 M.L.J. 131.* The defendant's application should be treated differently and not like an application by the plaintiff who could choose the forum for the action unlike the defendant. O.26, Rule 4(1)(a) says;
>
> Any court may in any suit issue a commission for the examination of any person resident beyond the local limits of its jurisdiction."

Panchapakesa Ayyar, J. in *Subramaniam Chettiar, In re., (1954)1 M.L.J. 449,* repelled the contention that a commission should not have been issued to examine a party and a defendant and has observed that a commission can be issued under the Code of Civil Procedure for the examination of "any person" including a defendant. Therefore, the petitioner could claim, under the provisions of O.26, Rule 4(1)(a) to be examined on commission having regard to the distance. Dealing with the contention that it was necessary to examine the person in court so that the court might observe the demeanour, Panchapakesa Ayyar, J. has observed in that decision.

I cannot agree that this would exclude the jurisdiction of the court for issuing the commission. In all cases where a commission is issued the court cannot observe the demeanour of a witness. The value of demeanour" has been too much emphasized; demeanour is one of those subtle things which are important only when the evidence is evenly balanced. It also gives no opportunity for either side to cross examine the Judge who observes that the demeanour of the witness and acts on it. So it is one of those medieval reliefs, which, though they have some value, are not so important as to take away the rights under the C.P.C., to issue a commission in deserving cases like this."

Even in *Viswantha Chetty v. Somasundaram Chetty alias Nagappa Chetty, 46 M.L.J. 131,* referred to above, where the defendant had been a resident of Rangoon with his family for many years, it has been observed by Krishnan, J. that the defendant should have been allowed to be examined on commission at Rangoon and that the watching of his demeanour which the lower court had referred to in support of its order was not a sufficiently strong ground for dragging the defendant all the way from Rangoon to Ramnad. Therefore, the fact that the petitioner is a defendant and that the court will not have the opportunity to observe his demeanour if he is examined on commission, is not a sufficient reason for disallowing the pe-

titioner's application for examination on commission."

In *Amina Bivi v. K.M.Raja Mohammed, 91 L.W. 629,* Nainar Sundaram, J. had the occasion to examine the case of a witness, who was ordered to be examined on commission on behalf of the plaintiff. In the said decision, it has been observed as follows:

> ".....He is not only outside the jurisdiction of the court below, but he is at a place not within India and hence, the provisions of O.26, Rule 5, C.P.C. are attracted. It is true that the order, subject-matter of this revision, is essentially a discretionary order. But the court has to exercise its discretion judicially as to granting or not granting a commission and this Court would be very unwilling to interfere with the exercise of that discretion (*sic.*). If this Court saw that the discretion has been wrongly exercised, if it saw that the case in all its bearings was not laid before the court below; if it saw that the court below misapprehended an important part of the case, this could would interfere. The question is whether the facts of the present case come within the above dictum."

This is in so far as the interference in exercise of discretion by the trial court is concerned. On the principles that the courts must follow with regard to issue of commissions, it is further observed in the said decision as follows:

> "Certain principles have been laid down by courts with regard to issue of commission to examine witnesses. There is a difference between a party witness and a third party witness. Although in the C.P.C., there is no (*sic.*) distinction drawn as regards this point, between the plaintiff, the defendant and (*sic.*) the witness, yet as a rule of prudence this rule has been applied. Normally, a party would not be allowed to be examined on commission. In *Lakshmana Chettiar v. Vadivelu Ambalam, 80 L.W. 148,* Ananthanarayanan, C.J. observed that it would be an unusual privilege to except the party from attendance in court merely because he was living beyond the limits of jurisdiction and permitting him to be examined on commission. It would be relevant in the context to extract (*sic.*) the observations of Jagadeesan, J. in *Ramakrishna Julvani v. Hardcastle and Company, (1962) 2 M.L.J. 490: A.I.R. 1963 Mad. 100,* which runs as follows:
>
> "The witness who is a third party to the action cannot be compelled to attend court to give evidence if he is a resident at a place beyond 200 miles from the court house; a party to a suit or proceeding has no such unqualified right. The plaintiff having filed the suit in a forum of his choice or in a forum where the suit had necessarily to be instituted, cannot, except in the circumstances of bodily infirmity or other disabling factors, avoid giving evidence in court. A defendant however is in a slightly better position. If he is a resident in a far off place, quite a long way from the jurisdiction of the court he can pray for the issue of a commission to examine him as a witness... The general is, and this should not be lost sight of or blurred that the evidence of a witness in an action, be he or she a party or not, should be given in public court and tested by cross-examination. Inability to attend court on grounds of sickness, or infirmity or detriment to the public service, would justify the issue of a commission. The court has got a discretion to relax the rule of attendance in court where the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the court. This discretion may be exercised even if the person happens to be no other than the defendant (See: *Subramaniam Chettiar; In re., (1954) 1 M.L.J. 449.* There can of course be no rule of law demarcating the boundaries and the area of the discretion to be exercised in these matters. What can however be stated is that the court of *nisi prins* must act judicially having regard to all the circumstances of the case, the desirability of the physical presence of the witness in court to enable it to observe his or her demeanour and not the unusual fact that convenience and economy of expenses for the applicant may involve his opponent in great inconvenience and consideration expense."

The principles as stated in the judgment of this Court in *Ramakrishna Kulveni Rai v. Hardcastle and Company, (1962) 2 M.L.J. 490* and extracted in the judgment of this Court in *Amina Beevi v. Raja Mohammed, 91 L.W. 629,* as referred to supra, have stood the test of time although there are various principles of law that are all laid on the fact of a particular case, by the courts in India, in substance, there has never been a departure to the said rule.

8. The Rule under O.16 of Rule 19, C.P.C., which is applied to a witness is also applicable to a party or parties in a suit or a proceeding. Whenever courts have found that the evidence of a particular witness is material for the determination of a question of fact and his attendance in court cannot be enforced because of the restriction imposed by the provisions of O.16, Rule 19, C.P.C., the courts have invariably ordered for examination of such a witness on commission. There is a proviso added to Rule 19 of O.16 which empowers the court to direct any person to attend the court as a witness even though such a witness resides beyond the local limits of the court, provided the transport by air is available between the places, that is to say the place where the court house is situate and the place where the witness resides and the witness is paid a fare by air. The object of the Proviso to Rule 19 of O.16 is that if a witness is residing at a place which is connected with the place of court house by air, the court may, instead of issuing a commission, direct in appropriate cases that summons be issued for attendance of the witness in person on his being paid fare by air. However, such an order cannot be passed mechanically in each and every case and before resorting to this provision, the court must make sure that the applicant is affluent enough to afford payment of fare by air otherwise it may result in undue hardship and even miscarriage of justice in many a case.

9. We are benefited by the judgment of the Delhi High Court in *Mrs.Sunita Jagmohan Verma v. Jagmohan Verma, A.I.R. 1985 Delhi 1,* in which beginning from the case of *Jagannath Sastry v. Sarathambal Ammal, A.I.R. 1923 Mad. 321,* and upto the judgment delivered by the Andhra Pradesh High Court in *Origunati Ranganayakamma v. Madhuri Lakshminarasamma, A.I.R. 1979 A.P. 8,* are looked into and the principles stated in *Jagannath Sastry v. Sarathambal Ammal, A.I.R. 1923 Mad. 321,* reiterated to the following effect:

> "Ordinarily in the case of a witness not under the control of the party asking for the commission, who resides beyond the limit fixed under O.16, Rule 19(b), C.P.C., a commission should issue as a matter of right unless the court is satisfied that a party is merely abusing its authority to issue process, and that it is not for the court to decide whether the party will be benefited thereby or not; that is a matter entirely for the party."
>
> "The plea that observing the demeanour of witness by the judge is not a strong or sufficient ground for refusing issue of commission for examination of a defendant residing beyond the local limits of the jurisdiction of the court cannot be accepted. Issue of commission being a matter of discretion each case has to be judged on its particular facts and ends of justice must undoubtedly be a paramount consideration."

The Delhi High Court has further recorded its reasoning to the effect that a party has a statutory right to an order to have the evidence on commission and on such an application, as pointed out supra, the court has to consider not only the claim of the party who is desirous of taking a commission, but the rights of opposite party is being deprived of in cross-examining the witness before the judge, who has to determine the suit, and that in the case of an unreliable witness it is a very valuable privilege.

10. Thus, we know the limitations under which the court has to exercised its judicial discretion, while ordering examination of a witness on commission. When we advert to the facts of this case, we cannot less sight of one glaring thing here. One of the witnesses sought to be examined on behalf of the plaintiffs is the third defendant and the other is her husband. Both are said to have been living in Singapore and both are said to be unwell and thus unable to undertake a journey from Singapore to Madras. This third defendant is the vendor of the property, of which, the plaintiffs/respondents are the vendee. The 3rd defendant has entered appearance in the suit and has filed a written statement supporting the case of the plaintiffs. She, the 3rd defendant, thus is not a plaintiff in the name but stands for and by the plaintiffs in the suit. The ailments which are attributed to the 3rd defendant and her husband are-the 3rd defendant is suffering from arthiritis and her husband is suffering from acute blood pressure, as described in the affidavit filed in support of the application, for appointment of a commissioner, before the trial court. This the plaintiffs claim to have learnt from the (the 3rd defendant and her husband), who, it is said, talked to some one on their side on telephone (The deponent of the affidavit is the 2nd plaintiff, who has claimed that he had spoken on telephone). An affidavit on the original side of this Court in a suit is to conform to the requirements

of O.19, C.P.C. The matters to which affidavit has to confine are stated in Rule 3 of O.19, C.P.C. only such facts can be stated therein which the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated. The advantage of seeing a copy of the affidavit shows that there is nothing to show in that affidavit that the deponent was able of his own to prove or that he believed the information that he received from the so-called witness. There is no evidence of any kind to prove the alleged ailments.

11. It is not disputed and we do not propose to go into the question that the 3rd defendant and her husband are relevant witnesses. It is also not in dispute that they are residing outside the jurisdiction of this Court. Thus, if situations warrant the court can order for their examination as witnesses on commission. The rule, however which has to be applied, to the husband of the 3rd defendant, who is sought to be examined as a witness by the plaintiff, cannot be extended to the 3rd defendant herself. The learned counsel for the respondents/plaintiffs has said that it is so on record that the 3rd defendant is sought to be examined as a witness by the plaintiffs. While so her character will not change and she would still be the third defendant. Her written statement so far has committed that she stands by the plaintiffs. She (the third defendant), thus, is not a plaintiff in name as we have observed earlier but nonetheless a defendant taking the side of the plaintiffs. As observed above, if the rule or principle is that the court shall ordinarily not accept the request of the plaintiff to examine himself as a witness on commission and the rule is almost the same for the defendant but not as strict as that applied to the plaintiffs, in the instant case the court would have to give a serious consideration as to the prejudice that the defendants in the suit are likely to suffer in case they did not get full and adequate opportunity to cross-examine her (3rd defendant) in court since the other witness is her husband. If he (3rd defendant's husband) was not able to move about at a particular point of time, can he not be found out now and brought before the court for examination. He is a willing witness and it is said that he is prevented on account of ailment. If the ailment is not genuine, the excuse must be refused. We are only reiterating what this Court has followed all thought. The general rule is, and this should not be lost sight of or blurred, that the evidence of a witness in an action, be he or she a party or not, should be given in public court and tested by cross-examination. Inability to attend court on grounds of sickness, or infirmity or detriment to the public service, would justify the issue of a Commission. The court has got a discretion to relax the rule of attendance in court whether the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the court. This discretion may be exercised even if a person happens to be no other than the defendant. There can, of course, be no rule of law demarcating the boundaries and the areas of the discretion to be exercised in these matters. What can, however, be stated is that the court of *nisi prius* must act judicially having regard to all the circumstances of the case, the desirability of the physical presence of the witness in court to enable it to observe his or her demeanour and the not unusual fact that convenience and economy of expenses for the application may involve his opponent in great inconvenience and considerable expense.

12. The facts we have noticed in this case, have alarmed us a little. It is on record how the advocate commissioner proceeded to Singapore and how without waiting for the arrival of the contesting defendants 1 and 2 and their counsel, he proceeded to examine the witnesses. There is information that he had the advantage of the hospitality of the plaintiff and this is a matter of record. We do not propose to say much about it. He has submitted his report and returned the evidence of defendant No.3 and her husband recorded by him to court. If we do not take notice of the prejudice that has occurred to the defendants in this behalf, we shall shut our eyes to injustice.

13. For the reasons as stated above, we are inclined to set aside the impugned order. Accordingly we set aside the impugned order. The application for appointment of an advocate-commissioner for examining the 3rd defendant and her husband as witnesses on behalf of the plaintiffs shall be considered in accordance with law. The report of the Advocate-Commissioner, submitted during the period of the pendency of this appeal, shall be treated as *non-est*.

14. Before parting with the judgment, we would like to observe that in our country, in particular, there is a need to be always aware of the economic

disparity between the parties and the uneven match that is brought before the courts, particularly by wealthy against poor and strong against weak. While it may not appear difficult for a millionaire or multi national to travel as and when he likes from one place in India to any other distination in the world, for another it may be impossible. We are aware of the provisions of Rule 15 of O.26, C.P.C. which says before issuing any commission under this order, the court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed paid into court by the party at whose instance or for whose benefit the commission is issued. According to Madras Amendment as per Rule 15(1) of O.26, C.P.C., before executing and returning any commissions issued by foreign courts under the provisions of Sec.78, the court of the Commissioner required to execute the commission may levy such fees as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under Rule 2 of O.16.

15. We are also aware that some courts have taken a view that while making order for the cost of commission the courts cannot invoke its inherent jurisdiction to order for the cost of the parties contesting the case. But we do not find any inhibition upon the jurisdiction of the court under any provisions of the Code of Civil Procedure or any other law that has been brought to our notice that while making an order for examination of a witness on commission, the court cannot take into account the position and status of the parties, the uneven match at which they stand and the economic harassment that the party may suffer if the court will not make an order for the cost to be paid by the party asking for the commission. We are making these observations for after instituting a suit or being called upon to answer certain allegations in a suit, a party may decide thus to go abroad to avoid summons on the one hand and on the other to insist that he/she should be examined on commission, and the party not able to manage necessary expenses, thus, will be deprived of a valuable right to cross examine such a person. This, in our opinion, shall be grave injustice. On the facts of the instance case, thus we hope and trust that the trial court shall keep this aspect also in mind before making any order, if at all to examine the witness or witnesses on commission, is necessary that, adequate expenses are to be made available to the contesting defendants.

16. For the reasons aforesaid, the appeal is allowed and the impugned orders are set aside. The case is remitted to the trial court for rehearing of the application in accordance with law. In the circumstances of the case, hearing fee is fixed at Rs.3,000.

B.S. ---- *Appeal allowed.*

[End of Volume (1992)II M.L.J. (Reports)]